

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

+ + + + +

TUESDAY, MARCH 9, 2004

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The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 10:00 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

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

ZONING COMMISSION MEMBER PRESENT:

JOHN G. PARSONS	Commissioner (Natl. Park Service)
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OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	ACTING Secretary, BZA
BEVERLY BAILEY	Zoning Specialist
JOHN K. A. NYARKU	Zoning Specialist

OTHER AGENCY STAFF PRESENT:

MAXINE BROWN-ROBERTS	Office of Planning
TRAVIS PARKER	Office of Planning

D.C. OFFICE OF CORPORATION COUNSEL PRESENT:

LORI MONROE, ESQ.
JANICE SKIPPER, ESQ.

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C-O-N-T-E-N-T-S

<u>AGENDA ITEM</u>	<u>PAGE</u>
<u>CALL TO ORDER:</u>	
Geoffrey Griffis	4
<u>PRELIMINARY MATTERS:</u>	
Application 17120 - Alexander Neill	7
<u>FREEDOM FORUM, INC.</u>	
<u>APPLICATION NO. 17122 - ANC-6C:</u>	12
<u>WITNESSES:</u>	
Wayne Quin	13
Peter Prichard	17
Joseph Fleischer	22
Steven Sher	57
<u>OFFICE OF PLANNING:</u>	
Maxine Brown-Roberts	71
<u>ACTION TAKEN:</u>	
Motion	73
Vote	76
<u>BEECH CENTER, INC.</u>	
<u>APPLICATION NO. 17123 - ANC-7B:</u>	77
<u>WITNESSES:</u>	
Philip Johnson	79
Somba Ndeti	83
Daniel Coywood	86
<u>CROSS EXAMINATION:</u>	
Vincent Spaulding	92
<u>OFFICE OF PLANNING:</u>	
Travis Parker	99
<u>ANC-7B:</u>	
Vincent Spaulding	107
<u>OPPOSING PARTIES:</u>	
Garet Bornstein	119
Thomas Kelly	128
John Judge	132
<u>CLOSING REMARKS:</u>	
Philip Johnson	134
<u>BOARD SPECIFIED ADDITIONAL MATERIALS:</u>	145
<u>PRELIMINARY MATTERS:</u>	
Southeast Citizens for Smart Development, Inc.	
Appeal No. 17121 - ANC-6B:	153
<u>KALORAMA CITIZEN'S ASSOCIATION</u>	
<u>APPEAL NO. 17109 - ANC-1C:</u>	156
<u>DISCUSSION ON MOTIONS TO DISMISS:</u>	158

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<u>AGENDA ITEM</u>	<u>PAGE</u>
<u>KALORAMA CITIZEN'S ASSOCIATION CONTINUED:</u>	
<u>WITNESSES:</u>	
Carolyn Brown	169
Andrea Ferster	184
<u>DCRA:</u>	
Laura Gilbert	200
<u>ANC-1C:</u>	
Alan Roth	208
<u>BOARD DISCUSSION:</u>	
215	
<u>MOTION 1 - DENY MOTION OF MONTROSE, LLC</u>	
<u>BASED ON TIMELINESS:</u>	
232	
<u>VOTE:</u>	
232	
<u>MOTION 2 - DENY MOTION TO DISMISS ON</u>	
<u>GROUND OF LACK OF JURISDICTION:</u>	
233	
<u>VOTE:</u>	
235	
<u>MOTION 3 - AMEND APPEAL TO INCLUDE</u>	
<u>MARCH 11, 2003 BUILDING PERMIT:</u>	
236	
<u>VOTE:</u>	
239	
<u>MOTION 4 - DENY MOTION TO DISMISS</u>	
<u>BASED ON LACHES AND ESTOPPEL:</u>	
241	
<u>VOTE:</u>	
242	
<u>WITNESSES:</u>	
Andrea Ferster	243/303
Ann Hargrove	245
Don Hawkins	252
<u>CROSS EXAMINATION:</u>	
Carolyn Brown	308
 <u>ADJOURN:</u>	
Geoffrey Griffis	319

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

10:09 a.m.

CHAIRPERSON GRIFFIS: Good morning, ladies and gentlemen. Let me call to order the Public Hearing of the Board of Zoning Adjustment of the District of Columbia. I am Geoff Griffis. I am Chairperson. Joining me today is the Vice Chair, Ms. Miller, and also Mr. Etherly. Representing the National Captial Planning Commission is Mr. Zaidain with us this morning, and we are anticipating Mr. Parsons of the Zoning Commission who had a prior engagement this morning, but is on his way and will join us when he gets here.

Copies of today's hearing agenda are available to you. They are located on the wall where you entered into the hearing room. Please, pick one up and you can see what we will progress through this morning. Two important notes of recording. As many of you have been here before are probably familiar, we are now recording in two fashions. One is the court reporter, who is sitting to my right, obviously setting up the transcript, which will be an official part of the record. I ask that anyone that is going to address the Board to fill out two witness cards prior to coming forward. Those witness cards go to

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1 the recorder, who sits to my right.

2 The second, of course, is we're being
3 broadcast live on the Office of Zoning's website, so
4 attendant to that and attendant to our regulations, we
5 certainly ask that everyone refrain from any
6 disruptive noises or actions in the hearing room. You
7 will also need, when coming forward to speak to the
8 Board, to turn a microphone on and speak into it, and
9 I will give you direction if they are not on.

10 The order of procedure for special
11 exceptions and variances is, first, we will hear
12 statements and witnesses of the applicant. Second, we
13 will hear Government reports attendant to the
14 application, such as the Office of Planning,
15 Department of Transportation and anything else
16 attendant with the application. Third, we would hear
17 from the Advisory Neighborhood Commission. Fourth,
18 would be persons or parties in support of an
19 application. Fifth, would be persons or parties in
20 opposition. And, of course, sixth, would be closing
21 remarks and/or rebuttal testimony by the applicant.

22 Cross examination of witnesses is
23 permitted by the applicant or parties within a case.
24 The ANC is automatically a party in the case and the
25 ANC, of course, that covers the area of which the

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1 property is located. I will not go exhaustively into
2 my openings on cross examination, because I think
3 we're going to get through a fairly easy morning
4 session that will be uncontested.

5 However, the record will be closed at the
6 conclusion of each case, except for any material that
7 the Board specifically requests, and the Board will be
8 very specific of any additional information that
9 should be submitted into the record and when it is to
10 be submitted into the record. Of course, it goes
11 without saying that after that material is received,
12 no other information would be accepted into the
13 record.

14 The Sunshine Act requires that this Board
15 conduct all hearings in the open and before the
16 public. This Board may, however, according to its
17 regulations, the Sunshine Act and the Rules of
18 Procedure, enter into Executive Session. Executive
19 Session is used for the purposes of reviewing a record
20 and/or deliberating on a case. The decision of this
21 Board in contested cases must be based exclusively on
22 the record, so that we ask people present today not
23 engage Board Members in any type of conversation so
24 that we do not give the appearance of receiving
25 information outside of the record.

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1 I would ask that everyone here present
2 now, please, turn off any cell phones or beepers or
3 any sort of noise making devices, so that we don't
4 have any disruption of those important people that are
5 in front of us that are about to establish record for
6 us. The Board will not consider any preliminary
7 matters. Preliminary matters are those which relate
8 to whether a case will or should be heard today, such
9 as requests for postponements, withdrawals or whether
10 proper and adequate notice has been provided for a
11 case.

12 If you are not prepared to go forward with
13 a case today or if you believe the Board should not
14 continue with a case on its agenda, I would ask that
15 you make that known to the Board by coming forward.
16 Let me say a very good morning to Ms. Bailey, who is
17 representing the Office of Zoning, sitting on my very
18 far right, and Mr. Moy on my closer right, and ask if
19 there are any preliminary matters that they are aware
20 of for the Board this morning.

21 MS. BAILEY: Mr. Chairman, and to everyone
22 good morning. I'm sorry for my raspy voice. There is
23 a preliminary matter. It has to do with 17120, that's
24 the application of Alexander Neill. That application
25 was withdrawn, so anyone who is here associated with

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1 17120, that will be no longer on the docket this
2 morning, Mr. Chairman.

3 CHAIRPERSON GRIFFIS: Excellent.

4 MS. BAILEY: And that's the preliminary
5 matter that staff has.

6 CHAIRPERSON GRIFFIS: Excellent. I don't
7 see any other indication of preliminary matters from
8 the audience, so let's move forward then. I would ask
9 that anyone here this morning that is wishing to
10 testify would, please, stand and give their attention
11 to Ms. Bailey, as she will administer the oath.

12 (The witnesses were sworn.)

13 CHAIRPERSON GRIFFIS: Good. And before we
14 call the first case, I did just want to take a brief
15 moment of everyone's time that is here, but just to
16 let you know the Board is now well-aware that Mr.
17 Zaidain's last day with us on the Board representing
18 National Capital Planning Commission is today, and I
19 think it is important just to recognize.

20 We're going to take him out after and
21 recognize him sufficiently, but recognize him on the
22 record that it has been an absolute pleasure to have
23 him, and I think it is getting close to three years on
24 the Board, and it doesn't seem to be that long, but
25 when you have fun, time passes quickly. He obviously

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1 has been a very substantive and engaged member that
2 has brought, I think, excellent insight to
3 applications and also an awful lot of good humor. So
4 with that, it's disappointing to see you move on. We
5 know NCPC's new representative will be of the same
6 quality as we're used to and we look forward, of
7 course, to that, but we also regret having to see you
8 leave.

9 BOARD MEMBER ZAIDAIN: Well, I appreciate
10 that. I was going to kind of -- I don't know if I
11 should wait until the end of the day before I speak
12 any more, but I definitely appreciate that and it has
13 been a pleasure working with all of the Board Members
14 and the Zoning Commission members and even a lot of
15 the applicants that we have had before us. There is
16 some really good work being done in the city and I
17 hope that we continue it. And, of course, the
18 replacement will be just as capable, I have no doubt
19 in my mind, especially with him sitting in the
20 audience.

21 So with that being said, I do want to have
22 some disclosures on this case. This project was
23 before the National Capital Planning Commission for an
24 amendment to the Pennsylvania Avenue Development
25 Corporation Plan. I was not privy to the project. I

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1 removed myself from the Commission hearing when it was
2 presented and from subsequent meetings. I have met
3 with a lot of individuals in the crowd on other
4 issues, but not on this project, specifically, and
5 specifically as it relates to the design. So I just
6 wanted to make sure that was on the record.

7 CHAIRPERSON GRIFFIS: Very well, Mr.
8 Zaidain. Do you have any difficulty in making an
9 independent judgment and assessment of this
10 application?

11 BOARD MEMBER ZAIDAIN: I do not.

12 CHAIRPERSON GRIFFIS: Board Members have
13 any questions of Mr. Zaidain?

14 BOARD MEMBER ETHERLY: No.

15 CHAIRPERSON GRIFFIS: Does the applicant
16 or anyone here for Application 17122 have any
17 questions or concerns about Mr. Zaidain continuing in
18 this case? If you wouldn't mind just turning your
19 mike on, you can introduce yourself.

20 MR. QUIN: My name is Whayne Quin of the
21 Law Firm of Holland and Knight and with me I just want
22 to introduce Kyrus Freeman. This is main voice before
23 the Board today, so he is going to be watching you
24 very carefully.

25 CHAIRPERSON GRIFFIS: Okay. It's already

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1 been rough.

2 MR. QUIN: And we have no objection to Mr.
3 Zaidain sitting.

4 CHAIRPERSON GRIFFIS: Good. Thank you.
5 Is there anyone else here attendant to this
6 Application 17122 that has comments on this? Very
7 well. I think we can proceed then. Anything else
8 from the Board at this time, if not, Mr. Quin, let me
9 turn it over to you and good morning.

10 MR. QUIN: Good morning again.

11 CHAIRPERSON GRIFFIS: And welcome back to
12 the country. I understand you were abroad.

13 MR. QUIN: Not very far, but I was out.

14 CHAIRPERSON GRIFFIS: Okay.

15 MR. QUIN: For Children's Hospital I
16 should hasten to say. But at any rate, I always --

17 MS. BAILEY: Mr. Quin?

18 MR. QUIN: -- wanted to know --

19 MS. BAILEY: Mr. Quin?

20 MR. QUIN: Yes?

21 MS. BAILEY: Sorry to interrupt you. Mr.
22 Chairman, may I call the case?

23 CHAIRPERSON GRIFFIS: Oh, we probably
24 should do that, too. See that. That's what happens
25 when you run stuff out of line.

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1 MR. QUIN: I thought you could just go
2 ahead and give a decision right now.

3 CHAIRPERSON GRIFFIS: Yes, right.

4 BOARD MEMBER ZAIDAIN: I don't have to do
5 those disclosures again, do I?

6 CHAIRPERSON GRIFFIS: No.

7 BOARD MEMBER ZAIDAIN: Okay.

8 CHAIRPERSON GRIFFIS: Let's go. Thank
9 you, Ms. Bailey.

10 MS. BAILEY: Application No. 17122 of the
11 Freedom Forum, Inc., pursuant to 11 DCMR 3104.1, for a
12 special exception from the roof structure requirements
13 under section 411 and, pursuant to 11 DCMR 3103.2, for
14 a variance from the width of court requirements under
15 subsection 776.1, a variance from the arcade
16 requirements under subsection 1701.2, a variance from
17 the street wall requirements under subsection 1701.3
18 to permit the development of a mixed-use building,
19 including the Newseum, retail, an apartment house and
20 offices in the DD/C-4 District at premises 555
21 Pennsylvania Avenue, N.W., also known as Square 491,
22 Lots 826 and 831.

23 CHAIRPERSON GRIFFIS: Good. Thank you
24 very much, Ms. Bailey. And the last time, I'm going
25 to turn it over to you, of course, for the record to

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1 be clear. I knew you were out of the country, because
2 of the fact that we continued one of your cases,
3 because it was said that you were not here.

4 MR. QUIN: Yes.

5 CHAIRPERSON GRIFFIS: And with that, let's
6 move ahead.

7 MR. QUIN: Thank you, Mr. Chairman, and
8 Members of the Board. On behalf of the Freedom Forum
9 and the Newseum, we're pleased to be here on our final
10 leg of our journey through the approval process. This
11 process has been going on for about three years, maybe
12 longer, and virtually every agency that has reviewed
13 it has approved this project as you see it before you
14 today. And those agencies include the General
15 Services Administration, the National Park Service,
16 National Capital Planning Commission, the Commission
17 of Fine Arts and Advisory Neighborhood Commission-6C,
18 and now the favorable report from the Office of
19 Planning, which is a very strong report in support.

20 In fact, NCPC's most recent amendments to
21 the PADC Plan actually and specifically put amendments
22 in that would allow this design to proceed. And the
23 regulations that were amended are contained in part of
24 Tab E. The design challenge for this project was to
25 interpret the mission of the Newseum while at the same

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1 time addressing a number of the constraints unusual
2 situations and conditions that affect the site. These
3 conditions form the necessity and basis for the relief
4 which is requested before you today.

5 Let me just summarize some of those
6 constraints. They will be addressed by our witnesses.

7 First, the size of the site is 72,000 square feet on
8 a site that is trapezoidal in shape with frontages on
9 both the diagonal and the grid streets, namely
10 Pennsylvania Avenue, C Street and 6th Street. The
11 design by virtue of the regulations and Pennsylvania
12 Avenue Development Plan has to respect the axial
13 relationship to Pennsylvania Avenue, yet must also
14 respect the grid system, and that will be discussed by
15 some of our witnesses.

16 The PADC Plan requires a transition along
17 Pennsylvania Avenue from the Canadian embassy to the
18 east which has a set-back of about 50 feet to 601
19 Pennsylvania Avenue which is across 6th Street from the
20 site, which has no set-back. So that's one of the
21 constraints that requires us to come to you and that
22 will be explained as well. The other requirement, of
23 course, is excellence in architectural design. And in
24 this case, as will be explained by the architects, the
25 theme that will be described again is for a museum use

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1 and it has a special relationship to Pennsylvania
2 Avenue.

3 It also has multiple uses, so we're
4 dealing with not only a museum, but offices and
5 residential, 2 FAR residential fronting on C Street.
6 So these different components bring about different
7 requirements for each use and each portion of the
8 building. And finally, the context of the adjacent
9 and nearby institutional and monumental buildings and
10 designs require special treatment. There are four
11 areas of relief which are before you. The first is on
12 roof structures, which is a special exception. And I
13 should quickly say that we meet all set-back
14 requirements from the streets. The only variances or
15 rather special exception deviation is on the interior,
16 and that will be explained by our witnesses,
17 especially the architects.

18 The variance from the open court
19 requirements, first, there is no requirement for any
20 court under the Zoning Regulations, but because of the
21 separation of uses, courts have been put in and for
22 transition reasons, as will be described, we had to
23 provide courts and we could not comply fully with the
24 court requirements. Third, a variance from the street
25 wall requirement, that's a problem in the sense that

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1 if you normally want to have a street wall
2 requirement, you would have to have it on property
3 line on all streets, Pennsylvania Avenue, 6th and C.

4 But because, again, of some of the open
5 space and different use requirements of PADC, we had
6 to have openings to allow better access to those
7 various uses. And that will be described. And
8 finally, there is a variance from the arcade
9 requirements, which, frankly, I don't think we need,
10 but since we were coming anyway, we wanted to make
11 certain that if this is an arcade, which we cannot
12 meet all the requirements under the Zoning
13 Regulations, because we could not extend the arcade
14 through the Canadian chantry which is already built,
15 so that's another variance that we are seeking.

16 Our witnesses will describe the project
17 and all the issues and how we meet all the tests. We
18 are hopeful that you can approve this project
19 expeditiously and unless there are questions, I would
20 like to proceed with our first witness, Mr. Peter
21 Prichard, president of the Newseum and Freedom Forum.

22 CHAIRPERSON GRIFFIS: Good. Let me also
23 state that Mr. Parsons has joined us representing the
24 Zoning Commission. Are there any questions from the
25 Board? Very well. Let's proceed.

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1 MR. PRICHARD: Thank you, Whayne. I'm
2 Peter Prichard, president of the Newseum and the
3 Freedom Forum, which funds the Newseum. My role today
4 is to give you a brief overview of the project. The
5 Newseum, which is the largest operating program of the
6 Freedom Forum, which is a nonprofit, nonpartisan
7 foundation devoted to free press, free speech and free
8 spirit. The Freedom Forum's other priorities, besides
9 the Newseum, are First Amendment education and
10 increasing the number of people of color in newspaper
11 newsrooms through our training programs.

12 We operate the Newseum, the worlds only
13 interactive museum of news for four years in
14 Arlington, Virginia. During that period, it attracted
15 more than 2.2 million visitors and received good
16 reviews from visitors and the media. Each year we
17 have a corporate management retreat to talk about our
18 long term priorities. And in 1999, we asked ourselves
19 how can we increase our impact. Well, those of us who
20 had worked on the Newseum replied that if we could
21 move the Newseum from Virginia to Washington, D.C. to
22 a location near the mall with its 20 million annual
23 visitors, we would have an opportunity to have a much
24 greater impact.

25 So we began a lengthy process of

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1 identifying a site and developing a plan. After
2 several discussions with city officials including
3 Mayor Williams, we offered the District a \$100 million
4 financial package for the site at 555 Pennsylvania
5 Avenue next to the Canadian embassy. The package
6 included \$75 million for the land and \$25 million that
7 went into a fund to provide low income housing around
8 the District.

9 We entered into an agreement with the city
10 where we agreed to make annual payments in lieu of
11 property taxes, although we are not required to do so,
12 because we are a nonprofit organization. We also
13 signed a First Source Agreement to consider District
14 residents first for jobs and an LSDDE Agreement
15 pledging to make good faith efforts for 35 percent
16 minority participation on the project, a goal we have
17 exceeded to date. We have also embarked upon an
18 extensive series of educational programs for District
19 students, programs which we have continued in the
20 District in schools and in libraries after the Newseum
21 closed in Arlington in 2002.

22 We then began a series of presentations of
23 our plans to various officials with the District, the
24 Department of Economic Development, the Planning
25 Department, the Public Works Development Department,

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1 the City Council, as well as interested neighbors, the
2 Architect of the Capital and several members of
3 Congress. We also made presentations to and received
4 approvals from the National Capital Planning
5 Commission, the successor to the Pennsylvania Avenue
6 Development Corporation, from the General Services
7 Administration, from the National Park Service, which
8 has jurisdiction over the sidewalk, from the Advisory
9 Neighborhood Commission, and, of course, from the
10 Commission of Fine Arts.

11 We received initial approvals from all of
12 these groups and the Pennsylvania Avenue Plan was
13 amended by Congress to allow our unique use for a
14 mixed-use project, which includes a 327,000 square
15 foot museum and associated offices, 144,000 square
16 feet of residential development devoted to 126
17 apartments and 30,000 square feet of retail space,
18 including food service and retail.

19 To put the museum size in perspective, the
20 Newseum's exhibit space of about 70,000 square feet is
21 about twice as large as the Holocaust Museum and just
22 slightly smaller than the exhibit space in the east
23 wing of the National Gallery of Art. Because we hope
24 this will be an important museum known around the
25 world for its architecture, as well as for its

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1 exhibits, we asked our architect, James Stewart
2 Polshek, to design an iconic building that reflected
3 our mission, just as the Rose Center for Earth and
4 Space is an icon that reflects its mission at the
5 American Museum of Natural History in New York, also a
6 Polshek design.

7 Mr. Polshek did that creating a
8 transparent aerie building, which you can see over
9 there, that suggests a window on the world and can
10 also be seen in profile as the sections of a newspaper
11 with its unique design of glass and steel bars
12 stepping back from Pennsylvania Avenue. As a result
13 of this iconic design and its several competing uses,
14 the design was a big challenge to fit into the site
15 while trying to retain its unique character. The
16 building contains a museum, the apartments, a high-end
17 restaurant, a large store, a food court, a private
18 dining area, 15 theaters, two television studios,
19 offices for the Newseum and the Freedom Forum and a
20 large conference center.

21 This has been an extremely complex
22 project. Many of the people who have worked on it
23 have said it is the most complex project they have
24 ever worked on, requiring literally scores of
25 presentations and approvals and already the design

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1 stage is nearly four years old. The most frequent
2 questions we are asked about the Newseum are when will
3 you start construction and when will you be open on
4 Pennsylvania Avenue.

5 We hope that with your approval today, we
6 will be able to reply we have begun construction and
7 we hope to finish the building by 2006 and open early
8 in 2007. Thanks very much for your consideration.

9 CHAIRPERSON GRIFFIS: Good. Thank you
10 very much. And clearly, it's a fantastic location in
11 the District of Columbia. Mr. Quin?

12 MR. QUIN: Mr. Chairman, I didn't know
13 whether you would have any questions now, why don't we
14 just finish our presentation altogether?

15 CHAIRPERSON GRIFFIS: Absolutely. Yes.

16 MR. QUIN: Is that all right?

17 CHAIRPERSON GRIFFIS: yes.

18 MR. QUIN: Okay. Then our next witness is
19 Mr. Joseph Fleischer of Polshek Partnership Architects
20 and I've submitted a resume that may be circulating of
21 Mr. Polshek and we'll submit him as an expert in the
22 field of architecture.

23 CHAIRPERSON GRIFFIS: Okay. It's coming
24 in now? Is there a representative from ANC-6C here
25 today? Oh, here we are. Any questions from the

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1 Board? Any concerns?

2 UNIDENTIFIED SPEAKER: No questions.

3 CHAIRPERSON GRIFFIS: Not noting any, I
4 think we can establish Mr. Fleischer is an expert
5 witness in architecture.

6 MR. QUIN: Thank you.

7 MR. FLEISCHER: Thank you. As I indicated
8 in the information you have, I'm managing partner of
9 Polshek Partnership and I'm also the partner in charge
10 of the day to day oversight of this project and the
11 plans and everything will be filed under my license in
12 the District.

13 CHAIRPERSON GRIFFIS: Have you got an
14 apartment in the District?

15 MR. FLEISCHER: Not as of yet.

16 CHAIRPERSON GRIFFIS: Okay.

17 MR. FLEISCHER: The goals of our design
18 effort were to meet the programmatic needs of this
19 very complex priority. Before I even go further,
20 sitting to my right is Tyler Donaldson, who is a
21 senior associate in my firm and a licensed architect.
22 And rather than me trying to juggle my notes, a
23 microphone and point simultaneously, I've asked Tyler
24 to assist me as my exhibit person in pointing out the
25 issues as we go through them.

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1 Back again. The goals of our design
2 effort were to meet the programmatic needs of this
3 very complex mixed-use project and complex in a
4 variety of ways. But to do so in a manner that is in
5 the first instance respectful to the urban context and
6 also to the neighboring buildings. This requires to
7 interpret the needs in the mission of the Newseum, a
8 museum, while creating a meaningful iconic form for
9 this very visible and unique site. In many ways the
10 requirements of the site provided the road map for the
11 design.

12 The site's location is at the intersection
13 of Pennsylvania and Constitution Avenues and it has,
14 in fact, an actual relationship through the Mellon
15 Fountain to the National Gallery, and that gives the
16 site itself and its location a very monumental
17 character or the desire for monumental character. The
18 building design and the request of the client, the
19 Newseum, was that we needed to maintain the
20 qualitative excellence represented by the site's
21 neighbors, particularly the Canadian embassy and both
22 wings of the National Gallery, as well as the Federal
23 Trade Commission Building that begins the Federal
24 Triangle.

25 The design needed to address the diagonal

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1 geometry of Pennsylvania Avenue as it transitions
2 itself to the orthogonal street grid of both 6th and C
3 Streets in the northwest sector and the area north of
4 the site where the grid continues. Simultaneously, it
5 needed to mediate the Pennsylvania Avenue Street wall
6 from the very deeply set-back Canadian embassy, which
7 is set-back some 50 feet from the property line to the
8 east and aligned and then make the transition
9 essentially to the commercial buildings to the west,
10 which are actually at the property line.

11 Lastly, the design seeks to encourage
12 visitors to the mall to cross the divide of the
13 avenues and enter downtown. That was an integral part
14 of what both the District and the Newseum desired. It
15 does so by locating pedestrian friendly program
16 elements, such as retail and food service, as well as
17 the Newseum's famed front pages display along
18 Pennsylvania Avenue and C Streets.

19 The site is a 72,000 plus square foot
20 site. It is bordered by 6th Street to the west, C
21 Street to the north. The property line of the
22 Canadian embassy. Those are all on an orthogonal
23 relationship to the grid. And then it also has to
24 deal with what I call the dominant Pennsylvania Avenue
25 diagonal geometry related to the other streets. The

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1 site actually elevates slightly from the Pennsylvania
2 Avenue intersection with the Canadian embassy around
3 to the C Street intersection of the embassy. There is
4 actually about a 4.5 or 5 foot change in elevation.

5 This property is within the PADC area and
6 is governed by the Pennsylvania Avenue Plan. The plan
7 was amended in 1993 to provide guidance for any
8 building on this property to be compatible with the
9 embassy by establishing uses, height, set-backs,
10 build-to-lines, building restriction lines, roof
11 structures, pedestrian features and off-street
12 loading. The uses within the facility also contribute
13 to the form that it eventually takes.

14 The Newseum projects comprise of the
15 following primary uses: A museum facility, containing
16 both permanent and changing exhibits, as well as
17 administrative support areas, food service facilities
18 and a museum store, the offices of the Freedom Forum
19 including a conference center on the upper levels of
20 what I will subsequently describe as bars 2 and 3, a
21 multi family residential facility at 2 FAR for the
22 site, retail facilities and lastly parking for the
23 offices, residents and guests. There is also an off-
24 street loading facility that services all of the other
25 project uses.

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1 As previously mentioned, the project is
2 surrounded by monumental buildings with the Canadian
3 embassy having the most direct impact on the design
4 effort. Let me now take you through the project
5 design itself and we can talk a little bit about the
6 project and its design. The Newseum project itself is
7 composed of three rectangular bars. The iconic vision
8 being a three dimensional newspaper, and those bars
9 are set parallel and stepping away from Pennsylvania
10 Avenue. I apologize for the dullness of that
11 particular drawing, but I think if you look at the
12 rendering, the three bars are quite evident.

13 CHAIRPERSON GRIFFIS: And we should have
14 that sheet in the record.

15 MR. FLEISCHER: Yes, all those sheets are
16 in your record if you need to see them up close.
17 That's in Exhibit D and that particular drawing is
18 Z1.09. These bars actually vary in length, they vary
19 in height, and they vary in levels of transparency.
20 The bar furthest from Pennsylvania Avenue, what we
21 call the third bar, is actually nestled within the
22 volume of the residential building. The residential
23 building seeks to -- is oriented to the orthogonal
24 grid, and so what you have is you have a series of
25 bars parallel to Pennsylvania Avenue and they

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1 essentially are grabbed by the residential building to
2 translate the direction of the building from the
3 elements parallel to Pennsylvania Avenue to the
4 orthogonal grid of the area adjacent to it.

5 These bars are also separated from each
6 other by 12 foot wide circulation zones. I think the
7 section maybe is the best one behind the rendering.

8 CHAIRPERSON GRIFFIS: Which section?

9 MR. FLEISCHER: It's behind the rendering,
10 the elevation, I'm sorry. There you can see both the
11 12 foot articulations between it as well as the bars
12 themselves pretty clearly there. These bars together
13 with a series of bridges within the facility move the
14 visitor between exhibits and between halls. And they
15 are also connected by vertical elements, what we call
16 the vertical cores, which do come up as an issue with
17 regard to their location. The vertical cores of
18 elevators and stairways that have to connect these
19 bars, and as you can see from the stepping pattern
20 that core in order to connect bars will sometimes
21 exist in the zone between the bars as well.

22 It is actually the articulation of these
23 12 foot wide circulation zones along with some entries
24 to the building that create the so-called courtyards
25 to which we are seeking a variance along C Street, in

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1 particular. Essentially, they are facade
2 articulations to the building. The first bar is the
3 lowest with a height related to the strong horizontals
4 of the adjacent Canadian embassy. It affects the
5 transition between the embassy street wall to the east
6 and the commercial building street wall to the west.

7 It is recessed at street level to
8 facilitate or ease the transition, which means people
9 walking along the 50 foot wide sidewalk begin to
10 transition across the site to the narrower point.

11 CHAIRPERSON GRIFFIS: Let me interrupt you
12 briefly.

13 MR. FLEISCHER: Sure.

14 CHAIRPERSON GRIFFIS: As we're looking at
15 Z1.01.

16 MR. FLEISCHER: Right.

17 CHAIRPERSON GRIFFIS: The lightly gray
18 areas are the courts that are not conforming and
19 before us. Is that correct?

20 MR. FLEISCHER: Right. The lightly grayed
21 areas are the courts. The darker grays, at least in
22 the first bar, represent, in a sense, overhang of the
23 building.

24 CHAIRPERSON GRIFFIS: Right.

25 MR. FLEISCHER: Above the first floor.

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1 CHAIRPERSON GRIFFIS: Right. I think it's
2 important to focus the Board's attention to those
3 specific areas. In the larger picture what you are
4 describing, which is quite well-said.

5 MR. FLEISCHER: Okay. And we have
6 essentially three courts. We have what we call Court
7 A, which is the first one adjacent to that
8 articulation where the front pages of the Newseum come
9 around the corner. The second courtyard and the
10 courtyard extends itself, as you can see in the
11 transition from the rectangular grid, to the angle
12 grid or from the diagonal grid of Pennsylvania Avenue
13 to the orthogonal grid of C Street in order to
14 maintain the rectangular area of the building and
15 retain the concept of these layered pages. We are
16 left with certain spaces which then become courtyards
17 that actually strengthen the entry points of those
18 buildings. And I will go through areas of access and
19 entry as I continue with the presentation.

20 The first bar is the lowest with a height
21 related to the Canadian embassy. It affects the
22 transition between the embassy street wall to the east
23 and the commercial building to the west. It is
24 recessed at street level. The main public entry to
25 the building is through this bar on Pennsylvania

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1 Avenue. So that is the primary public entry to the
2 building.

3 The second or middle bar is what we think
4 of as the spiritual heart of the Newseum and contains
5 within it exhibits such as the Journalist Memorial,
6 the September 11, 2001 Gallery, as well as the Berlin
7 Wall Gallery, the atrium space, which is some 80 foot
8 high from its lowest level to the zone above it, is
9 within that bar.

10 The third bar is the highest and most
11 enclosed of the three bars. I talked earlier about
12 the transparency issues. The first bar is intended to
13 be very transparent. It has within it a, roughly, 50
14 x 75 foot window, if you will, to the interior of the
15 Newseum. The second bar begins to tighten in the
16 transparency a bit, but remains a transparent bar.
17 The third bar becomes much more of an opaque space and
18 that opaque bar, essentially, contains the core
19 elements of the exhibit.

20 And the opacity and the increasing opacity
21 relates to the needs of the exhibit and the
22 presentation of the Newseum. And those core elements
23 include the News History Gallery, the Interactive News
24 Room, a Demonstration Broadcast Studio and the Foreign
25 Theater, which is a 535 seat theater on the first

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1 floor and into the lower levels below that. The third
2 bar houses at the top the Freedom Forum Offices on its
3 top two floors.

4 Nestled within the residential volume, the
5 third bar provides access from 6th Street to the
6 Freedom Forum Offices. We can maybe stay on that one.

7 Stay on that one. So the entrance to the Freedom
8 Forum Offices are basically right in there. The floor
9 for residential volume is parallel to and oriented to
10 C Street. It wraps around onto 6th Street. The lower
11 levels of this residential volume has a restaurant,
12 which is entered off of 6th Street, yes, and the
13 residences themselves are also entered off of 6th
14 Street, basically, in an area that faces the National
15 Gallery. So the courtyard in front of that entry
16 serves as the entry point for both of those
17 facilities.

18 The C Street side of this portion of the
19 building also houses the group entry for the Newseum,
20 which is, essentially, on C Street. That's where the
21 bus drop-off will be for the Newseum to keep it off of
22 Pennsylvania Avenue. And it also has the loading
23 dock. The loading dock which contains the required
24 number of bays is expected to be closed during the day
25 for normal operations. The doors would be open only

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1 for a delivery and then the doors would be closed back
2 down again.

3 Adjacent to the loading dock is also
4 access to the parking garage immediately to the east.

5 And let me go back for a moment and discuss the basic
6 courtyards and the dimensions. The courtyards, as
7 intended by the Zoning Regulation, really have to do
8 with the issue of light and air in most instances.
9 And in this instance, they really are in the street
10 and they are, essentially, the entry plazas to
11 different sectors of the Newseum. And so within that
12 context, they are actually quite commodious, but
13 within the context of trying to place what we would
14 call the circular form that defines its full width,
15 which is what you see in the thing, actually the
16 courtyards are a lot more open than the circular form
17 would indicate.

18 The third courtyard, which is the one on C
19 Street, is really an obligation that we had to bring
20 the buildings and step it back to the Canadian
21 embassy, because one of the requirements of the
22 Pennsylvania Avenue Plan was the respect for the
23 Canadian embassy and the alignments of those faces
24 with the Canadian embassy.

25 CHAIRPERSON GRIFFIS: And the dimension of

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1 that in width is 19.6?

2 MR. FLEISCHER: Yes. And, in fact, what
3 it actually does is above it provides us with the
4 opportunity on those corner residential units to open
5 them up to a very, very nice open vista to the
6 northeast.

7 CHAIRPERSON GRIFFIS: So there is
8 residential fenestration looking over that court?

9 MR. FLEISCHER: Right.

10 CHAIRPERSON GRIFFIS: If I understand what
11 your point is, but there is no structure on the
12 adjacent property.

13 MR. FLEISCHER: There's no structure to
14 it.

15 CHAIRPERSON GRIFFIS: So it's open.

16 MR. FLEISCHER: So you're really looking
17 out into the openness.

18 CHAIRPERSON GRIFFIS: So perhaps the
19 intent in the regulations in defining a court in the
20 property line is part of the aspect of closing it was
21 that there would be a potential for a property to be
22 built up and to that property line, which would close
23 it off. Is that your understanding?

24 MR. FLEISCHER: That's correct, yes.

25 CHAIRPERSON GRIFFIS: And what is the

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1 potential that they are going to add on to that
2 Canadian embassy out on to the street?

3 MR. FLEISCHER: I think there is no
4 potential for them to do that at that corner.

5 CHAIRPERSON GRIFFIS: I see.

6 MR. FLEISCHER: And we've had continuing
7 ongoing discussions with the Canadian embassy.

8 CHAIRPERSON GRIFFIS: What is the function
9 directly adjacent to that courtyard attendant to the
10 Canadian embassy?

11 MR. FLEISCHER: That is -- right next to
12 them is actually where they go into their garage.

13 CHAIRPERSON GRIFFIS: I see.

14 MR. FLEISCHER: Underneath the building.
15 That is actually their driveway entrance and the
16 entrance at our parking structure literally parallels
17 their parking.

18 CHAIRPERSON GRIFFIS: So it would be
19 problematic to put a structure there?

20 MR. FLEISCHER: Yes.

21 CHAIRPERSON GRIFFIS: I see.

22 MR. FLEISCHER: And again, based on our
23 discussions with them, they have no intention of doing
24 that. They are not here to testify, but we have had
25 continuing and ongoing discussions.

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1 CHAIRPERSON GRIFFIS: You can tell them
2 how long it will take them to get approvals. Oh, wait
3 a minute, they are Canadian. I see. Okay.

4 MR. FLEISCHER: But as I say, that
5 actually gave us the advantage of actually opening up
6 some very nice vistas to the northeast from the
7 residential corner units.

8 CHAIRPERSON GRIFFIS: Okay. Understood.

9 MR. QUIN: That concludes Mr. Fleischer's
10 testimony. I would like to call our last witness,
11 Steven Sher, unless there are clarifying questions.

12 CHAIRPERSON GRIFFIS: Let's hold Mr. Sher,
13 because I think this is going to be the bulk of the
14 questions that we're really going to need to get into
15 and fairly quickly. Let me for iteration purposes or
16 for understanding, can you point out the area of which
17 the arcade is in question?

18 MR. FLEISCHER: Yes. Mr. Donaldson is
19 pointing out the arcade now.

20 CHAIRPERSON GRIFFIS: And so --

21 MR. FLEISCHER: It was essentially focused
22 solely on the group entry area.

23 CHAIRPERSON GRIFFIS: Right.

24 MR. FLEISCHER: To the Newseum and it was
25 actually to just get a little more width in there

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1 without significantly impacting the group entry.

2 CHAIRPERSON GRIFFIS: And Mr. Quin had
3 said in the opening statement, but more substantially
4 in the written submission, it's talked about that that
5 is going to accommodate the large amount of visitors.

6 MR. FLEISCHER: Right.

7 CHAIRPERSON GRIFFIS: And that that may
8 not fall within the definition of arcade in the DD
9 District because it's more of a set-back for an
10 entrance?

11 MR. FLEISCHER: It's more of an entrance
12 set-back than it is an arcade.

13 CHAIRPERSON GRIFFIS: Okay.

14 MR. FLEISCHER: There was no intention to
15 try to run it to the length.

16 CHAIRPERSON GRIFFIS: Who determined?
17 There was a statement in the written submission that
18 was kind of indirect, but it was given that there was
19 now an understanding or an indication, although the
20 acting Zoning Administrator didn't believe it was an
21 arcade, someone does. Who is that?

22 MR. QUIN: We just want to make certain
23 that if somebody raises that a subsequent Zoning
24 Administrator that we've covered the point.

25 CHAIRPERSON GRIFFIS: I see.

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1 MR. QUIN: It's really belts, suspenders
2 and tight pants and anything else to keep it working.

3 CHAIRPERSON GRIFFIS: Excellent. Okay.
4 And then if I could, let's visit the penthouse
5 structures and it's my understanding from the
6 submissions that, well, let's walk through it. First
7 of all, when you talk about the elements of the
8 building and the three primary elements of the
9 building, they are all of different height. Is that
10 correct?

11 MR. FLEISCHER: Yes, yes.

12 CHAIRPERSON GRIFFIS: Okay.

13 MR. FLEISCHER: Let me parallel this with
14 you.

15 CHAIRPERSON GRIFFIS: Do we have that
16 cordless?

17 UNIDENTIFIED SPEAKER: They're going to
18 get you a microphone.

19 MR. QUIN: Mr. Chairman, I might just
20 comment on what our structure of our testimony was to
21 be, so you will know where we were headed. Mr.
22 Fleischer was really going to talk about the
23 architecture, but Mr. Sher was going to link it to the
24 test. So, in other words, we're building on the
25 general list of what the project is, then the

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1 architecture and where it is and then Mr. Sher would
2 cover why it is essential for this relief to be
3 granted.

4 CHAIRPERSON GRIFFIS: Excellent strategy.

5 But I think we'll just get through the penthouse
6 structure, so that we all understand graphically what
7 we're looking at.

8 MR. QUIN: Right.

9 CHAIRPERSON GRIFFIS: And then take some
10 quick questions for the architect and then we'll go to
11 the actual test.

12 MR. FLEISCHER: Well, actually, I think I
13 can sit here and I can title it. There are basically
14 six penthouse structures. Each of those structures
15 represents a core of the building, which includes an
16 elevator. Unlike an office building or buildings of
17 that nature, you can't have all of the elevators in
18 one spot, because the goal here was to facilitate
19 movement within the museum itself, as well as to
20 facilitate the ability of people to move from exhibit
21 to exhibit, especially for return visitors who didn't
22 necessarily want to follow the primary process.

23 CHAIRPERSON GRIFFIS: Do you have a
24 separate core for the residential, the museum and the
25 office?

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1 MR. FLEISCHER: Yes. Is this on?

2 UNIDENTIFIED SPEAKER: Yes.

3 MR. FLEISCHER: Basically, we have. There
4 are three Newseum cores, essentially. One in between
5 the first and the second bar, the other between,
6 essentially, the second and the third bar, another one
7 between the second and third bar, and then two
8 penthouses for the residential building and one, what
9 I will call, mechanical penthouse, and I'll try to
10 explain each of them.

11 Within the context of the museum itself,
12 this core sits here and actually works between the two
13 bars. And these cores are well set-back from the
14 street. The issue here is street set-back. They are
15 really well set-back from the street, but because of
16 the step nature of the bars, they are effectively out
17 front and therefore are in technical violation of the
18 requirements with regard to the core.

19 The first core has elevator and stairs in
20 there, and those elevators and stairs connect variably
21 through the building. The second core in this bar has
22 two sets of elevators and a stair. Part of those
23 elevators go up to the block of the offices and the
24 conference center and the other elevator services
25 primarily from the conference center down through the

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1 Newseum itself.

2 This third core has a series of elevators
3 in it. It services the office support areas that are
4 below this roof. It services the public, in terms of
5 the Newseum itself, and it also contains the major
6 service elevator for the entire complex. The two
7 cores, the two elevator stair cores at the residential
8 building represent what we would call the normal
9 elevating of tenants going to and from their
10 apartments and on this side is the service elevator
11 and the exit stairs with it. They both provide access
12 to the roof for the use of tenants of the residence.

13 And the third core, these cores could all
14 have been tied together, but in discussion with NCP
15 earlier and in discussions of the design, it was felt
16 that it was desirable to actually break down the mass
17 of those cores. And so what we have done is we've
18 taken this -- we've consolidated all of the mechanical
19 areas for the residential building in this core,
20 primarily, and these are really focused on some
21 mechanical space, but primarily focused on the stairs
22 and elevators. All the other mechanical equipment for
23 this entire complex are on these lower roofs and are
24 fully shielded from the street.

25 CHAIRPERSON GRIFFIS: Okay. And you

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1 indicated in the written submission that the penthouse
2 is actually integral to the design of the building.
3 You just indicated that in terms of breaking the
4 massing. What other elements of it integrate with the
5 building?

6 MR. FLEISCHER: Well, the location of the
7 cores were critical to the exhibition sequence.

8 CHAIRPERSON GRIFFIS: Okay. So they
9 function.

10 MR. FLEISCHER: And the way in which the
11 building was to function. And I said this is
12 particularly important. There is a primary sequence
13 for what we would call the first time visitors, what
14 we call the track, the normal track.

15 CHAIRPERSON GRIFFIS: Right.

16 MR. FLEISCHER: On the other hand, for
17 return visitors and for visitors who want to take a
18 break within the middle of the visit, you're going to
19 have easy access to a core and move to and from
20 different levels of the building was felt to be quite
21 critical.

22 CHAIRPERSON GRIFFIS: Okay.

23 MR. FLEISCHER: And this is very large as
24 well.

25 CHAIRPERSON GRIFFIS: And how do they

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1 integrate then to the exterior to the actual massing
2 or one might say correctly to the visual aspect of the
3 building?

4 MR. FLEISCHER: Right. You need --
5 basically, the cores are -- the first three cores are
6 -- this one is the one between bars one and two. By
7 connecting through it, it actually begins to break
8 down some of the mass of the building and provide some
9 articulation without being a massive plunge. You can
10 see it extends only about a foot or two over that
11 second bar.

12 CHAIRPERSON GRIFFIS: And which material
13 is the penthouse?

14 MR. FLEISCHER: The penthouses are metal
15 panels.

16 CHAIRPERSON GRIFFIS: Okay. And that
17 obviously is integral to the materials that are being
18 used in the others.

19 MR. FLEISCHER: The overall of that
20 building, I did not describe. But the overall
21 building is essentially an aluminum and glass
22 building.

23 CHAIRPERSON GRIFFIS: Right.

24 MR. FLEISCHER: And the aluminum panels
25 are then used again to tie it all together including

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1 the residences as part of the skin of the building.
2 And it is those same aluminum panels that are used in
3 a modular way to clad the towers. So they are
4 actually all part of one thing.

5 CHAIRPERSON GRIFFIS: Okay. One other
6 quick question I have. As you've stated, of course,
7 we're looking at the penthouse under 411 and 770 for
8 the set-backs from the exterior wall and then there is
9 a statement of which, although all the penthouses are
10 of equal height, so if my understanding of that is of
11 each of the six, each one has a height and it is
12 similar to itself, but not to all the others?

13 MR. FLEISCHER: I'll have to describe in
14 my own words.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. FLEISCHER: But, basically, each
17 penthouse, the height of the penthouse is set up by
18 the technical requirements.

19 CHAIRPERSON GRIFFIS: Right.

20 MR. FLEISCHER: Of the elevators and
21 stairs. Within that context, each one bears a
22 relationship to the space adjacent to it. So
23 penthouses, for example, and residential building
24 floor heights are 9.5 feet, roughly, are going to
25 extend further up than a penthouse and a building

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1 where the floor heights are 18 foot. So the height of
2 each of these penthouses are exactly the same to each
3 other.

4 CHAIRPERSON GRIFFIS: I see.

5 MR. FLEISCHER: And the height of these
6 elements above the floor or below them are always the
7 same height. But the articulation, which is what is
8 projected here, varies very little in terms of the
9 height above the roof. But they are always roughly
10 2.5 feet above.

11 UNIDENTIFIED SPEAKER: So these two are
12 the same height?

13 MR. FLEISCHER: No.

14 UNIDENTIFIED SPEAKER: Is this the floor
15 right there?

16 MR. FLEISCHER: They are the same height
17 relative to the roofs.

18 CHAIRPERSON GRIFFIS: I see.

19 MR. QUIN: We also can say that in terms
20 of the 1910 Height Act that this building could go to
21 160.

22 CHAIRPERSON GRIFFIS: Yes.

23 MR. QUIN: In the Zoning Regulations.

24 CHAIRPERSON GRIFFIS: Indeed.

25 MR. QUIN: But we're well under that and

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1 each penthouse is below what it could be under the
2 regulations as well.

3 CHAIRPERSON GRIFFIS: Right. Which would
4 be 18.6, is what you're saying, above the adjacent
5 roof level. Okay.

6 MR. FLEISCHER: Basically, none of them
7 are that much above the roof.

8 CHAIRPERSON GRIFFIS: Right. And what is
9 the building height currently? I think it's at 130?

10 MR. QUIN: 134, 1 and 1.5 inches.

11 MR. FLEISCHER: Yes, the highest point is
12 in bar 3 which is 134, 1.5 which is the parapet wall.

13 CHAIRPERSON GRIFFIS: It must have been an
14 issue for somebody. Okay. Other questions from the
15 Board for the architect?

16 BOARD MEMBER ZAIDAIN: Yes, I've got a
17 couple. In terms of your loading, the loading dock,
18 as I understand it, is located within the building
19 footprint underneath the residential. Is that
20 correct?

21 MR. FLEISCHER: Yes.

22 BOARD MEMBER ZAIDAIN: Okay. How deep is
23 that? And basically, what I'm asking is is it deep
24 enough for a vehicle to pull all the way in and unload
25 without blocking the pedestrian space in a queuing

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1 manner?

2 MR. FLEISCHER: Yes.

3 BOARD MEMBER ZAIDAIN: Okay. And are you
4 going to regulate that? I mean, you've talked about
5 controlling the loading. Are you going to have a
6 policy to make sure there are not more than one
7 vehicle queuing at a time?

8 MR. QUIN: Yes.

9 BOARD MEMBER ZAIDAIN: Okay.

10 MR. QUIN: I think Mr. Fleischer would say
11 yes, and that would --

12 BOARD MEMBER ZAIDAIN: Yes, okay.

13 MR. QUIN: -- check that he was unloading.

14 MR. PRICHARD: Yes.

15 BOARD MEMBER ZAIDAIN: Okay. How many bay
16 doors do you currently have?

17 MR. FLEISCHER: We have two doors, but we
18 got five bays.

19 BOARD MEMBER ZAIDAIN: Okay.

20 MR. FLEISCHER: And this was done in
21 response to foreign arts.

22 BOARD MEMBER ZAIDAIN: Yes.

23 MR. FLEISCHER: That requested that we
24 reduce the number to a degree possible, so it would be
25 good to set one bay in essentially and off-set to

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1 reduce the width of the door opening.

2 BOARD MEMBER ZAIDAIN: Yes.

3 MR. FLEISCHER: So there are two large
4 doors, each one covering essentially two bays.

5 BOARD MEMBER ZAIDAIN: Right.

6 MR. FLEISCHER: And then one would just
7 enter from the east bay into the dock.

8 BOARD MEMBER ZAIDAIN: Yes. And that's
9 the minimum you can go door-wise, I guess?

10 MR. FLEISCHER: Yes.

11 BOARD MEMBER ZAIDAIN: From a functional
12 standpoint?

13 MR. FLEISCHER: I believe we had it
14 reviewed by others who are experts getting at that and
15 we've been able to get it down to.

16 BOARD MEMBER ZAIDAIN: Yes. That always
17 gives you heartburn to see bay doors on an elevation
18 like that, but that's the minimum you could do.

19 MR. FLEISCHER: Yes.

20 BOARD MEMBER ZAIDAIN: Then that's the way
21 it is.

22 MR. FLEISCHER: In order to meet the
23 functional and technical requirements.

24 BOARD MEMBER ZAIDAIN: In terms of the
25 theater space, can you give us some order of magnitude

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1 on how big that is? Like how many stories or square
2 feet or both?

3 MR. FLEISCHER: Well, as volume, it is
4 quite substantial.

5 BOARD MEMBER ZAIDAIN: Right.

6 MR. FLEISCHER: It has a balcony and a
7 main level and it is 535 seats total for the facility.

8 BOARD MEMBER ZAIDAIN: Well, how many
9 stories is it covering within the building's interior
10 space?

11 MR. FLEISCHER: Okay. It starts from the
12 B, what we call the, B11 level.

13 BOARD MEMBER ZAIDAIN: Yes.

14 MR. FLEISCHER: Which is one full basement
15 below first floor, which is roughly 20 feet down. And
16 it goes up to the underside of the residential level,
17 if you will. So it is essentially 30 -- it's about 35
18 or 40 feet and within it we have a number of
19 activities in there, but primarily it's a 45 foot.

20 BOARD MEMBER ZAIDAIN: And it goes to the
21 underside of the residential space?

22 MR. FLEISCHER: It goes to the underside.
23 No, it's not under the residential.

24 BOARD MEMBER ZAIDAIN: Right.

25 MR. FLEISCHER: The residential is out

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1 here.

2 BOARD MEMBER ZAIDAIN: But in terms of the
3 level?

4 MR. FLEISCHER: It's the level side of the
5 exhibits which are above it.

6 BOARD MEMBER ZAIDAIN: Oh, okay. Okay. I
7 understand.

8 MR. FLEISCHER: It essentially goes from
9 what we call the B1 level, which you have in your
10 documents.

11 BOARD MEMBER ZAIDAIN: Yes.

12 MR. FLEISCHER: Through the B1 mezzanine
13 through the first floor to the underside of the second
14 floor of exhibits.

15 BOARD MEMBER ZAIDAIN: Okay. Okay. I
16 understand. And I have some questions regarding the
17 arcade. I might want to save them for Mr. Sher. But
18 what is the depth of the arcade or whatever it may be?

19 MR. FLEISCHER: 7 foot.

20 BOARD MEMBER ZAIDAIN: 7 foot within the
21 interior or from the exterior of the footprint?

22 MR. FLEISCHER: The footprint will give it
23 best. 7 foot 4 inches from the build to line.

24 BOARD MEMBER ZAIDAIN: Right. So that
25 shaded gray area is 7 feet 4 inches?

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1 MR. FLEISCHER: Yes.

2 BOARD MEMBER ZAIDAIN: Okay. Okay. And I
3 have to look at the elevation, but I assume there will
4 be peering and everything through there?

5 MR. FLEISCHER: Yes.

6 BOARD MEMBER ZAIDAIN: Okay.

7 MR. FLEISCHER: It's clear and open.

8 BOARD MEMBER ZAIDAIN: Okay. And is it
9 glass along there or what exactly is the material on
10 that?

11 MR. FLEISCHER: Yes, the area adjacent to
12 the lobby is glass.

13 BOARD MEMBER ZAIDAIN: Is all glass.

14 MR. FLEISCHER: There is an exit door and
15 other things to come out below the level, but that is
16 glass.

17 BOARD MEMBER ZAIDAIN: Okay. Okay.

18 MR. FLEISCHER: What's based in there is a
19 quad for the security issues that are glass associated
20 with.

21 BOARD MEMBER ZAIDAIN: Right.

22 MR. FLEISCHER: With the world we live in
23 today.

24 CHAIRPERSON GRIFFIS: Excellent. Any
25 other questions from the Board at this time?

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1 BOARD MEMBER ZAIDAIN: No, we may have to
2 have some more discussion on the arcade with the
3 Zoning Regs, because the -- I mean, I was struggling
4 with the definition as well. It seems like the
5 definition implies that a street wall can be an arcade
6 as well.

7 CHAIRPERSON GRIFFIS: Right.

8 BOARD MEMBER ZAIDAIN: And I just want to
9 make sure that we're clear on the relief and how, you
10 know, we can tie the test to the arcade element as
11 well.

12 CHAIRPERSON GRIFFIS: Okay. Ms. Miller?

13 VICE CHAIR MILLER: I'm not sure if this
14 is the right time for this question, but I just have a
15 question with respect to the loading dock. I think
16 you made a statement or one of the witnesses did that
17 loading won't take place during the day. I'm
18 wondering when will it take place?

19 MR. FLEISCHER: No, that was a mistake.

20 VICE CHAIR MILLER: Okay.

21 MR. FLEISCHER: The intent was that the
22 loading dock doors would always be drawn down after a
23 delivery was made, not that it would not be made
24 during the day. I don't know if it was in the
25 schedule, but I would imagine there would be some

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1 during the day that we would close those doors, but
2 the intent was to say that they would not be left open
3 once a vehicle pulled into the dock, the doors would
4 be closed down.

5 BOARD MEMBER ZAIDAIN: Is there a loading
6 schedule?

7 MR. FLEISCHER: I'm saying there is no --

8 BOARD MEMBER ZAIDAIN: There's --

9 MR. FLEISCHER: We are not -- we don't
10 have a schedule.

11 MR. PRICHARD: We aren't that far along,
12 but the idea would be to pull the whole truck in, so
13 that it doesn't disrupt the sidewalk.

14 BOARD MEMBER ZAIDAIN: Okay. Well, that's
15 what it is designed to do, so it has become more than
16 an idea, obviously.

17 MR. FLEISCHER: Well, right.

18 CHAIRPERSON GRIFFIS: Very well. And
19 lastly, then if there are no other questions from the
20 Board, we need to talk briefly about the requirement
21 for the, now, I've lost it.

22 MR. QUIN: Street walk?

23 CHAIRPERSON GRIFFIS: Yes, the street
24 walk. Such a strange terminology. But the point is
25 is that you are looking at having the exterior of the

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1 structure not more than 4 feet back from the building
2 line. And what you are indicating if I understand
3 correctly is based on the articulation and the
4 requirements in context, the contextual requirement is
5 also the programmatic requirements, you can't build or
6 you are not proposing to build just a straight wall
7 right down Pennsylvania Avenue or for that matter
8 going north/south.

9 MR. FLEISCHER: Well, what we do on
10 Pennsylvania Avenue in the first instance, of course,
11 on the rules that we were given with regard to
12 Pennsylvania Avenue Plan, we needed to transition that
13 from the 50 foot.

14 CHAIRPERSON GRIFFIS: Okay. So if you
15 were going to put a conforming street wall on that
16 corner right there, where would it be?

17 MR. FLEISCHER: A conforming street wall
18 on this corner technically would literally be right
19 over here.

20 CHAIRPERSON GRIFFIS: Okay. So it would
21 be out extending past?

22 MR. FLEISCHER: Yes, it would be all the
23 way out to that line.

24 CHAIRPERSON GRIFFIS: Okay. And as you
25 have indicated, the Canadian embassy is 50 feet set-

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1 back.

2 MR. FLEISCHER: Right.

3 CHAIRPERSON GRIFFIS: So how can you
4 comply with both?

5 MR. FLEISCHER: Well, you can't.

6 BOARD MEMBER ZAIDAIN: Exactly.

7 MR. FLEISCHER: You can't comply with
8 both.

9 CHAIRPERSON GRIFFIS: I see.

10 MR. FLEISCHER: What we have done is we
11 have placed the First Amendment tablet, as we refer to
12 it, the tablet from the First Amendment right on the
13 property line.

14 CHAIRPERSON GRIFFIS: Right.

15 MR. FLEISCHER: At the street walk.

16 CHAIRPERSON GRIFFIS: Right, right.

17 MR. FLEISCHER: And that's the last step
18 in the transition back to Pennsylvania Avenue.

19 CHAIRPERSON GRIFFIS: Okay.

20 MR. FLEISCHER: Where there is a
21 commercial building or both.

22 CHAIRPERSON GRIFFIS: So we clearly have
23 discrepancy or actually a contradiction from the PACD
24 design requirements specific to this site and that of
25 the overall zoning of which this property is located?

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1 MR. FLEISCHER: That's correct.

2 CHAIRPERSON GRIFFIS: I see.

3 MR. FLEISCHER: On C Street, what we will
4 be doing as far as 6th, the residential building
5 actually stays along the street wall.

6 CHAIRPERSON GRIFFIS: Yes.

7 MR. FLEISCHER: As it turns the corner
8 essentially to find that edge, and that each of the
9 bars -- each of these two bars actually comes out to
10 the street wall line, but because of the grid, rather
11 than angling the edges of the building, which we felt
12 would not be appropriate to the very concept of what
13 we were trying to accomplish, the intent here is to
14 hold the street line.

15 CHAIRPERSON GRIFFIS: I think we're having
16 recording problems with you.

17 MR. FLEISCHER: Okay.

18 UNIDENTIFIED SPEAKER: So hold the mike
19 closer.

20 UNIDENTIFIED SPEAKER: Is that mike on?

21 CHAIRPERSON GRIFFIS: Is it on?

22 MR. FLEISCHER: It is. It says it's on.

23 UNIDENTIFIED SPEAKER: Yes, you need to
24 hold it closer.

25 BOARD MEMBER ZAIDAIN: Just hold it

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1 closer.

2 MR. FLEISCHER: Hold it close up here.

3 CHAIRPERSON GRIFFIS: Ah, there it is.

4 MR. FLEISCHER: That certainly covers it.

5 I apologize. With regard to 6th Street, the
6 residential portion, essentially, at ground and above
7 aligns with 6th Street. However, to articular the bars
8 and to provide access points for the other entry
9 points here, we've, essentially, carried it through in
10 such a way that we've stuck the building back.
11 However, at the ground point through landscaping,
12 planters and benches would be the intent to hold the
13 6th Street line for it's entire length.

14 CHAIRPERSON GRIFFIS: Excellent.

15 MR. FLEISCHER: Again, except for the
16 entry points.

17 CHAIRPERSON GRIFFIS: Okay. Any other
18 questions from the Board? Very well. Thank you very
19 much.

20 MR. FLEISCHER: Thank you.

21 CHAIRPERSON GRIFFIS: It was very
22 informative.

23 MR. QUIN: Our clean-up hitter is Mr.
24 Steve Sher, who has been qualified a few times before
25 this Court as an expert in land planning.

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1 CHAIRPERSON GRIFFIS: And we will allow it
2 only based on the fact that he put his testimony in
3 the record prior to showing up.

4 MR. SHER: Yes, sir. Aye, aye, sir. For
5 the record, my name is Steven E. Sher, the director of
6 Zoning and Land Use Services with the Law Firm of
7 Holland and Knight. Tab J in the applicant's
8 prehearing submission, a lot of what I would have
9 talked about has sort of been gone into by the Board
10 in its questions and in the presentation of Mr.
11 Fleischer. But let me go through it quickly.

12 Again, as you heard, much is made of the
13 fact that of our neighboring buildings, the Canadian
14 embassy to the east is set-back 50 feet, 601
15 Pennsylvania Avenue is at the property line, and both
16 in a design sense and in the requirements of the
17 Pennsylvania Avenue Plan, we were forced to address
18 that and create a design that transitions between
19 those two. When you come to the Zoning Regulations,
20 the site is, of course, DD/C-4. The Downtown
21 Development Overlay District has a couple of wrinkles
22 that are important to what happens here and why we're
23 here this morning.

24 One, we are required to provide a minimum
25 of 2 FAR residential, not otherwise in C-4, but under

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1 DD/C-4 housing priority area C. And then the area
2 wide design standards, the requirement for an open
3 arcade to extend the full length of an entire block
4 frontage and the requirement that not less than 75
5 percent of the street wall to a height of 15 feet has
6 to be within 4 feet of the property line, and the
7 Board was just going into that.

8 The Pennsylvania Avenue Plan site was
9 under the jurisdiction of the Pennsylvania Avenue
10 Development Corporation when PADC was dissolved. Its
11 responsibilities were transferred to an divided among
12 GSA, the National Park Service and NCPC. The Zoning
13 Regulation section 2518 requires --

14 CHAIRPERSON GRIFFIS: Who has
15 responsibility? How is it split with three agencies?

16 MR. SHER: Well, I was about to get into
17 one piece of that. GSA took over the property owning
18 interests of PADC. The Park Service took over the
19 street maintenance and sidewalk and other
20 responsibilities. And NCPC took over the requirement
21 to determine compliance with the plan. All three of
22 the agencies have a role in approval of amendments to
23 the plan, which we went through last year. But that's
24 essentially how the three were. That takes about a
25 five page document and condenses it into three

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1 sentences. But that's what it does.

2 CHAIRPERSON GRIFFIS: Okay. There is a
3 memorandum.

4 MR. SHER: There is a memorandum of
5 understanding between the three agencies.

6 CHAIRPERSON GRIFFIS: Right.

7 MR. SHER: About how that worked.

8 CHAIRPERSON GRIFFIS: I think it is
9 important just to understand the jurisdiction of each
10 of those. But let's go.

11 MR. SHER: Under 2518 of the Zoning
12 Regulations, PADC had been required to approve and
13 certify that construction was consistent with
14 implementation of the plan. That responsibility has
15 now gone to NCPC, because it has responsibility in
16 terms of compliance with the plan, even though the
17 Zoning Regulations haven't actually been amended.
18 It's still NCPC not PADC. The original plan did not
19 contemplate a museum on this site, but we went to the
20 Park Service, GSA and NCPC and as a result of a
21 process, the plan has been amended to specifically
22 provide for and include this particular use or set of
23 uses and this particular design.

24 We have included an attachment in Tab E in
25 the middle. What the current plan is and the

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1 requirements for build two lines and height and roof
2 structures are all very detailed and Mr. Parsons will
3 remember the going back and forth on getting that
4 wording exactly so that the height profile in the
5 approved plan is exactly the height profile that you
6 see on these drawings. And that was all being done
7 very carefully.

8 We've talked a little bit about the
9 program, so I won't spend any time on that. What are
10 we here for? One special exception and three
11 variances. A special exception for roof structures
12 under section 411.11, set-back, as Mr. Fleischer
13 indicated, we have six roof structures, three of them
14 on the roof of the residential wing and three in the
15 middle on the Newseum's bars. They don't meet the
16 set-back requirements from the edges of the roof upon
17 which they are located. We have multiple enclosures
18 and we have walls of unequal height. Again, the laws
19 are equal within each, but they are varying as they
20 relate to the roofs on which they are located.

21 We have the three courts which have
22 already been described where we have variances from
23 the width of open court requirements. These are all--
24 well, two of the three are irregularly shaped courts,
25 so by regulation, the width is the diameter of the

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1 largest circle, which can be inscribed in the courts.

2 For Court A, which is the one right here at the
3 intersection of, basically, the first and second bars,
4 you can see the circle is there, but the court
5 actually has a much greater frontage along 6th Street
6 than if you were to measure the width that way, we
7 wouldn't be here, but that's not what the regulations
8 say.

9 Court B, again, is formed by the
10 intersection of the second and third bars, and then
11 the residential wing coming here, and again the circle
12 is inscribed here, but the frontage along 6th Street
13 runs all the way from the point where this bar hits
14 the property line back to where the residential bar
15 does and so the frontage is longer, but the width of
16 the circle is not. And the third court is the one
17 over the entrance to the loading, which forms the
18 transition between the line of our building here and
19 the line of the Canadian embassy building, which
20 corner is there. And we have set forth in our
21 statement and in my outline what the various
22 requirements are.

23 The variance for the street wall
24 requirements, again, this is the first 15 feet up. We
25 do not meet the 75 percent requirement on any of the

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1 three street frontages. And, in fact, on Pennsylvania
2 Avenue, because of the way the building fronts, none
3 of that frontage, actually on the ground floor,
4 actually comes out to the property line. There is
5 some overhang at this point where the First Amendment
6 tablet is, but at the ground floor, for the first 15
7 feet, none of that Pennsylvania Avenue frontage is
8 actually on the property line. But again, we're
9 creating a transition from the line of the Canadian
10 embassy here, the line of 601, which is out there or
11 you can see it on the lower drawing that is on the
12 ground there.

13 And then the arcade requirements, an
14 arcade is not defined anywhere in the regulations. It
15 is regulated in Chapter 25. We went and we asked the
16 Zoning Administrator is this an arcade and he hemmed a
17 little bit and he said I don't think so. It could be.

18 It could not be. We didn't want to be in a position
19 down the road where somebody says ah-ha, that's an
20 arcade. You didn't get relief. So, in fact, if that
21 had been the only area where we potentially had
22 noncompliance and we hadn't had to come to the Board
23 anyhow, we probably might not have raised it and just
24 gone ahead.

25 But it is this area here which is set-back

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1 7 feet 4 inches covered by the line of the building
2 above for a distance of, approximately, 99 feet along
3 here. But it does not run the full length, because
4 the restaurant comes out here, the loading berth comes
5 out here and, obviously, we cannot connect to an
6 arcade in the Canadian embassy, because there isn't
7 one. So if this is an arcade, we need relief. If
8 it's not an arcade, thank you very much and we'll go
9 home.

10 BOARD MEMBER ZAIDAIN: If you were to fill
11 it in, would it count toward your FAR?

12 MR. SHER: It counts towards FAR now,
13 because it is covered.

14 BOARD MEMBER ZAIDAIN: Oh, okay.

15 MR. SHER: It's in FAR and we can't get
16 credit for the FAR. FAR is not our problem.

17 BOARD MEMBER ZAIDAIN: Yes.

18 MR. SHER: We're at about 5 FAR. We're
19 allowed to be 10.

20 BOARD MEMBER ZAIDAIN: Okay. So if you
21 filled it in, it wouldn't change your FAR
22 calculations?

23 MR. SHER: It wouldn't change the FAR at
24 all.

25 BOARD MEMBER ZAIDAIN: Okay.

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1 MR. SHER: It's covered by the -- because
2 it's covered by, in effect, a roof, it's counted in
3 FAR now.

4 CHAIRPERSON GRIFFIS: And there is no
5 reduction in FAR for a bonus for the arcade in this
6 area. Is that correct?

7 MR. SHER: You can't use the FAR credit in
8 the DD District.

9 CHAIRPERSON GRIFFIS: In the DD District.

10 MR. SHER: But we don't need any FAR
11 credit. We're well under the permitted FAR.

12 CHAIRPERSON GRIFFIS: Right. I
13 understand.

14 MR. SHER: All right. Compliance with the
15 special exception standards, the size of the building
16 lot and other conditions, Mr. Fleischer went through
17 the multi function mixed-use nature of the building.
18 The requirements of the Pennsylvania Avenue Plan, the
19 differing heights make it impossible to place all the
20 roof structures in a single enclosure. As Mr.
21 Fleischer indicated, the lower roof levels in here are
22 where much of the mechanical equipment is. The only
23 mechanical equipment on the roof of any of the
24 buildings that is high is on the residential bar, but
25 that is not even the highest bar of the building.

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1 The highest bar is the third bar that is
2 parallel to Pennsylvania Avenue, which is where you
3 get to the 134 feet and then it steps down to get to
4 the residential bar, so that all of those elevators
5 and stair towers are necessary for the circulation and
6 they have been designed into the building. They are
7 all set-back substantially from the street frontages.

8 We have no 1910 compliance, 1910 Height Act
9 compliance issues and, of course, this design has
10 already been through fine arts and others who have
11 looked at all of that.

12 CHAIRPERSON GRIFFIS: Aren't you also
13 required to have a single enclosure for the three
14 penthouses on a single block?

15 MR. SHER: Yes, we mentioned that. We
16 have them -- they are, obviously, on different roof
17 levels and they have been designed in a way that we
18 try to --

19 CHAIRPERSON GRIFFIS: But that's not
20 different roof levels. Isn't it more -- well, there
21 it is.

22 MR. SHER: Yes. There are three areas of
23 special exception noncompliance that we're asking for
24 approval on the single enclosure.

25 CHAIRPERSON GRIFFIS: Right.

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1 MR. SHER: The set-back and the walls of
2 unequal height.

3 CHAIRPERSON GRIFFIS: Okay.

4 MR. SHER: On the variance, the shape of
5 the site, again, the diagonal Pennsylvania Avenue and
6 the need for the building to respond to that parallel
7 to the major frontage, the requirements of the
8 Pennsylvania Avenue Plan, the configuration and the
9 locations of the adjacent buildings, the provisions
10 are at odds with one another. The requirement for
11 street wall versus the size of courts, for example,
12 will work in opposite directions.

13 There is basically no way to comply with
14 the street wall requirement and make the transition
15 from the Canadian embassy to 601 Pennsylvania Avenue.

16 With respect to detriment to the public good as we
17 have said before, we're consistent with the
18 Pennsylvania Avenue Plan. We've gotten all of these
19 approvals from various other agencies and if the
20 concern about bringing the building to the street wall
21 was to create liveliness and animation, I mean, that's
22 what this use is. It's going to bring people in.

23 The front page display, which wraps around
24 the front of the building here and then goes on around
25 onto the 6th Street side here, is going to bring people

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1 in to stop. The Board may remember when we had the
2 interim parking lot use, we erected that front page
3 display as a temporary condition in front of the
4 parking lot. Now, it was a feature in the Newseum and
5 it will continue to be. It's just all designed to
6 bring people up to the face of the building, and I
7 don't believe there is any detriment to the public
8 good.

9 So having said all that, I believe that we
10 have met all of the requirements for the relief that
11 we have asked for and the application should be
12 approved.

13 CHAIRPERSON GRIFFIS: Very well. Any
14 questions from the Board?

15 BOARD MEMBER ZAIDAIN: Yes, just a follow-
16 up on the arcade. You're not required to provide the
17 arcade. I just want to see that if you do provide it,
18 that explains it.

19 MR. SHER: That's correct.

20 BOARD MEMBER ZAIDAIN: Okay. And my
21 second question is the court on the southwest corner,
22 I guess, I wish I had a laser pointer, I don't. Yes,
23 right there. You are considering that to be a court?

24 MR. SHER: Well, the court --

25 BOARD MEMBER ZAIDAIN: Because to me, it's

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1 only enclosed on two sides.

2 MR. SHER: It's enclosed on one, two,
3 three, four sides of the building.

4 BOARD MEMBER ZAIDAIN: But that --

5 MR. SHER: This line of the building above
6 here.

7 BOARD MEMBER ZAIDAIN: But that point
8 right there doesn't go to the property line.

9 MR. SHER: Well, the property line is
10 here.

11 BOARD MEMBER ZAIDAIN: Right.

12 MR. SHER: Here, there, there and there.
13 It's kind of, I don't know what I would call that, an
14 icepick head or something like that.

15 BOARD MEMBER ZAIDAIN: Yes, I don't know.
16 I just --

17 MR. SHER: Yes, it's open here.

18 BOARD MEMBER ZAIDAIN: It seems like it
19 has to be enclosed by two exterior walls. I mean, it
20 can have a lot line, but it has got to have two
21 exterior walls.

22 MR. SHER: Right. Right. And we've got--
23 as we said, we have one, two, three, four exterior
24 walls and one lot line.

25 BOARD MEMBER ZAIDAIN: Well, I guess, I'm

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1 just -- what I'm questioning is the third wall is not
2 enclosing it, because it doesn't go to the lot line.
3 I'm just asking the question. I don't know.

4 MR. SHER: We consider it to be one
5 irregularly shaped court, because of the diameters and
6 dimensions. I guess, conceivably, you could divide
7 that up into a couple of different courts, in which
8 case none of them would comply, but it is one space
9 bordered by the walls of the building and the property
10 line.

11 CHAIRPERSON GRIFFIS: Why isn't it a court
12 niche?

13 MR. SHER: Decorative architectural
14 treatment, it might be, if you tell us we don't need
15 to be here, we'll be out. There's no requirement for
16 width, steps, sizes of court niches, but, we thought
17 it was a court and if you want to tell us it's a court
18 niche, that's fine.

19 MR. QUIN: We thought the court niche is
20 usually something less deep and less functional.

21 CHAIRPERSON GRIFFIS: Right.

22 BOARD MEMBER ZAIDAIN: It would be an
23 extreme court niche, but I don't know.

24 CHAIRPERSON GRIFFIS: Well, on a scale of
25 a building like this, I mean, I can't say we see court

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1 niches of that size.

2 BOARD MEMBER ZAIDAIN: Right.

3 CHAIRPERSON GRIFFIS: But in terms of
4 scale in proportion of the building it seems to be
5 appropriate.

6 BOARD MEMBER ZAIDAIN: Yes.

7 CHAIRPERSON GRIFFIS: In either case, it
8 doesn't --

9 BOARD MEMBER ZAIDAIN: I mean, I question
10 whether or not it's a court or not, but that's not a
11 big issue.

12 CHAIRPERSON GRIFFIS: Anything else, Mr.
13 Zaidain?

14 BOARD MEMBER ZAIDAIN: No.

15 CHAIRPERSON GRIFFIS: Follow-up? Any
16 other questions? Very well. Thank you very much, Mr.
17 Sher. Let's move on then. Anything else?

18 MR. QUIN: Just to say this completes our
19 direct testimony, that we are hoping for an early as
20 possible decision, like today, and but we note that
21 the Office of Planning has a report. The record will
22 reflect that the ANC-6C is in support. You also have
23 a letter in support from the Cluster, the
24 Congregation, Cluster of Congregation, Terry Lynch and
25 no opposition.

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1 CHAIRPERSON GRIFFIS: Good. Very well.
2 Yes, we need to get to the Office of Planning.
3 They're going to present their report. But I want to
4 note does ANC-6C, as you said, it's Exhibit 25 in the
5 record, also the Downtown Cluster of Congregation, the
6 letter that has now been referenced is Exhibit 25, and
7 they are putting, am I right? Exhibit 27. And they
8 have submitted in support. Let's go then to the
9 Office of Planning's report.

10 MS. BROWN-ROBERTS: Good morning, Mr.
11 Chairman and Member of the Commission. I am Maxine
12 Brown-Roberts representing the Office of Planning. I
13 think we've heard extensive testimony and the analysis
14 presented by Mr. Sher, I think, we agree with that,
15 and therefore I would just stand on the record
16 regarding the request for a special exception and for
17 the variances. Our report clearly outlines the
18 requirements for the special exception as required
19 under section 411 for roof structure set-backs,
20 enclosures and uniform height requirements have been
21 met.

22 Regarding the variances relating to court
23 width, street wall and arcade, the applicant has
24 demonstrated that due to the requirements and
25 conflicts of the Pennsylvania Avenue Plan, the Zoning

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1 Regulation requirements to meet the needs of the
2 mixture of uses in the building, there is a uniqueness
3 caused by extraordinary situations. There is
4 practical difficulty meeting requirements and there
5 will not be substantial detriment to the public good
6 or impairment to the intent of the Zoning Regulations.

7 In fact, the proposal will and has the
8 public good over that required by the Zoning
9 Regulations. The Office of Planning, therefore,
10 recommends approval of the requested special exception
11 and variances. Thank you, Mr. Chairman.

12 CHAIRPERSON GRIFFIS: Good. Thank you
13 very much and appreciate the excellent report and the
14 summation at this time. Are there questions from the
15 Board? Does the applicant have any cross examination
16 of the Office of Planning?

17 MR. QUIN: None whatsoever.

18 CHAIRPERSON GRIFFIS: Very well. I do not
19 have any other notes in my record attendant to this
20 application in terms of submissions from any other
21 agencies. The ANC we have noted. Correspondence was
22 timely filed and I do believe it rises to be given the
23 great weight for which it can be now accorded. Other
24 than that, Mr. Quin, are you aware of anything else
25 submitted into the record?

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1 MR. QUIN: No, I'm not.

2 CHAIRPERSON GRIFFIS: Board Members?
3 Good. I think it's very clear in terms of the
4 submission that we got from the applicant, first of
5 all, what a dynamic and exciting project and I can say
6 that as opposed to the relief sought for the surface
7 parking lot that we had to process some time ago. But
8 most important to this submission, the extensive
9 detail that walked us through this, made this hearing
10 perhaps easier to understand.

11 Are there final questions from the Board
12 for the applicant or any other witnesses? If not,
13 then I would move approval of Application 17122, the
14 application of Freedom Forum. That would be pursuant
15 to the special exception under 411, of course, goes to
16 the roof structure, the variance from the width of the
17 court requirements under 776.1, also the variance from
18 the arcade for undue caution and insurance
19 requirements under section 1701.2 and the variance
20 from the street wall requirements under 1701.3.

21 This would, of course, permit the
22 construction of the mixed-use building, which, as
23 we've heard today and also in the submissions, is
24 incredibly complex, not only in the interior, but the
25 exterior that it would allow this museum, retail,

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1 apartment and offices at 555 Pennsylvania Avenue, N.W.
2 and I would ask for a second.

3 BOARD MEMBER ZAIDAIN: I'll second that.

4 CHAIRPERSON GRIFFIS: Thank you, Mr.
5 Zaidain. I do appreciate it. I think we've walked
6 through quite extensively and I'm not going to rehash
7 all of it. But it's fairly clear that there are
8 things in great conflict here which make it
9 particularly difficult to comply exactly with the
10 Zoning Regulations. I'm most persuaded by the fact of
11 the design requirements from the PADC and how, in
12 fact, their overall zoning or the specific aspect of
13 zoning districts are in conflict with that. I do not
14 think it's an error to look at that as a practical
15 difficulty in providing certain aspects.

16 In fact, be that this is through the PADC,
17 specifically looked at in terms of design and what
18 would happen here, it seems like that should, in fact,
19 be the controlling element. As we're not a design
20 board, we won't go extensively into design, except,
21 from my personal opinion, I think it's an excellent
22 address to the context of the site. It seems easy
23 looking at the overall drawings now and what it has
24 come out to be to say well, of course, that's what you
25 should have done.

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1 It's more difficult, of course, when its a
2 surface parking lot to envision it. The practical
3 difficulty of dealing with a 50 foot set-back from the
4 Canadian embassy and then from the adjacent 601
5 Building, that does not set-back, I think has been
6 established fairly extensively, which also creates the
7 difficulty in setting the street wall according to the
8 requirements.

9 Penthouses, I think, the Board is very
10 familiar in terms of special exception. I won't go
11 too far into that. 411 and 770, clearly, in a mixed-
12 use building, our regulations never -- it's almost as
13 if we never anticipated that we would have mixed-use
14 buildings or for that matter new residential
15 buildings. We have noted numerous times about the
16 importance of building code and the separation of
17 those courts.

18 When you look at something as complex as
19 this, it would be hard to imagine a single enclosed
20 penthouse and, in fact, what detriment that would
21 actually have to the actual street scape, the massing,
22 I think, it would read as a great visual intrusion and
23 an interesting, almost tearing building that breaks
24 down its own mass within its function. That being
25 said, the courts also, I think, we've flushed out

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1 quite extensively of the practical difficulty relating
2 on the angle of Pennsylvania Avenue with the grid,
3 also addressing again the design requirements
4 attendant to this, have created these areas, which are
5 to remain open, but nonconforming. And I think it
6 would be quite difficult, if not detrimental, to the
7 overall design and purpose of this building if we were
8 to require strict adherence to the Zoning Regulations.

9 I'll open it up to other Board comments at
10 this time. Not noting any, then we have a motion
11 before us for approval of 17122 and it has been
12 seconded. I ask for all those in favor to signify by
13 saying aye.

14 ALL: Aye.

15 CHAIRPERSON GRIFFIS: And opposed?
16 Abstaining? Very well. Why don't we record the vote?

17 MS. BAILEY: The vote is recorded as 5-0-0
18 to approve the application. Mr. Griffis made the
19 motion. Mr. Zaidain second, Ms. Miller and Mr.
20 Etherly and Mr. Parsons are in agreement.

21 CHAIRPERSON GRIFFIS: Very well. Thank
22 you very much.

23 MR. QUIN: May I ask a question?

24 CHAIRPERSON GRIFFIS: As you asked, the
25 most important question is when are you going to start

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1 construction and can we go?

2 MR. QUIN: Just one other question.

3 CHAIRPERSON GRIFFIS: Yes.

4 MR. QUIN: Which is would you like this to
5 be a summary order?

6 CHAIRPERSON GRIFFIS: I see no need,
7 unless Board Members feel differently, to afford, I
8 would issue a summary order on this.

9 MR. QUIN: Thank you. We hope to start
10 construction early in April, Mr. Chairman. Thank you
11 very much.

12 CHAIRPERSON GRIFFIS: Excellent. Thank
13 you all very much. It's an excellent project. Not
14 that you need my opinion of that. I think it's all
15 over.

16 MR. FLEISCHER: We do need your opinion.

17 MR. PRICHARD: We do actually.

18 CHAIRPERSON GRIFFIS: Okay. Let's move
19 ahead then and call the last case in the morning
20 session.

21 MS. BAILEY: Application No. 17123 of
22 Beech Center, Inc., pursuant to 11 DCMR 3103.2, for a
23 variance from the lot area requirements under
24 subsection 401.3, to allow the construction of two new
25 single-family detached dwellings in the R-1-B District

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1 at premises 3139 and 3143 Westover Drive, S.E., Square
2 5664, Lot 70 and 71.

3 Mr. Chairman, I just wanted to make note,
4 Mr. Chairman, that the correct citation is section
5 401.3. The numbers were transposed in the Public
6 Hearing Notice. And then the last thing is the
7 affidavit indicates that the property was posted on
8 March 21st of this year. Well, we haven't quite gotten
9 there yet, so I'm assuming that was just an oversight.

10 CHAIRPERSON GRIFFIS: Okay. We'll get
11 that clarified in terms of posting. Good morning.
12 Could you turn on your microphone, please? Just touch
13 that button. Excellent. And if you wouldn't mind
14 just giving your name and your address for the record?

15 MR. JOHNSON: Yes, my name is Philip L.
16 Johnson. I live at 821 Fourth Street, N.E.,
17 Washington, D.C.

18 CHAIRPERSON GRIFFIS: Okay. And you are
19 representing the?

20 MR. JOHNSON: I'm representing the
21 applicant.

22 CHAIRPERSON GRIFFIS: Okay. And can you
23 just quickly note when it was posted?

24 MR. JOHNSON: The site?

25 CHAIRPERSON GRIFFIS: Yes.

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1 MR. JOHNSON: It was February 21st instead
2 of March.

3 CHAIRPERSON GRIFFIS: Oh, I see. So the
4 month was just wrong.

5 MR. JOHNSON: Right.

6 CHAIRPERSON GRIFFIS: Okay. So the filing
7 makes some sense. Okay. Please, proceed.

8 MR. JOHNSON: Okay. Good morning, Mr.
9 Chairman, Members of the Board of Zoning Adjustment.
10 As I indicated, my name is Philip Johnson. I am here
11 representing the applicant in this matter now being
12 considered before this esteemed body. We have come
13 this morning before you with a very simple request,
14 approval of an area variance, 15 percent less than
15 what the zone requires of 744 square feet.

16 When we decided to go forward with this
17 project, we approached the owner and we were given a
18 plat that was signed and the lots were subdivided,
19 signed by Zoning Administrator in 1985, and so we did
20 not anticipate that we would have any difficulties in
21 moving forward with the building permit. Upon
22 applying for the building permits for this location,
23 we were told by the Office of Zoning that we needed to
24 appear before this body to seek relief in relationship
25 to the area variance for these two lots.

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1 The Zone is R-1-B. The lot requirement in
2 terms of area is 5,000 square feet. We are 744 square
3 feet less than the zone requirements. We meet every
4 other requirement of the zone, except for the 15
5 percent of the area variance. We, after careful
6 consideration and some preliminary investigation,
7 decided that the request before this Board was not an
8 unreasonable request. It was a simple request of area
9 variance. We met all the other requirements. So
10 there should not, in our minds, be any reason why our
11 request would be denied.

12 This is a classic zoning case. This is
13 one of the classic reasons the BZA exists is to
14 provide relief in this type of a situation where the
15 constraints that we are faced with in a terrain of
16 geotechnical issues with relationship to the soils in
17 an area where we have pie shaped lots that have been
18 platted and approved, signed off on by the Zoning
19 Administrator in 1985, subdivided, where we have some
20 slope issues and constraints.

21 The relief that we seek is very simple.
22 And so we move forward to try and get this done. This
23 is a simple matter where a resident of the District of
24 Columbia decided to try and remain in the District
25 rather than move out of the city to a detached house.

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1 I'm representing one person here, Ms. Dion Farris,
2 who cannot be here today, who set out to find a place
3 to live in the District and realized that she had been
4 priced out of this city, basically, out of the
5 northwest sector.

6 CHAIRPERSON GRIFFIS: Okay. Before we go
7 too far afield outside of zoning issues, you keep
8 indicating that there are so many constraints and this
9 is a classic variance case. Of course, the variance
10 in order to remain has to show that there is some
11 uniqueness to this and that out of that uniqueness
12 rises some practical difficulty, as you are saying,
13 constraints. What are the constraints that go
14 directly to the lot area?

15 MR. JOHNSON: Why don't I let my two other
16 witnesses here, my geotechnical engineer and my civil
17 engineer speak to those issues? I would just like
18 to --

19 CHAIRPERSON GRIFFIS: Is the lot -- okay.

20 MR. JOHNSON: So I would like to indicate
21 before they begin in my final comments that what we
22 are seeking is relief from issues that, I think, are
23 very simplistic in an area. What we were faced with,
24 however, in relationship to the OP and ANC was issues
25 associated with the science of building at this

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1 location, not with our request that was simple area
2 variance. So we then did not prepare initially a
3 record in relationship to geotechnical and civil
4 engineering issues, because, from our view, what we
5 were requested was a simple area variance.

6 CHAIRPERSON GRIFFIS: Right.

7 MR. JOHNSON: Because we met such concerns
8 about the issue of building at that location and we
9 had to go back and have engineering announce,
10 additional engineering, this is done. We had to go
11 back and have geotechnical issues done in order now to
12 come forth to support our case, based around the
13 science of building at that location, not the simple
14 area variance.

15 CHAIRPERSON GRIFFIS: Well, what is the
16 simple area variance then?

17 MR. JOHNSON: The simple area variance is
18 for 15 percent.

19 CHAIRPERSON GRIFFIS: I understand what it
20 is for.

21 MR. JOHNSON: Okay.

22 CHAIRPERSON GRIFFIS: But what is the
23 test? What is your case presentation on the test of
24 how you make the simple area variance?

25 MR. JOHNSON: Okay. Why don't I let --

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1 start off with my first witness from the firm,
2 geotechnical firm of Thomas Brown, Mr. Somba Ndeti,
3 and then we'll go to the civil engineer, the second
4 witness, from Maddox Engineering.

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. NDETI: My name is Somba Ndeti. I'm
7 with Thomas L. Brown Associates. We are geotechnical
8 engineers. I'm here to talk about your technical
9 issues with regard to this site.

10 CHAIRPERSON GRIFFIS: Two things. Could
11 you move your microphone a little bit closer to you?
12 And did you say that you were technical engineers?

13 MR. NDETI: Geotechnical.

14 CHAIRPERSON GRIFFIS: Geotechnical.

15 MR. NDETI: Geotechnical engineering.

16 CHAIRPERSON GRIFFIS: Okay.

17 MR. NDETI: Yes.

18 CHAIRPERSON GRIFFIS: So you're going to
19 tell us how bad the soil is?

20 MR. NDETI: How good it is.

21 CHAIRPERSON GRIFFIS: Okay.

22 MR. NDETI: I would just read some
23 excerpts here. Geologically the proposed site is
24 located within a coastal physio -- coastal pan
25 physiographic province. According to the geologic map

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1 of Washington, D.C. and vicinity, mapped and compiled
2 by P. M. Johnson in 1958 for U.S. Geological Survey,
3 this site is on the land by the Patuxent Formation,
4 and Arundel Clay belonging to the Potomac group of the
5 upper-cretaceous period. These formations are
6 described as dark gray, massive clay containing
7 lignitized wood, sodium bonds, that is the Arundel
8 Clay and the Patuxent Formation is massive maroon clay
9 and varied colored clay and sand and the Patuxent
10 overlays the Arundel Clay.

11 CHAIRPERSON GRIFFIS: Can I interrupt you?

12 MR. NDETI: Yes.

13 CHAIRPERSON GRIFFIS: Briefly. I'm just
14 trying to be absolutely very direct. We've got, as
15 you've said numerous times, a simple application.
16 Those were your words. We have a clear request for a
17 lot area variance. So the question goes to are there
18 geotechnical elements associated with the size of
19 these lots?

20 MR. NDETI: Okay. Very briefly, I do not
21 see geotechnical issues arising. The soil is -- we
22 have researched them. It indicates that we have
23 competent soils. Looking at the --

24 CHAIRPERSON GRIFFIS: But do the soil
25 types or the stability of soil or how far down you go

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1 or where the water table, is there any of those issues
2 that have anything to do with the lot size?

3 MR. NDETI: No, that do not have.

4 CHAIRPERSON GRIFFIS: Okay.

5 MR. NDETI: Anything to do with the lot
6 size.

7 CHAIRPERSON GRIFFIS: I think we can move
8 on.

9 MR. NDETI: But they do have to do with
10 the stability of --

11 CHAIRPERSON GRIFFIS: I understand that.
12 And I'm going to be very clear. There are certain
13 things when you bring an application for relief before
14 us, we are looking at the variance from the lot area
15 requirements, just as it is stated and corrected in
16 401.3. Outside of that, we won't have any
17 jurisdiction. So I need to understand what the
18 uniqueness of these lots are, what the practical
19 difficulty in conforming with the regulation, meaning
20 conforming with the lot area, and that you need to
21 tell us that, in fact, it won't be in conflict with
22 the Zone Plan or Map or be against the public good.

23 MR. JOHNSON: Okay. I would like to have
24 our civil engineer speak to those issues right quickly
25 in relationship to those.

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1 CHAIRPERSON GRIFFIS: That would be
2 unique.

3 MR. JOHNSON: Okay.

4 CHAIRPERSON GRIFFIS: Okay.

5 MR. COYWOOD: All right. Good morning.
6 My name is Dan Coywood.

7 CHAIRPERSON GRIFFIS: I'm going to have
8 you turn off your mike, so we don't have feedback.

9 MR. COYWOOD: I'm a licensed and
10 registered land surveyor in the District of Columbia.
11 I have about 16 years of experience in land planning
12 and site surveying work. I got involved in this
13 project with the task of doing some site planning and
14 investigation feasibility work on the project. When
15 we got involved in it, we actually noticed that in
16 examining the regulations that it did not conform with
17 the area requirement. However, it did, as stated
18 before, comply with all of the other set-back issues,
19 etcetera, in the Zoning Ordinance.

20 CHAIRPERSON GRIFFIS: You weren't involved
21 in the original subdivision? Is that correct?

22 MR. COYWOOD: No, sir, I wasn't. And in
23 looking back in the Office of Planning's report,
24 originally these were three lots of a couple of 2,500
25 square feet roughly size that were created in 1985

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1 into two lots, which by just on the surface appeared
2 to be an attempt to conform or get closer to
3 conformance with. I'm not certain how that got all
4 the way through the process. In fact, we first didn't
5 pick it up until we got in depth in it and didn't even
6 notice the difference, because in looking at the
7 neighborhood and the existing lots in there, these
8 lots actually are larger than most of the lots in that
9 neighborhood.

10 If you are to look at the platted lots in
11 that area, where most of the lots are in the range of
12 3,500 square feet to 4,000, you know, so we're
13 actually a little bit bigger in there.

14 BOARD MEMBER ZAIDAIN: Are they all zoned
15 the same as this?

16 MR. COYWOOD: Yes, sir, I believe they
17 are.

18 BOARD MEMBER ZAIDAIN: Do you know when
19 that neighborhood was platted generally, I mean?

20 MR. COYWOOD: Our lots, the original lots
21 that were created in 1985, apparently, around 1911.

22 BOARD MEMBER ZAIDAIN: That was when the
23 original plat was done?

24 MR. COYWOOD: Yes, sir, at least for those
25 lots.

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1 BOARD MEMBER ZAIDAIN: So the smaller lots
2 were platted before 1958?

3 MR. COYWOOD: Yes.

4 BOARD MEMBER ZAIDAIN: Okay.

5 MR. COYWOOD: Yes, yes, so we have a bunch
6 of small lots that are developed with similar size
7 houses that are proposed by the applicant. Similar
8 situations, the topography in the neighborhood is very
9 steep. If any of you are familiar with it, our lot,
10 in particular, is extremely steep. It rises almost 30
11 feet from top to bottom. We've done some preliminary
12 designs that mitigate that situation by using the
13 house itself as a retaining wall and making up,
14 approximately, 10 to 12 feet of that grade, and then
15 terracing the rear half to mitigate the slopes in our
16 design.

17 But the fact is there is not enough room
18 there. I don't know if I can --

19 CHAIRPERSON GRIFFIS: Not enough room
20 there for what?

21 MR. COYWOOD: For two lots by the Zoning
22 Ordinance.

23 CHAIRPERSON GRIFFIS: I see.

24 MR. COYWOOD: The design, however, I
25 think, we've come up with a good design that meets the

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1 integrity of the zone and is consistent with the
2 neighborhood, and we believe it is a good and valid
3 proposal for that property. I'm not certain with the
4 original 1911 lots if they had not been combined, if
5 they would have been buildable by right, I'm not
6 certain of that. So I guess this 1985 platting is, I
7 believe, the closest that can be made, you know, in a
8 two lot situation, the best that can be made of that
9 property.

10 CHAIRPERSON GRIFFIS: Okay. Thank you.
11 Any other questions from the Board? Anything else?

12 MR. JOHNSON: In closing, I would like to
13 say that we believe that we have come up with a doable
14 site plan, a way to mitigate the issues, and that the
15 request approved will allow us to go forward with the
16 project that meets the integrity of the zone with the
17 exception of the 15 percent area variance that we are
18 requesting.

19 CHAIRPERSON GRIFFIS: Do you have a site
20 plan?

21 MR. COYWOOD: I have, unfortunately, I got
22 caught on short notice. I do have a small site plan
23 that --

24 BOARD MEMBER ZAIDAIN: That's topo on it?

25 MR. COYWOOD: Yes, sir, yes.

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1 BOARD MEMBER ZAIDAIN: Can we get a copy
2 of that?

3 CHAIRPERSON GRIFFIS: Indicating where
4 retaining walls are being proposed?

5 MR. COYWOOD: Yes, sir, yes, yes, it does.
6 This is not, of course, the final design.

7 CHAIRPERSON GRIFFIS: Understood.

8 MR. COYWOOD: There is some preliminary
9 work. I would be glad to give it to the Chairman
10 here.

11 CHAIRPERSON GRIFFIS: Okay. Snaps on the
12 right.

13 MR. COYWOOD: Okay.

14 CHAIRPERSON GRIFFIS: Do you have any
15 additional?

16 MR. COYWOOD: Well, I could, if it would
17 help, go over it briefly with you, if that is --

18 CHAIRPERSON GRIFFIS: Why don't we do
19 that? Why don't you put it in the record?

20 MR. COYWOOD: Sure.

21 CHAIRPERSON GRIFFIS: And we'll get copies
22 made.

23 MR. COYWOOD: Okay.

24 CHAIRPERSON GRIFFIS: It's going to take
25 us a couple of minutes. We're going to move on to

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1 Office of Planning and then we'll return once the
2 Board has a chance to look at that.

3 MR. COYWOOD: Do you want that, too?

4 CHAIRPERSON GRIFFIS: Mr. Moy? Let me
5 just be clear here. Is anyone here representing the
6 ANC-7B? Yes, sir, do you have any cross examination?

7 MR. SPAULDING: Yes.

8 CHAIRPERSON GRIFFIS: Well, actually, come
9 forward if you're going to talk and let me just
10 clarify. At this point, of course, the ANC with
11 interested property located is automatically a party
12 in this case. As a party, you have cross examination
13 responsibilities. So now is the appropriate time if
14 you had questions of the applicant and the testimony
15 that they had in order to show the weakness of their
16 case or anything of that nature, that would be the
17 appropriate time.

18 In terms of your actual statement from the
19 ANC, that will follow the Government reports, Office
20 of Planning, and then I will have you do that. So the
21 question is do you have any cross examination?

22 MR. SPAULDING: Yes. I'm Vincent
23 Spaulding ANC Commissioner.

24 CHAIRPERSON GRIFFIS: Just turn on the
25 mike.

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1 MR. SPAULDING: Okay. I'm Vincent
2 Spaulding.

3 CHAIRPERSON GRIFFIS: Excellent.

4 MR. SPAULDING: ANC Commissioner for 7B,
5 and I represent the same district that includes the
6 Westover Drive property. I guess in terms of
7 questions for the applicant, as mentioned in their
8 testimony, their lot is, I guess, you're looking at
9 about a 60 percent slope and the concern is the
10 stability of the soil and the fact that by slippage
11 and stability and the need for immediate action to
12 stabilize the soil. But the concern on the part of
13 the Commission is that --

14 CHAIRPERSON GRIFFIS: I'm sorry to
15 interrupt you. Is there a question of one of the
16 witnesses?

17 MR. SPAULDING: Yes. I guess my question
18 would be by the -- the two lots are 15 percent less
19 than the area variance in terms of area variance. 15
20 percent less than the required area lot size. And the
21 Commission voted that that makes the problem more
22 acute with respect to possible land/soil stability
23 issues. So I guess the concern is what action does
24 the applicant plan to take to, I guess, stabilize the
25 soil, such that once that house is built, and you walk

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1 away, what assurance will the property owners on the
2 right and left side have that no action on stability
3 will occur that will result in damage to their
4 property?

5 CHAIRPERSON GRIFFIS: Okay. Let me just
6 see if I understand your question. It seems to me
7 what you are asking is based on the fact that these
8 are not standard size, do you have even limited
9 distance from the next -- limited earth, limited soil.

10 Obviously, we know that the topography drops and the
11 grade drops substantially. What is the insurance that
12 all earth isn't going to fall into this hole that you
13 are about to create. Is that about right?

14 MR. SPAULDING: Yes, and we think that --

15 CHAIRPERSON GRIFFIS: Okay. We just need
16 the question.

17 MR. SPAULDING: Okay.

18 CHAIRPERSON GRIFFIS: Now, we get the
19 answer.

20 MR. NDETI: Okay. Prior to construction,
21 we are going to do a site investigation to determine
22 the actual soils that are there.

23 CHAIRPERSON GRIFFIS: Yes.

24 MR. NDETI: And the designs will be based
25 on the actual soils and their strengths.

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1 CHAIRPERSON GRIFFIS: What do you mean
2 designs? What are you going to design?

3 MR. NDETI: Well, the design of the
4 structure.

5 CHAIRPERSON GRIFFIS: What does that mean,
6 structure?

7 MR. NDETI: The residential units.

8 CHAIRPERSON GRIFFIS: Pardon me?

9 MR. NDETI: The residential units.

10 CHAIRPERSON GRIFFIS: Yes, okay. Help me
11 understand when you cut into this earth, you're saying
12 structure.

13 MR. NDETI: Right, right, yes.

14 CHAIRPERSON GRIFFIS: What is going to
15 happen? How is the earth going to be retained?

16 MR. NDETI: We will first do the
17 investigations and find out what kind of soils we
18 have. Based on that, we will determine what will be
19 the safe slopes that could be maintained at the site
20 during construction.

21 CHAIRPERSON GRIFFIS: I see. And so when
22 you say you're going to do some preliminary testing,
23 what you are doing is testing the solid aspect of the
24 soil? For instance, if you have a lot of clay, it may
25 mean there is different ways you can cut or different

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1 size of retaining walls?

2 MR. NDETI: The sloping of it.

3 CHAIRPERSON GRIFFIS: Or if you have, you
4 know, I don't know, good earth, because it was a great
5 farmland at one point, then perhaps it's not as
6 stable. You may find contaminants in it. That is the
7 kind of things that you are looking at?

8 MR. NDETI: No, if it's poor soil and it
9 cannot stand by sloping, then it may have to have some
10 temporary support of excavation.

11 CHAIRPERSON GRIFFIS: I see.

12 MR. NDETI: To hold it in place.

13 CHAIRPERSON GRIFFIS: Okay.

14 MR. NDETI: Right. So what we would need
15 to do is to look at these from an engineer point of
16 view. What we have there, what are we trying to do,
17 and then design for those conditions, make our
18 analysis based on the actual soil conditions there.

19 CHAIRPERSON GRIFFIS: Okay. Follow-up
20 questions?

21 MR. SPAULDING: I guess the follow-up
22 question I have is looking at the poor nature of the
23 soil for building, I'm just concerned as to what -- if
24 you're looking at poor soil, clay, soil of that
25 nature, what kind of construction do you envision

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1 would be required to be able to stabilize the soil and
2 provide for a safe construction for the house that
3 you're looking at building and also to prevent any
4 damage to the houses on either side? What kind of
5 construction are you actually looking at for retaining
6 walls?

7 MR. COYWOOD: Mr. Chairman, based on the
8 analysis of the soil, the structure of the house
9 itself, if you have a copy of the site plan, the rear
10 wall of those --

11 CHAIRPERSON GRIFFIS: Can you show it to
12 the ANC, also?

13 MR. COYWOOD: The rear wall of those homes
14 will actually act as the primary retaining wall for
15 the slope. In other words, these houses will be, the
16 term is, benched in or terraced in to the rear of that
17 slope.

18 CHAIRPERSON GRIFFIS: So the houses that
19 we have submitted in the record or retained that are--

20 MR. COYWOOD: Yes, sir.

21 CHAIRPERSON GRIFFIS: And these are
22 basically manufactured houses. This was done at a
23 factory or the plans were done in some shop and they
24 are being factored, but this particular house that you
25 are going to purchase and assemble is going to hold

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1 back all that earth?

2 MR. COYWOOD: Well, the actual foundation
3 will, not the house itself.

4 CHAIRPERSON GRIFFIS: It's good to be
5 particularly specific then.

6 MR. COYWOOD: The foundation of the home--

7 CHAIRPERSON GRIFFIS: Where is the
8 foundation?

9 MR. COYWOOD: -- would be constructed out
10 of poured concrete. The design, the strength of that
11 wall will be designed based on the actual tested soil
12 and the pressures that are exerted against it. That
13 wall, the design of that wall may -- a standard
14 foundation wall is typically 8 to 12 inches thick.

15 CHAIRPERSON GRIFFIS: So you may have 12
16 inches of concrete at the base of this house?

17 MR. COYWOOD: Or more.

18 CHAIRPERSON GRIFFIS: To hold up the
19 earth.

20 MR. COYWOOD: Depending on the --

21 CHAIRPERSON GRIFFIS: The test.

22 MR. COYWOOD: -- soil's actual test by the
23 geotechnical consultant. That wall will also have
24 steel reinforcing in it turned down into a foundation
25 slab and foundation footing. So those design standard

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1 would ensure that that slope behind the wall would be
2 stable.

3 CHAIRPERSON GRIFFIS: Mr. Spaulding, is
4 that understood?

5 MR. SPAULDING: Yes, I understand that.

6 CHAIRPERSON GRIFFIS: Any follow-up
7 questions?

8 MR. SPAULDING: No.

9 CHAIRPERSON GRIFFIS: Very well. Thank
10 you very much. We're going to get to the Office of
11 Planning then and then we'll have you back, Mr.
12 Spaulding, for your statement.

13 MR. SPAULDING: There are also
14 representatives from the community that would like to
15 make statements as well.

16 CHAIRPERSON GRIFFIS: Oh, absolutely.

17 MR. SPAULDING: Okay.

18 CHAIRPERSON GRIFFIS: Forgive me if I went
19 very quickly through my opening statements. We will
20 now have the applicant's presentation. We'll go to
21 the Government reports. Then we will go to the ANC.
22 Then I will call for any persons in support of the
23 application and then persons in opposition, and then
24 we'll have closing remarks by the applicant. So that
25 will be the whole piece all before lunchtime.

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1 MR. SPAULDING: Thank you.

2 CHAIRPERSON GRIFFIS: Okay. That being
3 said, last question from me before we hear from the
4 Office of Planning. Is there parking provided on each
5 of these sites? Can you turn your microphone on?

6 MR. JOHNSON: Yes, parking is provided.

7 CHAIRPERSON GRIFFIS: And where is the
8 parking provided?

9 MR. JOHNSON: In the garage, which will be
10 a part of the basement. So what, essentially, you
11 will have is a structure where the garage would be
12 underneath the structure. There would be a need to
13 walk up a flight of steps to the front door.

14 CHAIRPERSON GRIFFIS: Right. Is the
15 garage a basement or part of the cellar?

16 MR. JOHNSON: It would be part of a
17 basement, not a cellar. In other words, a full
18 basement and the garage would be part of that process.

19 CHAIRPERSON GRIFFIS: So how many levels
20 are you building in this house?

21 MR. JOHNSON: There will be two levels,
22 two story house. Two stories above the basement.

23 CHAIRPERSON GRIFFIS: I see. Okay. Let's
24 hear from the Office of Planning.

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

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1 Good morning, Members of the Board. My name is Travis
2 Parker with the Office of Planning. OP had a very
3 difficult time making a recommendation on this
4 application. The crux of the issue for us was the
5 legality of the lots as they exist now. As we briefly
6 touched on before, the original subdivision had three
7 lots in this same area created in 1911. And then in
8 1985, it was combined to two lots which did not meet
9 the requirements at the time for lot area.

10 The fact that the Zoning Administrator has
11 now sent this to the Board for a variance, tends to
12 indicate that those lots are not legally -- were not
13 legally created and that's the issue really before us
14 today. There are exceptional characteristics to these
15 lots in the size and the shape, so the existence of
16 two lots would -- arguments can be made to meet the
17 tests for practical difficulty and exceptional
18 situation.

19 The difficulty for the Office of Planning
20 was section 401.2 of the ordinance where lots created
21 after 1957 weren't addressed. And this section of the
22 ordinance appears to be intended to combine lots that
23 don't meet minimum lot area, with the exception of
24 lots created before '57 that are not near -- are not
25 adjacent to lots under the same ownership. This

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1 situation doesn't meet those requirements and
2 therefore we were not able to recommend in favor of
3 the application.

4 CHAIRPERSON GRIFFIS: Thank you very much.

5 Any questions from the Board?

6 BOARD MEMBER ZAIDAIN: Yes, in your
7 research on this case, was the 1985 combination/lot
8 split, was that attached to any BZA application?

9 MR. PARKER: Not that I found.

10 BOARD MEMBER ZAIDAIN: It was just?

11 MR. PARKER: Just signed.

12 BOARD MEMBER ZAIDAIN: Okay. So there
13 were three lots originally that were much smaller and
14 then this consolidated to two bigger ones?

15 MR. PARKER: Correct.

16 BOARD MEMBER ZAIDAIN: But still not
17 complying with zoning.

18 MR. PARKER: Right.

19 BOARD MEMBER ZAIDAIN: Okay.

20 CHAIRPERSON GRIFFIS: Was DCRA able to do
21 that?

22 MR. PARKER: Able to?

23 CHAIRPERSON GRIFFIS: Subdivide it to
24 nonconforming.

25 BOARD MEMBER ZAIDAIN: Well, that's the

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1 whole point.

2 CHAIRPERSON GRIFFIS: That's the question.

3 Well, what's your opinion? Do they have the
4 jurisdiction to subdivide nonconforming?

5 MR. PARKER: We would not recommend that
6 this be done now.

7 BOARD MEMBER ZAIDAIN: Right.

8 MR. PARKER: And therefore it maybe should
9 not have been done then.

10 BOARD MEMBER ZAIDAIN: But there would
11 have needed to have been a variance in order to do
12 that lot split back in 1985, right?

13 MR. PARKER: Correct.

14 CHAIRPERSON GRIFFIS: It wouldn't have
15 had. Okay.

16 BOARD MEMBER ZAIDAIN: Yes, that's why I
17 asked if there was an application.

18 CHAIRPERSON GRIFFIS: Anything else, Mr.
19 Zaidain? Sorry to cut you off.

20 BOARD MEMBER ZAIDAIN: That's okay.

21 CHAIRPERSON GRIFFIS: Ms. Miller?

22 VICE CHAIR MILLER: I think in your report
23 you note problems with disturbing the soil in the
24 excavation as a possible detrimental impact and my
25 question is is that something that you think the Board

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1 has jurisdiction to consider in the variance test?

2 MR. PARKER: In terms of impact on the
3 neighborhood?

4 VICE CHAIR MILLER: Yes.

5 MR. PARKER: Yes, I have not seen these
6 plans and it is certainly something that I'm sure can
7 be engineered and that's not the real issue for us.

8 BOARD MEMBER ZAIDAIN: Yes, but don't you
9 think that the environmental issues with this site
10 would have to be tied to the variance relief? Like,
11 for example, the way I could see that work is somebody
12 requesting say a sideyard set-back variance because
13 they want to move the building farther away from the
14 hillside.

15 MR. PARKER: Correct.

16 BOARD MEMBER ZAIDAIN: To preserve the
17 hillside.

18 MR. PARKER: Right, absolutely.

19 BOARD MEMBER ZAIDAIN: Do you see any type
20 of preservation effort going on here or is it even
21 possible to preserve any of the topography here?

22 MR. PARKER: No, the site would need to be
23 cut away in order to put these houses on it.

24 BOARD MEMBER ZAIDAIN: Right.

25 MR. PARKER: And that's going to happen

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1 with one house or two. Obviously, you're going to
2 have more impact with two than one, and that's the
3 issue of whether the impact is significant enough to
4 warrant denying the variances. That is another issue,
5 excuse me, with this application.

6 BOARD MEMBER ZAIDAIN: Right. Well, I
7 mean, in reviewing the application, did you see any
8 tie between the environmental condition, being the
9 topography and the soil, and the relief being
10 requested? Do you follow me?

11 MR. PARKER: No, can you clarify that?

12 BOARD MEMBER ZAIDAIN: Is there any tie
13 between the design of these sites and the variance
14 relief?

15 MR. PARKER: In other words, does the
16 design of these sites help them meet the test of the
17 variance relief?

18 BOARD MEMBER ZAIDAIN: Right.

19 MR. PARKER: I don't believe that -- the
20 only nexus would be the economic hardship. Whereas,
21 they are having to do so much engineering on these
22 sites, that it would be cost prohibitive to do it for
23 one house.

24 BOARD MEMBER ZAIDAIN: Yes.

25 MR. PARKER: I think that's where we would

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1 get to the argument for the variance test.

2 BOARD MEMBER ZAIDAIN: Yes, right.

3 MR. PARKER: That's a tough burden to me,
4 at least in my mind. I mean, on its face. I mean,
5 there would have to be a confluence of factors.

6 VICE CHAIR MILLER: I just wanted to
7 follow-up on the economic hardship question.

8 MR. PARKER: Right.

9 VICE CHAIR MILLER: I think that OP came
10 down on the side that it didn't rise to the level of
11 practical difficulty and can you just elaborate on
12 that?

13 MR. PARKER: OP's opinion was just that
14 that's a very difficult test to prove and our opinion
15 was it was not -- it has not yet been sufficiently
16 proven, but it may be possible to prove that point and
17 to make that case.

18 CHAIRPERSON GRIFFIS: Other questions of
19 the Board?

20 BOARD MEMBER ETHERLY: So just to follow-
21 up on the economic argument. The Office of Planning
22 did include a copy of submissions regarding the
23 economic aspect in a February 18th communication to the
24 Office of Planning and Mr. Parker's attention. Is it
25 your sense, Mr. Parker, that you did not find that

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1 submission to be compelling on the issue of the
2 economic argument?

3 MR. PARKER: Well, the cost submitted to
4 us, basically, didn't completely make a case that it
5 was impossible to or impractical to do this project
6 with one house and I think that may be a point that
7 can be proven, but we haven't looked into it further.

8 BOARD MEMBER ETHERLY: Okay.

9 MR. PARKER: Right.

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

12 CHAIRPERSON GRIFFIS: Anything else? Does
13 the applicant have any cross examination of the Office
14 of Planning? No?

15 MR. COYWOOD: I just had one question.
16 Under the 1911 plat, would those have been -- could
17 have been constructed as single-family homes?

18 MR. PARKER: If those three lots were
19 existing now?

20 MR. COYWOOD: Were existing today.
21 Perhaps, I don't know if the Zoning Administrator took
22 that into consideration at the time.

23 MR. PARKER: Well, I think we --

24 MR. COYWOOD: We don't know.

25 MR. PARKER: Yes, I think if you go back

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1 to 401.2, that design should take -- if you'll give me
2 a second to read it?

3 MR. COYWOOD: It's complicated.

4 MR. PARKER: Right, right, right.

5 CHAIRPERSON GRIFFIS: 401.2 is going to
6 tell you that it probably would not have been, as they
7 would have all been in single ownership.

8 MR. PARKER: Correct.

9 CHAIRPERSON GRIFFIS: If they were in
10 separate ownership, then certainly you would have been
11 a single owner of a lot that was nonconforming prior
12 to the 1958 Zoning Regulations. So it would have been
13 buildable. All three in single ownership would not.
14 Any other questions? Does the ANC have any cross
15 examination of the Office of Planning? Very well.
16 Thank you very much. Let's move on then to the ANC.

17 MR. SPAULDING: As I said, my name is
18 Vincent Spaulding, the ANC Commissioner for single
19 member District 7B-04, which includes the Westover
20 Drive included in that single member district. And
21 I'm here today to speak on behalf of ANC-7B. At a
22 regular scheduled meeting, we are publicized, public
23 meeting of ANC-7B on February 19, 2004 with all
24 Commissioners present. And after discussion by the
25 applicant and concerned citizens, ANC-7B voted

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1 unanimously to oppose the application of the Beech
2 Center, Inc. request for a variance for lot area
3 requirements at 3139 and 3143 Westover Drive.

4 The ANC-7B resolution states "We resolve
5 that for public safety and to minimize risk to
6 surrounding properties, the ANC-7B opposed the
7 application of Beech Center, Inc. pursuant to D.C.
8 Regulations for a variance from lot area requirements
9 in order to allow the construction of two single-
10 family detached dwellings in the R-B-1 District at
11 premises 3139 and 3143 Westover Drive, Square 5664,
12 Lot 70 and 71.

13 The ANC sent a letter on February 20th to
14 the Zoning Office addressed to the director providing
15 a resolution in detail, reasons and pictures why ANC-
16 7B voted to oppose the BZA Application 17123 for lot
17 area variance. And I assume that you have the ANC
18 testimony with the pictures attached.

19 CHAIRPERSON GRIFFIS: Absolutely.

20 MR. SPAULDING: Okay. In summary, the
21 reasons for opposing the application are Lot 70 and 71
22 are not just irregular in shape in the horizontal
23 plane, but have extreme slopes possibly reaching 6
24 degrees. These shaped slopes were located on flat
25 ground with good soil. The case may be made for

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1 granting a variance. However, the topography is so
2 harsh and dramatic that even the construction of one
3 house on the combined lots is a substantial and
4 questionable undertaking. And we have pictures of the
5 topography attached with that testimony, with that
6 recommendation.

7 Lot 70 and 71 are located in the most
8 vulnerable point on the landscape, right at the
9 sharpest end of the road. On either side of the
10 subject lots are single-family custom homes with lot
11 areas greater than 6,000 and 8,000 square feet,
12 respectively. Forcing two modular homes into the
13 space in between where the frontage has the sharpest
14 arch in the topography is the most pronounced. The
15 lot is subject to landslides and cause risk to
16 adjacent properties.

17 The most critical concern in this is the
18 soil composition and its classification as having poor
19 potential for use as building sites, because of slope
20 and poor stability. And this was a quote taken from
21 the soil survey of D.C. 1976 written by the Department
22 of Agriculture. And we attach our reply to the BZA
23 copies of that text.

24 The surface water run-off is rampant on
25 this land, leading to erosion, location has poor

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1 potential for use of the building site, because of
2 slopes and poor stability, cuts or excavation are
3 difficult to stabilize and the clay frequently slides
4 slumps and flows down the surface onto roads below.
5 The type of soil at this location, especially, where
6 it has been destroyed or graded is severely limited or
7 even sometimes dangerous for building purposes. They
8 cause instability of the clay, particularly where it
9 is under pressure. Those can squeeze out from under
10 foundations allowing footings of basements to crack
11 and settle. Extreme cases buildings have been
12 severely damaged, banks and fills, construction from
13 the clay material have been known to collapse causing
14 severe damage to property.

15 Long time residents of the ANC-7B and
16 Westover Drive residents have unfortunately
17 experienced first hand the damages of buildings
18 disturbing this type of soil, including the soil
19 coming down the hill closing off Westover Drive and it
20 is remembered by a 30 year resident of Westover Drive.

21 Lot 70 and 71 of Square 5664 have poor potential for
22 use as building sites, because of slope for stability.

23 Cuts or excavations will be difficult to stabilize
24 and the clay frequent slides slopes or flows down to
25 surface or cuts onto the road and onto other areas

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1 below.

2 And because the area for each lot is less
3 than the minimum area required by 50 percent, the
4 opportunity for the foregoing problems is increased,
5 and that's our main concern. We feel that the
6 opportunity for the foregoing types of problems become
7 more acute because of the fact that both lots are less
8 than required minimum of 5,000 square feet. So
9 therefore for safety and to minimize the risk of
10 surrounding properties, ANC-7B voted to oppose the
11 application of Beech Center, Incorporated pursuant to
12 the applicable D.C. Regulations to allow the
13 construction of two single-family detached houses in
14 the R-B-1 District on premises 3139 and 3143 on
15 Westover Drive.

16 CHAIRPERSON GRIFFIS: Good. Thank you
17 very much, Mr. Spaulding, for a very comprehensive
18 report and we appreciate that along with the
19 attachments. I assume the applicant has this report?

20 Is that correct?

21 MR. JOHNSON: I don't have a copy of it,
22 no.

23 CHAIRPERSON GRIFFIS: Do you have
24 additional copies, Mr. Spaulding?

25 MR. SPAULDING: I can give him a copy of

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1 the letter that was sent to the BZA with the pictures
2 that were attached.

3 CHAIRPERSON GRIFFIS: That would be good.

4 Did you present the project to the ANC?

5 MR. JOHNSON: Yes, we did. We went to
6 present the project based on our request for a
7 variance.

8 CHAIRPERSON GRIFFIS: Right.

9 MR. JOHNSON: The ANC hearing was around
10 the science of building at the location.

11 CHAIRPERSON GRIFFIS: Understood.

12 MR. JOHNSON: So our request for a
13 variance in relationship to the issues associated with
14 the zoning were never considered. Instead we engaged
15 in a conversation around the scientific elements of
16 the soil and geotechnical issues and reports that were
17 read.

18 CHAIRPERSON GRIFFIS: Understood. You
19 submitted some --

20 MR. JOHNSON: I'm speaking specifically to
21 our site.

22 CHAIRPERSON GRIFFIS: Okay. Does the
23 Board have any questions of the ANC? Ms. Miller?

24 VICE CHAIR MILLER: Yes. Mr. Spaulding,
25 I'm just curious. In reaching your conclusions about

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1 the soil and topography and the geotechnical issues,
2 did you consult with any expert in that area?

3 MR. SPAULDING: We did. I guess, some of
4 the property owners that live adjacent to the site did
5 research. Also, in the testimony that will be
6 provided today by some of the property owners, they
7 did seek a report from a geotechnical engineer
8 addressing the nature of the soil. And also, I'm an
9 architect as well, so I had some appreciation for the
10 construction on the site and also a great concern
11 about the cost, the economics of taking the remediate
12 action required to properly retain the walls,
13 stabilize the soil, prevent any damage to adjacent
14 property. So that's one of my personal concerns as
15 well.

16 CHAIRPERSON GRIFFIS: And you also cited
17 the soil survey, the D.C. Soil Survey by the
18 Department of Agriculture as one of your sources for
19 what the soil was and what condition.

20 MR. SPAULDING: Yes, that was public
21 information. It was available. It referenced that
22 particular location.

23 CHAIRPERSON GRIFFIS: Okay.

24 MR. SPAULDING: It identified the types of
25 soil, the composition of soil in that particular

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1 location.

2 CHAIRPERSON GRIFFIS: I understand.

3 MR. SPAULDING: So it was a contributing
4 factor.

5 CHAIRPERSON GRIFFIS: Follow-up, Ms.
6 Miller?

7 VICE CHAIR MILLER: Just one more
8 question. Since you mentioned the economic hardship,
9 I'm wondering if you have an opinion with respect to
10 applicant's case that the economic hardship of
11 building one house as opposed to two rises to the
12 level of practical difficulty under the variance test?

13 MR. SPAULDING: I think when you look at
14 configuration, nature of the lot, and you look at the
15 need to put two houses with the proper set-backs, rear
16 side and front, frontage, and then you look at the
17 space between those two houses in terms of what it
18 would take to stabilize that particular area is of
19 concern to me. I think that to actually put those
20 houses in uniquely cast in place concrete, you're
21 looking at a large, possibly even, some piling to
22 stabilize the footings. We've had slippage problems
23 in that area because of the surface water run-off
24 conditions.

25 CHAIRPERSON GRIFFIS: I think Ms. Miller

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1 is asking more your understanding or if you had an
2 opinion on the economics, the difference between
3 building one house and two houses.

4 MR. SPAULDING: Oh.

5 CHAIRPERSON GRIFFIS: And do you think it
6 would be practically -- let's put it in real terms,
7 would it not be financially feasible to build just one
8 based on the amount of work that has to be done?

9 MR. SPAULDING: I think that probably it
10 would not be financially feasible to build just one.
11 I think for the economic perspective, you would
12 probably need to look at building two houses on the
13 site. But then you still have associated costs with
14 taking every action required to stabilize.

15 CHAIRPERSON GRIFFIS: Okay. Follow-up,
16 Ms. Miller?

17 VICE CHAIR MILLER: No, thank you.

18 CHAIRPERSON GRIFFIS: Any other questions
19 from the Board? Does the applicant have any cross
20 examination of the ANC?

21 MR. JOHNSON: One question. We did
22 analysis, a preliminary soil analysis of the site in
23 question. And I would like to hear from you in
24 relationship to this specific site, because our
25 geotechnical analysis of the specific site is totally

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1 different than what you presented in relationship to
2 the soils in regards to the area. What you read from
3 the agriculture and soil analysis report to the area,
4 but I don't think it speaks directly to the site in
5 question, because our geotechnical engineer here --

6 CHAIRPERSON GRIFFIS: I get the point.

7 MR. JOHNSON: So the question is -- yes.

8 CHAIRPERSON GRIFFIS: Is generally the
9 Department of Agriculture study controlling for you in
10 your understanding or don't you trust and test that
11 they have done themselves on the property?

12 MR. SPAULDING: Well, I think one of the
13 residents from the community will be speaking
14 specifically to the geotechnical as well. But we
15 looked at the Department of Agriculture approach
16 report dated 1976 which specifically identified this
17 particular area.

18 CHAIRPERSON GRIFFIS: Okay.

19 MR. SPAULDING: So we were able to
20 correlate the soil types composition.

21 CHAIRPERSON GRIFFIS: Which would you find
22 to be more specific though, actual soil borings that
23 you do on-site or the Department of Agriculture
24 overall soil condition?

25 MR. SPAULDING: Well, I think actual soil

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1 borings would be easier.

2 CHAIRPERSON GRIFFIS: Okay. Were soil
3 borings conducted?

4 MR. NDETI: No, let me clarify.

5 CHAIRPERSON GRIFFIS: You need to turn
6 your mike on.

7 MR. NDETI: Excuse me. No, let me clarify
8 something here. We did not actually do the soil
9 borings.

10 CHAIRPERSON GRIFFIS: What did you test?

11 MR. NDETI: No, we did literature search.

12 CHAIRPERSON GRIFFIS: You did which?

13 MR. NDETI: Yes, literature search on the
14 soils of the site. We looked at the geologic maps and
15 also the soil survey, too. Let me also point out that
16 the soil survey is basically used for agricultural
17 purposes and not mainly for structural reasons.

18 CHAIRPERSON GRIFFIS: Okay. That's fine.
19 I understand. Follow-up questions? Any follow-up
20 cross of the ANC? Okay. Thank you very much. Do you
21 have a question?

22 VICE CHAIR MILLER: No.

23 CHAIRPERSON GRIFFIS: Good. I'm going to
24 have you all take a seat and be comfortable. I'm
25 going to ask how many folks, just a show of hands, are

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1 here to give testimony, personal testimony? Just
2 three? Excellent. Why don't you all come up?

3 MR. BORNSTEIN: Should we give our cards
4 to the reporter? Yes, thank you. In fact, I'll walk
5 them over.

6 MR. KELLY: Give her a copy of my
7 statement, too, please.

8 MR. BORNSTEIN: Okay. Cards. I also have
9 some -- I will be the first witness. My name is --

10 CHAIRPERSON GRIFFIS: Okay. You're going
11 to need to sit down and be on a microphone. So take
12 your time. Make yourselves comfortable.

13 MR. BORNSTEIN: Let me pass this over to
14 the reporter.

15 CHAIRPERSON GRIFFIS: What's going on?

16 MR. BORNSTEIN: My name is Garet Bornstein
17 and I own the house next to the two lots in question,
18 3147 Westover Drive, S.E. I've owned it for 30 years.

19 CHAIRPERSON GRIFFIS: Good. Let me just,
20 before you get very far into it, of course, we do
21 provide persons to give testimony three minutes. So
22 I'm not going to turn this buzzer on, because boy when
23 that thing goes off, it's really awful.

24 MR. BORNSTEIN: Yes. Well, let me --

25 CHAIRPERSON GRIFFIS: But I'm going to

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1 keep an eye on it and move you along.

2 MR. BORNSTEIN: What I'm going to do
3 before I get there, I'm going to pass out, because I
4 didn't know how many there were going to be.

5 CHAIRPERSON GRIFFIS: Anything that goes
6 in needs to go to staff, if you don't mind.

7 MR. BORNSTEIN: You can't see it?

8 CHAIRPERSON GRIFFIS: We will see it. We
9 just need to put it to staff and they'll give it to
10 us.

11 MR. BORNSTEIN: I will show it to them as
12 I go along.

13 CHAIRPERSON GRIFFIS: Sorry, I wasn't
14 specific. Hand it to Mr. Moy who is sitting here.
15 Thank you very much.

16 MR. BORNSTEIN: Sorry about that. I just
17 wanted you to follow along with my --

18 CHAIRPERSON GRIFFIS: It's really
19 important that you sit down and talk into a
20 microphone, otherwise --

21 MR. BORNSTEIN: Right.

22 CHAIRPERSON GRIFFIS: -- whatever you say
23 will not be part of the record.

24 MR. BORNSTEIN: Okay. What I have done is
25 I show a picture history of the property so you can

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1 see the harshness of the terrain and also the pictures
2 show trees, which are bending, which is an indication
3 that the soil is moving.

4 CHAIRPERSON GRIFFIS: I hate to interrupt
5 you, just so -- up here.

6 MR. BORNSTEIN: Yes?

7 CHAIRPERSON GRIFFIS: The first two
8 pictures are of the site and the first picture is
9 being taken from a site to the left of it, I take it?

10 MR. BORNSTEIN: Actually, it's from my
11 property looking on to it.

12 CHAIRPERSON GRIFFIS: From your property
13 looking on to it. Okay.

14 MR. BORNSTEIN: Can you see -- oh, you
15 have those?

16 BOARD MEMBER ZAIDAIN: Yes, we have them.

17 MR. BORNSTEIN: Okay. Great. Yes, and
18 you can see, actually, there is cracks in my wall. I
19 had to replace the wall opposite this. That the trees
20 are lipping, that's an indication that the soil is
21 moving. The second picture shows the lot looking up
22 at it and what you have to deal with. It's all slope.
23 There is nothing, there is no flat land on it.

24 CHAIRPERSON GRIFFIS: Okay.

25 MR. BORNSTEIN: Actually, the construction

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1 of these houses here and it will be shown in the
2 fourth picture or fifth picture, is that this is MVD
3 for the slope and across the top is CDC soil, and
4 that's where the houses that are there are built, not
5 on the MVD. And the set-back that they are talking
6 about here is 10 feet. My house is set-back 31 feet
7 and the house next to me is set-back even further,
8 roughly 40 or 45 feet.

9 CHAIRPERSON GRIFFIS: And what does the
10 set-back allow you?

11 MR. BORNSTEIN: Well, you are away from
12 the MVD.

13 CHAIRPERSON GRIFFIS: I see.

14 MR. BORNSTEIN: Which is the bad soil. I
15 mean, the poor soil.

16 CHAIRPERSON GRIFFIS: Right.

17 MR. BORNSTEIN: CDC is not very good, but
18 it's better than MVD. MVD is terrible, because it's
19 also known as marine clay.

20 CHAIRPERSON GRIFFIS: A lot of water, huh?

21 MR. BORNSTEIN: And when it gets wet, it
22 flows.

23 CHAIRPERSON GRIFFIS: Understood.

24 MR. BORNSTEIN: Picture three is just
25 rotated around a little bit further. From the lot,

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1 you can see and down in the corner on the street you
2 see a cone.

3 CHAIRPERSON GRIFFIS: Right.

4 MR. BORNSTEIN: At that point, there is
5 erosion or something going on, because there's a
6 sinkhole. There has always been a sinkhole there and
7 you can see that the repairs to that roadway there
8 where they filled it on and then it has reappeared,
9 filled it in, reappeared, filled it in, reappeared.
10 The city has a problem there with this roadway from
11 the erosion and from the soil movement. It would also
12 have to deal with the construction of the properties
13 here. It would impose loads on that road.

14 CHAIRPERSON GRIFFIS: Yes.

15 MR. BORNSTEIN: And the next picture just
16 shows from the top down the view from the property,
17 from my property over their property down onto the
18 street below. And in a distance, you can see the O
19 Street wall. I'm sure all of you are familiar with
20 the O Street wall.

21 CHAIRPERSON GRIFFIS: We are now you have
22 submitted a picture.

23 MR. BORNSTEIN: Well, I will -- the O
24 Street wall was a project that -- where MVD soil was
25 encountered with somebody trying to build a parking

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1 lot or enlarge a parking lot and as a result they had
2 to build a wall which is over, it must be, at least
3 1,000 feet. When I tried to take a picture of it from
4 Branch Avenue, I couldn't find the end of it. The
5 cost of that wall which is 30 and 40 feet high was not
6 in just the millions of dollars, it was the multi-
7 million dollar range, \$20 or \$30 million. It took a
8 long time to build.

9 CHAIRPERSON GRIFFIS: Okay. Is it that
10 last picture in your packet?

11 MR. BORNSTEIN: That's it.

12 CHAIRPERSON GRIFFIS: Okay.

13 BOARD MEMBER ZAIDAIN: Yes.

14 MR. BORNSTEIN: Yes.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. BORNSTEIN: Did you have a question,
17 David?

18 BOARD MEMBER ZAIDAIN: No, I was just
19 trying to get your attention, because you were looking
20 at the Chair when I was talking but, no, this is the O
21 Street wall with the kind of treeless berm here? The
22 white wall in the background?

23 MR. BORNSTEIN: That's correct.

24 BOARD MEMBER ZAIDAIN: Okay.

25 MR. BORNSTEIN: Yes. And you might -- in

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1 the topography of this thing, Pennsylvania Avenue cuts
2 through and on one side is our hill. They cut a
3 roadway into it, which is Westover Drive. The hill
4 continues up to the peak, which is where the houses
5 are.

6 CHAIRPERSON GRIFFIS: Right.

7 MR. BORNSTEIN: And on the other side of
8 that ridge is eventually the O Street wall.

9 CHAIRPERSON GRIFFIS: Okay. Let me ask
10 you this. I think it's well understood the problems
11 and you have laid out very well all of the soil
12 conditions and topography. If this was one lot with
13 one house, do all those problems go away?

14 MR. BORNSTEIN: No. No, they don't and,
15 in fact, I had a geological engineer take a look at
16 it. There is a report in that.

17 CHAIRPERSON GRIFFIS: Is there a
18 difference in your mind of two lots and one lot?

19 MR. BORNSTEIN: Well, it exacerbates the
20 situation.

21 CHAIRPERSON GRIFFIS: So it just makes it
22 worse if there is two, but its all the same problems?

23 MR. BORNSTEIN: But it's a matter of
24 degree. Certainly, I mean, you would have with one
25 house, I mean, with two lots, two houses, I don't know

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1 how you -- you wouldn't spill over problems to the --
2 into the area.

3 CHAIRPERSON GRIFFIS: Could one house get
4 the set-back that your house does to remove it from
5 the marine clay?

6 MR. BORNSTEIN: No, it could not.

7 CHAIRPERSON GRIFFIS: I see.

8 MR. BORNSTEIN: That's why those lots were
9 never built on. They have been there and available
10 for years.

11 CHAIRPERSON GRIFFIS: Right. Okay.
12 Anything else?

13 MR. BORNSTEIN: Yes, the one picture shows
14 the houses up on the CDC on the plateau, that's the
15 next picture. There is another picture which shows
16 the cone up close, the erosion. And then there is
17 another picture which shows -- it was pointed out to
18 me by the engineer, soil engineer. You see the cracks
19 running down the roadway in the picture with the two
20 cars on it?

21 CHAIRPERSON GRIFFIS: Yes.

22 MR. BORNSTEIN: Okay. Those cracks are
23 indicators that the road, the soil is moving, that
24 those are stress cracks, and that the soil or that the
25 roadway is actually already in motion.

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1 CHAIRPERSON GRIFFIS: Okay.

2 MR. BORNSTEIN: And you can see this again
3 in pictures of the trees which are not straight.

4 CHAIRPERSON GRIFFIS: Right.

5 MR. BORNSTEIN: Now, one last, and I'll
6 make it as short as I can here, because I know it's --
7 you do have, for the record, the report of the soil's
8 engineer who looked at the property who did take soil
9 samples and identified it as MVD. There is a picture
10 on the second page of his report which shows the MVD.
11 Just basically where the hill starts.

12 CHAIRPERSON GRIFFIS: Right.

13 MR. BORNSTEIN: And he also points out
14 erosion as being a severe problem.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. BORNSTEIN: The little map I have
17 there prior to that shows, and this is not an
18 exhaustive study, as I went around, everybody has had
19 problems up there, just numerous problems with what
20 they have. People are having to put 22 foot pilings
21 in to support patios and things like that.

22 CHAIRPERSON GRIFFIS: Right. Understood.

23 MR. BORNSTEIN: And then finally you do
24 take a look at the O Street wall.

25 CHAIRPERSON GRIFFIS: Very well.

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1 MR. BORNSTEIN: That's the end,
2 essentially, unless there is questions.

3 CHAIRPERSON GRIFFIS: Questions? Ms.
4 Miller?

5 VICE CHAIR MILLER: Would you just clarify
6 for me what the O Street wall was built in response
7 to?

8 MR. BORNSTEIN: Sure. Oh, the O Street
9 wall, there was evidently the owner of the shopping
10 center across the street, right on the other side,
11 tried to enlarge his parking lot. And he triggered
12 off this soil movement. And the amazing thing about
13 it is not only is it in the immediate proximity of the
14 parking lot, but it extended -- they had to extend the
15 wall up 1,000 feet. So once the soil starts to move,
16 it's not just at the very specific location, it's from
17 the surrounding areas.

18 VICE CHAIR MILLER: Thank you.

19 MR. BORNSTEIN: Yes.

20 CHAIRPERSON GRIFFIS: Any other questions
21 from the Board? Very well.

22 MR. BORNSTEIN: Thank you very much.

23 CHAIRPERSON GRIFFIS: Yes. Don't go
24 anywhere. We're going to hear from all the panel,
25 we're going to take Board questions and then the

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1 applicant has the opportunity to cross examine as does
2 the ANC.

3 MR. BORNSTEIN: Sure.

4 CHAIRPERSON GRIFFIS: Let me just say and
5 we'll get to you right away, but clearly the Board
6 understands the issue and you've set it up very well
7 in terms of these soil conditions and all of that. I
8 think it should be well understood what the Board is
9 faced with in terms of a variance application.
10 Somehow we need to -- we can't stop this project,
11 because of poor soil conditions, unless those poor
12 soil conditions start to get to the relief that is
13 requested, meaning does it relate to the area of the
14 lot? That's all we're being asked. That's all our
15 jurisdiction takes us. Is there the strong persuasive
16 test of uniqueness, practical difficulty and not
17 impairing the intent and integrity of the Zone Plan to
18 grant a lot area variance.

19 MR. BORNSTEIN: May I address you?

20 CHAIRPERSON GRIFFIS: Briefly.

21 MR. BORNSTEIN: Is it in the public
22 interest?

23 CHAIRPERSON GRIFFIS: Well, and there is
24 that aspect, too. Okay. Good. Next?

25 MR. KELLY: Good morning, Mr. Chairman,

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1 Members of the Board. My name is Thomas J. Kelly and
2 I live on Westover Drive, also. The testimony that
3 I'm about to give addresses the request before the
4 Board for the variance for Lot 70 and 71. First of
5 all, let me say that Washington, D.C. is a fault-line
6 city. This is an area between the Piedmont Plateau
7 and the Atlantic Coastal Plain. The underlying rock
8 formation on the Piedmont Plateau is metamorphic,
9 which is very hard rock and the underlying rock on the
10 Atlantic Coastal Plain is sedimentary.

11 Part of Washington lies on the Piedmont
12 Plateau. In fact, it is separated by Rock Creek, the
13 creek itself running down the center of the city. The
14 sedimentary rock is a sulphur rock, for example,
15 sandstone, shale. On top of this sedimentary rock is
16 clay. The proposed premises at 3139 and 3143 Westover
17 Drive for which the variance has been requested to
18 construct two houses are located in the area of
19 sedimentary rock.

20 The Washington Post quoted somewhere
21 around May of 1996, I don't have the exact date, Dr.
22 James O'Conner, the District's city geologist, in
23 Bethesda at the University of District of Columbia
24 said "It's a kind of wonder clay. Basically, it
25 increases 10 times its size when it is wet. Until it

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1 becomes like chocolate pudding. The instability of
2 this clay can cause foundations to shift and basements
3 to crack and settle. One house built on these lots
4 would cause serious damage to the surrounding
5 structures and two houses would certainly be
6 catastrophic to the surrounding structures."

7 Let me say briefly how I come about this
8 knowledge. I have lived on Westover Drive for 33
9 years and 10 months, it will be a year in May, would
10 be 34 years. I have always had a very keen interest
11 in the geographic and historic significance of
12 Washington, D.C. I have studied this area in school
13 and out of school and as a teacher, I'm a former
14 teacher in the D.C. Public School System. The
15 information that we tried to teach our students in the
16 D.C. Public School System was such that decisions
17 would be made based upon the historic facts and the
18 geographic conditions of our city.

19 For instance, what really reinforced my
20 keen interest in this is when they built the Sam
21 Rayburn Building. We knew and many of our students
22 knew that there was a river running under New Jersey
23 Avenue. Yet, they started building the Sam Rayburn
24 Building and they had no idea they were going to run
25 into this river which caused thousands, millions and

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1 millions of dollars extra to build the Sam Rayburn
2 Building. So that's my interest in that.

3 CHAIRPERSON GRIFFIS: Excellent. Thank
4 you very much and very informative. Questions from
5 the Board?

6 VICE CHAIR MILLER: Mr. Kelly, when was
7 your house constructed? Do you know?

8 MR. KELLY: Yes, around '47 or '48.

9 VICE CHAIR MILLER: And do you know --

10 MR. KELLY: 19.

11 VICE CHAIR MILLER: Do you know if it
12 caused any problems to the soil, at that time?

13 MR. KELLY: Yes, it did and it continues.

14 I have reinforced my entire foundation on my house.
15 Each year or at least every other year I have to patch
16 my walls, because they crack. This clay upon which we
17 live on it swells up and like the professor said, it's
18 just like pudding. It shakes. I have a door right
19 outside of my study that at one time of the year it
20 closes, another time of the year it won't close, so
21 this just tells me that there is shifting going on.
22 And I have lived with this, you know. I didn't go in
23 yesterday and do a little quick study and look at the
24 soil and shake it down, but I have lived with this for
25 34 years.

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1 UNIDENTIFIED SPEAKER: Across the street
2 from the Sam Rayburn?

3 MR. KELLY: Yes, thank you, Sydney, across
4 the street at 3138.

5 CHAIRPERSON GRIFFIS: Good. Thank you.
6 Any other Board questions? Yes, sir?

7 MR. JUDGE: My name is John Judge.

8 CHAIRPERSON GRIFFIS: If I could have you
9 guys turn off your microphones, please?

10 MR. JUDGE: My name is John Judge and I'm
11 a resident at 3147 Westover Drive and don't have a lot
12 to add to this, except I think you ought to consider
13 why residents, and I have spoken to a lot of them,
14 because we took a petition around for you to see
15 supporting the ANC decision, are sort of amateur
16 geological experts in this area. Everyone that I
17 talked to has had problems. They have had to take
18 bulldozers and move dirt up behind their houses to
19 keep them from flowing down that hill. There has been
20 slides in that area. I mean, I'm only in there for 10
21 years, but this is a problem right in that soil.

22 And the other issue, I think, is if they
23 are going to terrace this, my assumption is they are
24 going to be taking out the trees, a lot of the shallow
25 root trees go over in a strong wind, they don't hold

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1 and the trees are about the only thing that probably
2 stabilizes the soil or has, you know a watershed
3 affect on the soil. And, you know, if you take those
4 off, I think, it is going to make it more likely and I
5 do feel also there is at least some concern at the
6 level of the District about reducing the amount of,
7 you know, arborage.

8 These may not be variance issues. I don't
9 know how to tell you how it relates to the 5,000 foot
10 thing.

11 CHAIRPERSON GRIFFIS: Okay.

12 MR. JUDGE: I'm just saying that any
13 problem you create, the bigger you make it. It will
14 probably create more of a problem.

15 CHAIRPERSON GRIFFIS: Understood. Thank
16 you very much. The Board have questions? Any cross
17 examination from the applicant?

18 MR. JOHNSON: I have one question.

19 CHAIRPERSON GRIFFIS: You're going to need
20 to sit down and be on a microphone.

21 MR. JOHNSON: I have one question for the
22 gentlemen here. And I would like to preface that with
23 a quick statement. We have --

24 CHAIRPERSON GRIFFIS: Hopefully not.

25 MR. JOHNSON: Okay. My question is since

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1 -- we're going to go forward with the project, either
2 one house or two. We will then -- if we -- because we
3 have money --

4 CHAIRPERSON GRIFFIS: That seems to be a
5 statement.

6 MR. JOHNSON: Well, I'm saying -- let me
7 say it like this. There is a necessity from the
8 economics of where we are now to go forward with the
9 project and that means in building one house or two we
10 face the same issues. So I would like to know from
11 this body, from the group that is sitting here what is
12 your opinion of the fact that one house or two
13 construction faces the same issues, how does your
14 testimony deal with the fact that this Board does not
15 have jurisdiction over the issues that you raised.
16 There is another body called Consumer Regulatory
17 Affairs who will work with our engineers to solve
18 these problems and that the variance that we requested
19 does not at all deal with the issues that you raised.

20 And so how does your testimony relate to the request
21 that is before the Board?

22 MR. KELLY: I would like to address that.

23 I would hope that the Board would look at the spirit
24 and the letter of the law.

25 CHAIRPERSON GRIFFIS: Thank you. Any

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1 other respondents?

2 MR. JUDGE: Well, I guess if one of their
3 stated criteria was whether it was in the public good
4 that that ought to cover at least some concern for
5 this separate from the construction questions, whether
6 the overall good of doing the project is to benefit,
7 because it seems to impact on the economics of the
8 whole area.

9 CHAIRPERSON GRIFFIS: Okay. Thank you.

10 MR. BORNSTEIN: I believe that would be
11 that it certainly would be better with one house than
12 two.

13 CHAIRPERSON GRIFFIS: Okay. Additional
14 questions? No more? Very well. Thank you all very
15 much. I appreciate your patience this morning in
16 coming down here to give us all this pertinent
17 information. Let's go to then closing remarks,
18 summations by the applicant.

19 MR. JOHNSON: Mr. Chairman, Members of the
20 Board, we would like to close by saying that the
21 opposition as presented today to this particular
22 application does not really speak to the issue before
23 the Board and that is a simple variance of zoning of
24 15 percent for noncompliance with the current zone.
25 And these two particular lots in question have been

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1 platted and subdivided and signed off on by the
2 District of Columbia Zoning Administrator in 1985.

3 What we have put before the Board in terms
4 of our request is a need for relief based on the
5 topography, based on the shape and the size of the
6 lots and based on the issues that we need to mitigate
7 in relationship to our request. In some cases I
8 believe it would be fair to say some of these types of
9 situations that have been developed over the years in
10 the platting of lots in the District of Columbia have
11 been grandfathered. Our assumption was that we were
12 grandfathered into this location, because of the plat
13 and subdivision that was already in existence.

14 We discovered it with our building permits
15 that we were not. We ask zoning to consider this
16 situation. They took the position, obviously, that we
17 needed to be here to seek relief on the variance.
18 From an economic point of view, we are in the
19 situation whereby we will, because of our deposits are
20 non-refundable, because of the amount of money we
21 spent in preliminary investigations, need to move
22 forward with this project.

23 In our need to mitigate the economic
24 problems, it will force us, if the variance is not
25 approved, to build a larger structure to try and

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1 recoup our investment in this particular deal by
2 developing a larger house. In other words, if we are
3 not approved, then we have, essentially, two lots
4 currently that have been platted, that are almost
5 5,000 square feet. It will give us the opportunity to
6 develop a much larger structure at this location in
7 order to mitigate the economics.

8 The same issues that we are faced with
9 with one house, will be the same that we are faced
10 with with two. We believe that the jurisdiction of
11 this Board enables us to get our application approved.

12 The other issues that have been raised here today by
13 various parties, including the Office of Planning, are
14 issues that can be resolved and will be resolved in
15 conjunction with the Department of Consumer Regulatory
16 Affairs.

17 Our engineers and their engineers will
18 meet and we will either develop a consensus or we will
19 either be directed by the reviewing engineers of the
20 Government to make whatever design changes or mandate
21 designs that will enable us to mitigate the problems
22 that have been presented here today. Our look at the
23 soils in relationship to the specific site does not at
24 all conform with what has been presented to this body.

25 Our look at the soil says that we are in a very

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1 specific location, which fortunately puts us in a
2 process, in a group of soils that are not absolutely
3 Patuxent formations or marine clay that will present
4 the problems in relationship to what has been
5 described here today.

6 The description of the O Street wall or
7 behind the Penn Branch Shopping Center has no
8 relevance or no bearing on what is being presented
9 here today. We are building in southeast Washington
10 where there are hills and where the soils are poor in
11 many locations. That is nothing unusual today. That
12 is being done all over this city.

13 Our request is very simple. We have
14 conformed with every aspect of the zone. The
15 integrity of the R-1-B Zone is not impugned by our
16 application. We are 15 percent less in area variance,
17 lot area requirements and otherwise, we conform with
18 every other aspect of the zone from the standpoint of
19 public detriment, in relationship to an issue raised
20 by the Department of Planning in regards to traffic or
21 driveway. It could be possible that we could combine
22 driveways if the Department of Consumer and Regulatory
23 Affairs mandated such a thing to occur in order to
24 deal with the issue of traffic on the circle or the
25 curve.

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1 Once we complete soil analysis and do
2 complete borings in the location to determine the
3 extent of the clay or other types of issues on the
4 site, and the laboratory analysis will then indicate
5 to us the type of foundations and the type of bracing
6 or other types of things we will need to do relative
7 to construction at that location.

8 So I encourage the Board to review this on
9 the basis of the practical difficulties of both the
10 site and the economics, and that we will do everything
11 we possibly can under the guidance and mandates of the
12 Department of Regulatory Affairs to ensure that
13 construction at this site meets whatever test
14 necessary to ensure that no damage occurs to any
15 adjacent property now or in the future, and we will
16 build according to the science and analysis and using
17 the type of professionals that we have presented here
18 today. Thank you very much.

19 CHAIRPERSON GRIFFIS: Thank you very much.

20 Let me just get one quick clarification. You said
21 that one lot or two, you have a viable idea what to
22 do. Two houses would be fine. If it's one lot, you
23 will just build the bigger house to offset the
24 economic issue?

25 MR. JOHNSON: We would have to look at the

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1 idea of building a larger house to offset the
2 economics, because we already invested. In other
3 words, we stand to lose money if we walked away. We
4 can't walk away, so we will have to find a way to
5 offset these problems.

6 CHAIRPERSON GRIFFIS: Understood. And one
7 of your sheets in the Pro-Forma that was submitted
8 through the Office of Planning, there is a line item
9 and it's noted at the bottom, and these are paginated
10 so I can't tell you, but it's the second to the last
11 page that I have. It says profit margin includes sale
12 of extra lot at \$50,000 profit.

13 What extra lot is that talking about?

14 MR. JOHNSON: In other words, when we
15 started out with this, as I indicated in my testimony,
16 we had desired one resident to remain in the District
17 by building a house, developing the two lots, selling
18 off one lot and using the proceeds of the lot to
19 offset the cost of developing. In other words --

20 CHAIRPERSON GRIFFIS: I see. So you're
21 going to develop one and sell one?

22 MR. JOHNSON: Yes, the initial applicant
23 here is a resident who wanted to stay in the District.
24 We set out to build one house. We found these two
25 lots. The idea was simple. She would build her

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1 house.

2 CHAIRPERSON GRIFFIS: I understand.

3 MR. JOHNSON: And sell off the other lot
4 and use the proceeds from the sale of a developed lot
5 to offset the cost of being at that location, and it
6 was never anticipated, from our preliminary analysis,
7 that there was a need to enter into this type of a
8 situation relative to the simple variance request. So
9 our economics was really based on the fact that we had
10 two lots. They were platted. They were subdivided.
11 We would then build on one lot, develop the two lots
12 using the one lot, and then sell the lot to use the
13 proceeds to offset the cost of development.

14 CHAIRPERSON GRIFFIS: Understood. Okay.
15 Anything further? I would like to set this for a
16 decision then on -- we're going to set this for our
17 regular scheduled public meeting then and it's going
18 to be on the 6th of April 2004. Do the Board Members
19 have any opinion on additional information that should
20 be submitted into the record at this time?

21 BOARD MEMBER ZAIDAIN: Well, Mr. Chair, I
22 mean, just to put it out there, oddly enough, I agree
23 with what the applicant has said, but I don't think
24 that makes the case for the variance. There is no
25 real connection between the variance relief as it is

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1 stated, which is the lot occupancy, and all of these
2 issues with topography and slope and soil. There is
3 just no connection, which then asks well, what is
4 causing the variance?

5 And I think what's causing the variance is
6 this 1985 lot split, and I don't know. Because it's
7 there, it seems like there should have variance
8 granted when that split was done. I don't know if
9 there is any kind of information we can get on how
10 that worked and where that leaves us in having to deal
11 with this, because regardless of where this
12 application stands, these lots are going to exist as
13 illegal and nonconforming lots. They were done after
14 '58. So, I mean, aside from that issue, I really
15 don't think the case is there for the variance.

16 CHAIRPERSON GRIFFIS: Okay, the variance.

17 BOARD MEMBER ZAIDAIN: I just think we
18 need to get some information and see what kind of --

19 CHAIRPERSON GRIFFIS: Important aspect.

20 BOARD MEMBER ZAIDAIN: What that does to
21 the application.

22 CHAIRPERSON GRIFFIS: We can leave the
23 record open if the applicant wants to submit
24 additional history of the 1985 subdivision. If that's
25 understood, it means how was it actually done? How

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1 did DCRA do it? And then, of course, anything that is
2 submitted into the record needs to be served to the
3 ANC, and anything the ANC, which we're not asking for
4 anything from the ANC, at this point, but anyway.

5 BOARD MEMBER ZAIDAIN: Just so I can ask a
6 question. There has to be some documentation of the
7 lot split, right, like an official survey or stamp
8 drawing that was approved by DCRA?

9 CHAIRPERSON GRIFFIS: Subdivision?

10 BOARD MEMBER ZAIDAIN: Yes.

11 CHAIRPERSON GRIFFIS: Yes.

12 BOARD MEMBER ZAIDAIN: We don't have that.
13 I don't remember seeing that in the packet. Is that
14 correct?

15 CHAIRPERSON GRIFFIS: Do you have that?

16 MR. SPAULDING: No, we would have to go
17 back and research that in terms of how it actually
18 occurred.

19 UNIDENTIFIED SPEAKER: Did you see that?

20 CHAIRPERSON GRIFFIS: No, but you don't
21 have --

22 UNIDENTIFIED SPEAKER: You did see it?

23 CHAIRPERSON GRIFFIS: You have the
24 southeast city plat.

25 BOARD MEMBER ZAIDAIN: OP said he has

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1 filed.

2 MR. SPAULDING: Yes.

3 CHAIRPERSON GRIFFIS: The 1985 plat?

4 MR. SPAULDING: Yes.

5 BOARD MEMBER ZAIDAIN: I don't know if
6 that would be helpful or not. I don't know.

7 MR. PARKER: I have seen the plat. It
8 does exist. It was signed by the Zoning Administrator
9 and it was dated, I have the exact date, February 12th
10 of '85.

11 CHAIRPERSON GRIFFIS: Okay. I don't think
12 we needed anything else in this. Mr. Parsons?

13 COMMISSIONER PARSONS: Well, I wanted to
14 engage Mr. Zaidain a little bit. I mean, don't forget
15 the public good test here. I mean, I am very much
16 persuaded by the testimony we have had today that the
17 public good is at risk here.

18 BOARD MEMBER ZAIDAIN: Oh, I agree. When
19 I said I -- I was saying that I agree with the
20 applicant in an ironic kind of way, because I think
21 the information we have gotten from the applicant does
22 not prove, does not support the variance test. That
23 was kind of the point.

24 COMMISSIONER PARSONS: I missed your
25 point. Thanks.

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1 BOARD MEMBER ZAIDAIN: Okay.

2 CHAIRPERSON GRIFFIS: Okay. And I think
3 we'll leave the record open also for you to restate
4 and give a summary of your case presentation in terms
5 of the test for the variance and, of course, that
6 needs to be served on the ANC, and then we'll keep the
7 record open for any responses that the ANC might have.
8 With that, let's go to the schedule.

9 MS. BAILEY: March 22nd for the
10 submissions, Mr. Chairman, and then March 29th for the
11 response from the ANC.

12 CHAIRPERSON GRIFFIS: March 22nd?

13 MS. BAILEY: Yes, sir.

14 CHAIRPERSON GRIFFIS: You can just nod
15 your head. I will take the words from here.

16 MS. BAILEY: Mr. Zaidain gave me his cold.

17 CHAIRPERSON GRIFFIS: Yes. I think Mr.
18 Zaidain, on his parting gift, is giving all of us his
19 cold. The March 22nd --

20 BOARD MEMBER ZAIDAIN: There is no
21 implications in that whatsoever.

22 CHAIRPERSON GRIFFIS: Right. The initial
23 filing would be on the 22nd. The responses would be
24 then required by the 29th. Is that correct?

25 MS. BAILEY: Yes, sir. Would that give

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1 you sufficient time, the 22nd?

2 MR. JOHNSON: Yes.

3 MS. BAILEY: Thank you.

4 CHAIRPERSON GRIFFIS: Okay. And then
5 we'll set this for our regular scheduled public
6 meeting on the 6th, in which case you will hear the
7 Board deliberate and make a decision. Yes?

8 MR. SPAULDING: The response from the
9 applicant comes to the ANC, would that be mailed
10 directly to the ANC by the applicant or would it come
11 from the BZA to the ANC?

12 CHAIRPERSON GRIFFIS: No, the applicant
13 has to serve you, so before you leave, you ought to
14 get together and figure out how you want to be served,
15 meaning where is he going to send it.

16 MR. SPAULDING: Okay. Thank you.

17 CHAIRPERSON GRIFFIS: We're out of the
18 picture, but you guys are required to communicate.

19 MR. JOHNSON: Yes, we have his address.

20 CHAIRPERSON GRIFFIS: Okay.

21 MR. SPAULDING: All right. Thank you.

22 CHAIRPERSON GRIFFIS: Excellent. Anything
23 else? Any other clarifications on schedule, what
24 we're going to do? Very well. Thank you all very
25 much. We do appreciate you being here and patient all

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1 morning. Mr. Moy, in order to save Ms. Bailey's
2 voice, is there any other information or any issues
3 attendant to the morning sessions for the Board?

4 MR. MOY: No, sir.

5 CHAIRPERSON GRIFFIS: Very well. Then
6 let's adjourn the morning session.

7 (Whereupon, the hearing was recessed at
8 12:47 p.m. to reconvene at 2:01 p.m. this same day.)
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1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 2:01 p.m.

3 CHAIRPERSON GRIFFIS: Good afternoon,
4 ladies and gentlemen. Let me call to order the
5 afternoon session on the 9th of March 2004 of the Board
6 of Zoning Adjustments of the District of Columbia. I
7 am Geoff Griffis, Chairperson. With me today is Vice
8 Chair, Ms. Miller, and also our esteemed Member, Mr.
9 Etherly. Representing the Zoning Commission with us
10 this afternoon is Mr. Parsons, and representing the
11 National Capital Planning Commission with us,
12 unfortunately sitting for the last time officially,
13 Mr. Zaidain.

14 And we have had numerous opportunities to
15 give remarks about that, but let me just state that as
16 it is his last afternoon, of course, we do bid him a
17 great goodbye and appreciate all his service to the
18 Board, and we have absolutely enjoyed working with
19 him, fighting with him and once in awhile enjoying a
20 good joke from the NCPC Member.

21 Copies of today's hearing and agenda are
22 available for you. They are located at the wall where
23 you entered into the hearing room. You can, please,
24 pick one up if you are needing to understand what we
25 will accomplish this afternoon.

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1 Two important aspects of recording. All
2 proceedings between the Board of Zoning Adjustment are
3 recorded. They are in two fashions. One is the
4 recorder who is sitting to my right. She is
5 establishing the official transcript, which will go
6 into the record. There are several things attendant
7 to that that I will walk you through. The second, we
8 are now being broadcast live on the Office of Zoning's
9 website.

10 So attendant to that and to establish a
11 firm and real transcript, I ask when coming forward,
12 please, state your name and your address for the
13 record. Your microphone should be on when you state
14 all of that. You will also need to fill out two
15 witness cards. Witness cards are available at the
16 table where you will give testimony, and also the
17 table where you entered into the hearing room. Those
18 two copies go to the recorder who is sitting to my
19 right.

20 Also, I would ask that people, of course,
21 according to our regulations, refrain from making any
22 uncivil or outbursts or just any sort of noises or
23 actions that might detract from those people trying to
24 give testimony in our proceedings today. I don't
25 anticipate that, but have to say it as part of my

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1 opening.

2 The order of procedure for special
3 exceptions and variances, rather, we have appeals this
4 afternoon, so let me tell you about that. The order
5 of procedure for the appeal applications will be
6 statement and witnesses of the appellant. The second
7 will be the Zoning Administrator or other Government
8 officials in the case. Third is going to be the case
9 of the owner, lessee or operator of the property.
10 Fourth would be the ANC within which the property is
11 located. Fifth is going to be interveners, if any
12 interveners have been established. Sixth, finally,
13 we'll have rebuttal and closing statements by the
14 appellant.

15 Pursuant to sections 3117.4 and 3117.5,
16 the following constraints will be maintained. The
17 applicant, appellant, persons or parties, except the
18 ANC and witnesses, will be 60 minutes. Appellees,
19 persons and parties in opposition, including
20 witnesses, will be set for 60 minutes. Individuals,
21 if there are opportunities, of which there may not be,
22 are always regulated to three minutes.

23 Time restraints do not include cross
24 examination or questions by the Board, and we will
25 maintain a firm understanding of how much time has

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1 lapsed. Cross examination of witnesses is permitted
2 by the applicant and parties in the case. The ANC
3 within which the property is located, as I have
4 stated, is automatically a party in the case and,
5 therefore, is able to conduct cross examination.
6 Nothing prohibits the Board from placing restrictions
7 on times for cross examination questions, scope, and I
8 will be very specific if I start to limit anything
9 regarding cross examination.

10 The record will be closed at the
11 conclusion of each case, except for any material that
12 is specifically requested by the Board and those
13 familiar with us will know we will be very specific on
14 what is to be submitted and when it is to be submitted
15 into the Office of Zoning. After that material is
16 received, it should be obvious. The record would then
17 be finally closed and no other additional information
18 would be accepted into the record.

19 The Sunshine Act requires that the public
20 hearing on each case before this Board must be
21 conducted vastly before the public. This Board may,
22 however, consistent with its rules of procedure and
23 the Sunshine Act, enter into Executive Session.
24 Executive Sessions are used by the Board in order to
25 review records or to deliberate on specific cases.

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1 The decision of this Board must be based
2 exclusively on the record that is going to be created
3 for us today, so it is very important than anything
4 you want to be on the record be either submitted in
5 writing or be said into a microphone, so it's part of
6 the transcript. Additionally, we ask that people
7 present today not engage Board Members in any type of
8 conversation, so that we do not give the appearance of
9 receiving information outside of the record.

10 We will make every effort to conclude our
11 hearings at a reasonable time tonight, hopefully, by
12 6:00. I will update you as we get closer to 6:00 and
13 to see where we are, if we are at a breaking point or
14 if, in fact, we have finished what we needed to do for
15 the afternoon. I appreciate everyone's patience with
16 us. We did have a long morning session that started
17 very early and didn't end until well after 1:00, so we
18 had to get a little bit of food in us in order to
19 continue with our great attentiveness for this
20 afternoon's case.

21 At this time, the Board will consider any
22 preliminary matters. Preliminary matters are those,
23 which relate to whether a case will or should be heard
24 today, such as requests for postponements,
25 continuances or withdrawals or whether proper and

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1 adequate notice has been provided. If you are not
2 prepared to go forward with a case today or if you
3 believe the Board should not proceed with a case
4 that's on our agenda, I would ask that you come
5 forward and have a seat at the table as an indication
6 of a preliminary matter.

7 I will first go to staff to see if they
8 have any preliminary matters, and also say a very good
9 afternoon to Ms. Bailey, who sits to my very far
10 right, representing the Office of Zoning, and also Mr.
11 Moy, who is closer to me, representing the Office of
12 Zoning. Corporation Counsel is with us always, and
13 Ms. Monroe is representing OCC this afternoon with us.

14 Ms. Bailey, are you aware of any
15 preliminary matters?

16 MS. BAILEY: Mr. Chairman and Members of
17 the Board, good afternoon. Yes, sir, there is. It
18 has to do with Appeal No. 17121 of the Southeast
19 Citizens for Smart Development, Inc. There is a
20 request for that appeal hearing to be postponed, sir.

21 CHAIRPERSON GRIFFIS: Very well. And it's
22 my understand that the request for -- first of all, is
23 there anyone here representing the Appeal 17121?

24 MS. FERSTER: Andrea Ferster, counsel for
25 Southeast Citizens for Smart Development, the

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1 appellant.

2 CHAIRPERSON GRIFFIS: Okay. Is there
3 anyone else? They let you in here alone? Well, let's
4 call the case and we'll get it done. No, it's a bad
5 joke. My understanding is that the first issue is for
6 the request for a postponement, and I understand that
7 all involved are in agreement with the postponement.
8 Is that your understanding?

9 MS. FERSTER: That's correct. I spoke
10 with Phil Feola.

11 CHAIRPERSON GRIFFIS: Okay.

12 MS. FERSTER: Who represents the property
13 owner and he informed me that the property owner did
14 not intend to participate in this appeal and,
15 therefore, did not object to the postponement.

16 CHAIRPERSON GRIFFIS: Well, I'm not sure
17 what that means, but my understanding is that the
18 first issue for request is that the appeal may, in
19 fact, be rendered moot based on some action that may
20 be taken within the near future?

21 MS. FERSTER: We understand that's a
22 possibility.

23 CHAIRPERSON GRIFFIS: Okay. There also is
24 an indication that District Government has been
25 unresponsive to requests for necessary documentation?

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1 MS. FERSTER: That's correct.

2 CHAIRPERSON GRIFFIS: And so if we
3 postpone this, that you believe that the necessary
4 documents will be made available?

5 MS. FERSTER: We would hope that the
6 Government would make the documents available. If
7 they do not, we will follow-up with a separate motion
8 requesting that the Government be directed to produce
9 those documents.

10 CHAIRPERSON GRIFFIS: Hopefully, prior to
11 the day of the hearing, right? My understanding is
12 that we should set this off for six months?

13 MS. FERSTER: That's correct.

14 CHAIRPERSON GRIFFIS: Okay. What dates do
15 we have, Ms. Bailey?

16 MS. BAILEY: September 14th, Mr. Chairman,
17 would be staff's recommendation.

18 CHAIRPERSON GRIFFIS: September 14th. It's
19 guaranteed to be a beautiful Washington, D.C day on
20 the 14th, not that that would impact the appeal at all,
21 but the 14th works schedule wise?

22 MS. FERSTER: That's fine.

23 CHAIRPERSON GRIFFIS: Okay. Let's set it
24 then. Are we looking at the first case in the
25 afternoon, Ms. Bailey?

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1 MS. BAILEY: Mr. Chairman, I would suggest
2 perhaps the afternoon.

3 CHAIRPERSON GRIFFIS: Excellent. There it
4 is. Any other questions, clarifications? That's all
5 clear, right? Thank you very much. Any other
6 preliminary matters for the Board?

7 MS. BAILEY: It is case specific dealing
8 with the next case, Mr. Chairman, but that's actually
9 -- I guess the answer is no.

10 CHAIRPERSON GRIFFIS: Okay. Why don't we
11 call our next case?

12 MS. BAILEY: Appeal No. 17109 of the
13 Kalorama Citizen's Association, pursuant to 11 DCMR
14 section 3100 and 3112, from the administrative
15 decision of David Clarke, Director, Department of
16 Consumer and Regulatory Affairs from the issuance of
17 Building Permit Nos. B455571 and B455876, dated
18 October 16, 2003, respectively, to Montrose, LLC, to
19 address the building height to 70 feet and to revise
20 penthouse roof structure plans to construct a five
21 story apartment house in the R-5-D District.

22 The appellant alleges that the under
23 construction building is in violation of the building
24 height, floor area ratio and roof structure set-back
25 requirements of the Zoning Regulations. The property

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1 is located at 1819 Belmont Road, N.W., Square 2551,
2 Lot 45.

3 Is there anyone here today who was not
4 sworn in previously and will be testifying? If anyone
5 needs to be sworn in, please, stand. I'm assuming
6 there are some people behind the column. I really
7 can't see behind it.

8 CHAIRPERSON GRIFFIS: There are.

9 MS. BAILEY: Please, raise your right
10 hand.

11 (The witnesses were sworn.)

12 MS. BAILEY: Please, have a seat. Mr.
13 Chairman, there are several preliminary matters having
14 to do with this case. Otherwise, it is ready to go
15 forward, sir.

16 CHAIRPERSON GRIFFIS: Very well. Do you
17 want me to state the preliminary matters?

18 MS. BAILEY: Yes.

19 CHAIRPERSON GRIFFIS: Are you going to
20 outline the preliminary matters? I can easily handle
21 that. Why don't you save your voice? It seems to me
22 when we left off, we had two motions, two motions that
23 were before us. The first, I'm going to summarize, is
24 going to go to timeliness and the second is the laches
25 and estoppel. We have motions to dismiss based on

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1 these two issues.

2 And additionally, we have, well, the
3 third, we have a buried motion, I would call it, in
4 one of the filings by the appellant on page 16 in
5 which KCA is moving to adopt a March permit into the
6 appeal. I think we can take that up lastly after
7 dispensing with the first two.

8 So let me open it up to the Board for
9 discussion on the motions to dismiss. Ms. Miller?

10 VICE CHAIR MILLER: Yes, Mr. Chairman. I
11 would also like to add that in the motion to dismiss
12 is also the argument that this Board lacks
13 jurisdiction to consider the March 11, 2003 permit,
14 because it was not named in the appeal, and I would
15 like to address that one first.

16 CHAIRPERSON GRIFFIS: Okay.

17 VICE CHAIR MILLER: I think that one is
18 without merit, that this Board commonly allows parties
19 to amend appeals, and the case cited by Montrose was
20 appeal of Advisory Commission 6A, BZA Appeal No.
21 16934, and in that case, which was attached to their
22 motion, the Board actually invited the ANC to amend
23 its appeal and only denied the amendment, because it
24 was amended eight months later after the construction
25 of the dwelling was complete, and there was no

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1 explanation as to the delay of the ANC and they found
2 prejudice to the owner. So that is my take on our
3 jurisdiction to consider this building permit.

4 With respect to timeliness, I would like
5 to start the discussion by bringing our attention to
6 our regulation, which says that an appeal shall be
7 filed within 60 days from the date the person
8 appealing the administrative decision had notice or
9 knowledge of the decision complained of or reasonably
10 should have had knowledge or notice of the decision
11 complained of, whichever is earlier.

12 In this case, we're looking at a March 11,
13 2003 permit and the appeal was filed on November 10,
14 2003. So our starting point is should they have known
15 about this decision or did they know about this
16 decision on March 11, 2003, and I think that the
17 evidence that we have in our record, it's pretty
18 compelling that the permits were not posted and the
19 first time that I see that they had notice of the
20 permits, at least when they were posted, was after the
21 Stop Work Order was issued, which is September 12,
22 2003. So I would start with that date of when they
23 should have had notice of the decision complained of.

24 Since they filed their appeal November 10th, I believe
25 that's within the 60 days, but I haven't counted it

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1 out day by day.

2 CHAIRPERSON GRIFFIS: Ms. Brown, do you
3 have a procedural question?

4 MS. BROWN: Yes, I do. Since we filed the
5 motion for -- for the record, my name is Carolyn Brown
6 with Holland and Knight on behalf of Montrose, LLC.
7 We filed a motion to dismiss. We have had opposition
8 to that motion to dismiss. I believe that there are
9 many factual errors in the opposition to the motion
10 that need to be clarified, specifically with whether
11 or not the permits were noticed. We can refute all
12 those charges, and I think that it would be in order
13 for us to have an opportunity to reply to that
14 information.

15 CHAIRPERSON GRIFFIS: Ms. Ferster?

16 MS. FERSTER: We would oppose that
17 opportunity to reply to the extent that Montrose seeks
18 to submit factual information that rebuts the factual
19 information that we provided. Montrose is the movant
20 here. They provided a motion. They did not see fit
21 to attach any sworn --

22 CHAIRPERSON GRIFFIS: Do you have any
23 opposition to having them respond orally now?

24 MS. FERSTER: We do. We object to
25 Montrose having an opportunity to submit factual

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1 information that they could have submitted in their
2 motion. They made factual assertions to which they
3 neglected to attach any affidavits or declarations in
4 support thereof. And on the other hand, we opposed
5 their motion with declarations and statements that
6 rebutted the factual misstatements that were provided,
7 and we do not think that Montrose should be allowed
8 now to rehabilitate its original motion, which was
9 defective.

10 CHAIRPERSON GRIFFIS: Okay. Ms. Gilbert?

11 MS. GILBERT: Yes, I would simply say that
12 I think, in the interest of getting the full facts
13 before the Board, that there should be an opportunity
14 for a very limited additional argument, so that we
15 don't, you know, spend the afternoon here rehashing,
16 but just respond to those points.

17 CHAIRPERSON GRIFFIS: Two excellent
18 points. First of all, the most important thing, of
19 course, is to get the facts in front of the Board, so
20 that we can deliberate on them. Second is we don't
21 want to spend four hours on preliminary matters.
22 We're either going to get to the substance of this
23 today or not depending on the outcome of the motions.

24 I think it does not prejudice anybody and,
25 in fact, it may be helpful to the Board. What I'm

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1 going to do is allow five minutes for each person to
2 address their case in, basically, a summation form and
3 you let me know if you need a couple minutes to get
4 this together. At that point, we'll go down and we
5 can have the panel give that to the Board, and then I
6 will allow brief rebuttals to that and then we'll move
7 on. So all in all, we should be 20, 25 minutes.

8 Is everyone ready? Do we need extra time?

9 Very well. Then shall we flip a coin for order? Any
10 objections to started on my right and moving down, Ms.
11 Ferster?

12 MS. FERSTER: It's Montrose's motion. It
13 seems appropriate that they should begin.

14 CHAIRPERSON GRIFFIS: Agreed.

15 MS. BROWN: I would also note for the
16 record that it is typical if someone files a motion,
17 there is an opposition reply.

18 CHAIRPERSON GRIFFIS: I know it's typical
19 and all that stuff.

20 MS. BROWN: A reply is in order.

21 CHAIRPERSON GRIFFIS: Indeed.

22 MS. BROWN: First, I guess, I have a
23 procedural question about you want me to do this. I
24 can make a proffer as to what the witnesses will say.
25 I can have the witnesses come up here and do an

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1 actual factual, make factual statements into the
2 record.

3 CHAIRPERSON GRIFFIS: No, because I don't
4 think we're going to conduct any cross examination.
5 What we're looking at is just the summation of the
6 case presentation based on the motion. So I would say
7 you can proffer what the witnesses are going to say.
8 We start bringing them up and we'll be in cross
9 examination. Disagreement?

10 MS. FERSTER: Again, I have no, and
11 perhaps you misunderstood my objection, I have no
12 objection to Montrose replying to the legal arguments
13 that we made in our opposition, but to the extent that
14 they are offering fact witnesses to rebut or make a
15 case that they should have made in their motion, we
16 would object, and if they are going to proffer any
17 witnesses, we would ask that they be available for
18 cross examination.

19 But again, our position is that they had
20 their opportunity to submit declarations or affidavits
21 in support of the facts on which their motion is
22 based. They declined to do that, and they should not
23 be allowed to have another bite at the apple at this
24 point.

25 MS. BROWN: I can respond to that or I can

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1 proceed as you instructed me to do.

2 CHAIRPERSON GRIFFIS: I think I'll take
3 hints from my Board. I think it would be appropriate
4 just to do a quick summation of the argument, and then
5 we'll move on. If we start calling witnesses, at this
6 point, I'm in agreement, we're not here to spend the
7 afternoon to have arguments on the motion to dismiss.

8 We might as well hold it in abeyance and go right
9 into the substance of the case, and we can get the
10 information out that we need. I think we have
11 sufficient information to decide or to make a
12 substantive deliberation on it now, but a summation is
13 what I would like.

14 Board Members, any disagreement?

15 VICE CHAIR MILLER: No, I was just going
16 to comment that the opposition was filed, I think,
17 March 2nd and Montrose could have filed a reply in
18 response to that.

19 MS. BROWN: We were not instructed that we
20 could file any reply.

21 VICE CHAIR MILLER: No, but you could have
22 asked us ahead of time.

23 BOARD MEMBER ETHERLY: Mr. Chairman, I am
24 inclined to agree with your assessment. I think your
25 course of action is perhaps rather generous, because I

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1 would be inclined to side with the appellant in this
2 particular instance in terms of feeling very
3 comfortable with the information that we have in front
4 of us to dispose of the factual issues. I agree with
5 you, there are some factual disputes here, but I think
6 the briefing on both sides has been sufficient enough
7 for us to deal with it, but I would agree with you for
8 some very limited, some limited discussion on some of
9 the factual issues that might still be up for debate,
10 and then we can move forward and dispose of the
11 motion.

12 CHAIRPERSON GRIFFIS: Very well. Thank
13 you. Do any Board Members feel like there is factual
14 information that would be required for us to make a
15 substantive decision?

16 BOARD MEMBER ZAIDAIN: Well, I have to
17 respond. I mean, I think that there is. I mean, you
18 know, my issue is kind of the opposite of what's going
19 to be presented. I'm pretty clear on what the law is
20 in terms of the timeliness issue, the 60 days, and
21 they should have known. I mean, what's at dispute
22 here is the factual information on when plans were
23 seen, when height was known.

24 I assume just from the reactions I saw
25 from the intervener, that we're going to hear some

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1 disputed information on whether or not the building
2 permit was posted. I just think we need to get some
3 clarification on the facts in order to properly
4 dispose of the timeliness issue, because I think
5 that's what's at dispute here. So I guess I would
6 side with Mr. Etherly's comment.

7 CHAIRPERSON GRIFFIS: Not as I understood
8 Mr. Etherly's comment.

9 BOARD MEMBER ZAIDAIN: He said that he
10 would like to hear some discussion on the factual
11 issues.

12 CHAIRPERSON GRIFFIS: You want to hear
13 witnesses and factual?

14 BOARD MEMBER ETHERLY: Oh, no, oh, no.
15 I'm very clear about not wanting to have witnesses at
16 the table here. Once again, it was my position that
17 the briefing was fairly concise and to the point,
18 quite honestly. I think there's enough in front of
19 this Board that we could, this is perhaps where I
20 differ a little bit with Mr. Zaidain, where I think we
21 could just resolve this without any additional
22 argument. But perhaps for the purposes of just
23 rounding out the briefing that has been submitted,
24 limited discussion or limited argument from the
25 parties would perhaps be sufficient, but I want to be

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1 very sensitive to your caution, Mr. Chair, in that we
2 don't need to spend five hours trying to sort out this
3 preliminary matter.

4 BOARD MEMBER ZAIDAIN: Yes.

5 BOARD MEMBER ETHERLY: I think the issue
6 is fairly clear here. We have the 60 day time limit.

7 The question, I think, in my mind really is are there
8 exceptional circumstances here, which prevented the
9 appellant from fully knowing or contemplating what was
10 at issue with this particular permit and I think
11 that's where the game is at here. So to the extent
12 argument can be focused, and to an extent be factual
13 perhaps, but if it comes down to are we going to spend
14 three hours talking about what KCA should have known,
15 what the ANC heard, what was in the In-Towner, I don't
16 want to spend five hours doing that, Mr. Chair.
17 That's definitely not my suggestion.

18 BOARD MEMBER ZAIDAIN: Yes, I think that
19 would address my issues. I mean, to speak frankly,
20 I'm pretty clear on where I am. I mean, a lot of the
21 issues that have been appealed before us were
22 containing revised permits that were issued in
23 October. I think, at least the way I view the issues,
24 we're going to be getting into what was going on
25 subsequent to that. So I think taking Mr. Etherly's

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1 approach would satisfy my concerns.

2 CHAIRPERSON GRIFFIS: Let's proceed, Ms.
3 Brown, summation?

4 MS. BROWN: All right. With that
5 direction, I'm unclear, I can make a 30 second proffer
6 on testimony, but I'm not clear on where you ended up
7 on that. If you don't want to hear it, that's fine.

8 CHAIRPERSON GRIFFIS: I can't believe
9 we're not clear.

10 MS. BROWN: Okay. So I'll go.

11 CHAIRPERSON GRIFFIS: No.

12 MS. BROWN: I know you didn't want
13 witnesses.

14 CHAIRPERSON GRIFFIS: That's in humor.
15 This is the situation. What we're going to do is I'm
16 asking you just to summarize the presentation of your
17 motion and the facts that are in it.

18 MS. BROWN: Okay.

19 CHAIRPERSON GRIFFIS: You're just going to
20 summarize those.

21 MS. BROWN: Okay. That's fine.

22 CHAIRPERSON GRIFFIS: If the Board has
23 questions of which there is going to need to be a
24 factual answer, we're going to ask it and you're going
25 to have an answer.

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1 MS. BROWN: Fine.

2 CHAIRPERSON GRIFFIS: Which may mean
3 bringing up a witness, and we'll walk down that
4 treacherous path if we need to, but I think only on
5 demand.

6 MS. BROWN: Okay. I'm prepared to go
7 right to the heart of the matter then.

8 BOARD MEMBER ETHERLY: If I may, Mr.
9 Chair, just as additional guidance for Ms. Brown and
10 for other counsel at the table, you know, at least
11 speaking from one Board Member's standpoint,
12 exceptional circumstances that substantially impair
13 the ability here, that is some of the key language
14 from the case law, so what I'm going to be looking to
15 hear is clearly, there are some allegations. There
16 are some pieces of information that have been offered
17 in declarations that we have received. To the extent
18 the appellant and other parties can help us walk
19 through that thicket of exceptional circumstances,
20 that would be very helpful.

21 MS. BROWN: Fine. Thank you very much.
22 First, I think it does go back to your point, Mrs.
23 Miller, about whether or not there is a jurisdictional
24 question of whether or not you can reach the March 11th
25 permit, A, because it was never appealed, B, because

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1 there is a timeliness issue.

2 First, you can't reach it, because they
3 never appealed it and despite the fact that they have
4 a veiled motion in their March 2nd submission to amend
5 the appeal to include it, why didn't that happen
6 before? They had every opportunity. There is no
7 exceptional circumstance that prevented them from
8 appealing it September 1 when they first learned of
9 it, in September when they had -- and I believe it was
10 in September where they had ANC motions saying that to
11 the extent that they need a waiver of time to file an
12 appeal of the March 11th permit, they would ask for it.

13 This was prior to the issuance of the
14 October permits, so they knew that this permit existed
15 on March 11th. They had the opportunity to appeal it
16 and they chose not to. They simply appealed the
17 October permits. Again, they had this whole period
18 from the date that they filed the appeal to the time
19 that the hearing was scheduled to fix their deficiency
20 and they elected not to.

21 At the hearing that we had two, three
22 weeks ago, again, it was on the table. Right there
23 they were put on notice that this was going to be an
24 issue in the appeal, about whether or not they could
25 get to the March 11th permit. They had the opportunity

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1 to make an oral motion, at that time, and they failed
2 to do it. So I don't understand how now, we can say
3 that they have the opportunity to amend their
4 application.

5 And furthermore, with respect to the
6 Appeal 16934 for 922 Constitution Avenue, that is
7 right on point, I would argue. There the foundation
8 permit for the building was issued first. Shortly
9 thereafter, the full building permit was issued and it
10 was before that the building was completed, and they
11 had the opportunity all that summer to appeal it.
12 They had the opportunity when it was under
13 construction and the first hearing was held that fall
14 and it was continued. The Chairman, at that time,
15 brought up the fact that they may have appealed the
16 wrong permit in the fall.

17 Again, in the three other hearings that
18 were there in the spring, they never did it. And, you
19 know, how many opportunities is someone going to get
20 to file an appeal or to fix the deficiencies when they
21 had plenty of time and they knew it, and they made a
22 mistake and it can't be fixed now just because of some
23 "technicality" that's supposedly in the filing. It
24 can't happen.

25 And I would note that the appellant's

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1 reliance on the assistant case is also misplaced.
2 There they argue that there was piecemeal approach to
3 the permits, that there was malfeasance, that the
4 property owner in that case was deliberately trying to
5 deceive people, and they were allowed to amend their
6 appeal to include two additional permits. The facts
7 in those cases are very distinguishable and quite
8 different from what's going on here.

9 In the assistant case, there were five
10 permits. One was the two story addition, but
11 apparently the Board concluded that it did not reflect
12 all the work. There was a permit to add to a garage
13 structure, but that garage structure had already been
14 demolished. Third, there was a new permit for a
15 garage, but it was filed after the work had been
16 completed on the garage. Fourth, there was a permit
17 to repair a porch roof, but there was no porch roof to
18 repair at that time. And fifth, they finally got a
19 new permit to construct the porch.

20 The difference with these five permits, as
21 well, all had to deal with zoning issues in the Wesley
22 Heights Overlay District. Here we have three permits
23 filed at the same time in December, sheeting, shoring
24 and excavation, the demolition permit and three, the
25 new construction permit. Every piece of paper that is

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1 related to height, to FAR and to roof structure set-
2 backs was part of that March 11th permit. There was
3 full knowledge pertaining to that March 11th permit
4 about what was encompassed. It's not piecemeal. You
5 don't have to guess what facts are in the record on
6 that.

7 Let's assume that they didn't have an
8 opportunity to get a copy of those drawings. Let's
9 assume again that everything that they are stating in
10 their record is true, which we don't necessarily
11 believe, they still failed to appeal it and it's not a
12 piecemeal approach at all. And I think that I would
13 argue very strenuously that they just missed the boat.

14 They missed their opportunity to appeal this in a
15 timely fashion, particularly when they had knowledge
16 of it and, again, had resolutions saying that they
17 wanted a waiver from the time and still, they didn't
18 do it.

19 CHAIRPERSON GRIFFIS: And what are you
20 resting your milestone knowledge of? Is it the
21 issuance of the permit? Is that when they knew?

22 MS. BROWN: Let's concede that they didn't
23 know with the issuance of the permit.

24 CHAIRPERSON GRIFFIS: Yes.

25 MS. BROWN: They should have known at the

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1 ANC Transportation Planning Meeting where there were
2 drawings shown. We have copies of those drawings here
3 that we can share with you to show you exactly what
4 they saw at the Transportation Meeting that shows a
5 full front elevation with the measurements for each
6 floor all the way up to the top of the building. Now,
7 they may not have focused on that, but it certainly
8 was there for them to examine and see. The second --

9 CHAIRPERSON GRIFFIS: And the date of that
10 meeting?

11 MS. BROWN: I'm sorry?

12 BOARD MEMBER ETHERLY: And that's the
13 March 19th meeting?

14 MS. BROWN: Correct.

15 BOARD MEMBER ETHERLY: Okay. March 19,
16 2003.

17 CHAIRPERSON GRIFFIS: Mr. Zaidain?

18 BOARD MEMBER ZAIDAIN: I didn't want to
19 interrupt your presentation before I asked a question.

20 CHAIRPERSON GRIFFIS: Question?

21 MS. BROWN: That's all right.

22 BOARD MEMBER ZAIDAIN: There were two
23 permits issued on October 6th and October 16th that
24 corrected issues with roof height, roof structure,
25 floor area and set-backs. Those are the controlling

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1 permits. Am I understanding? Am I incorrect?

2 MS. BROWN: The October 6th and 16th permits
3 are the controlling ones in this case, but I disagree
4 with what they actually -- they did not deal with roof
5 structure set-backs. It dealt with correcting the
6 height of the building at the front.

7 BOARD MEMBER ZAIDAIN: Okay.

8 MS. BROWN: And FAR calculations and a
9 reconfiguration of the roof structure at the rear, but
10 not dealing with set-backs.

11 BOARD MEMBER ZAIDAIN: Okay. But they are
12 reflective of what has been built on the property,
13 correct?

14 MS. BROWN: Yes.

15 BOARD MEMBER ZAIDAIN: I mean, that's the
16 permit. They superseded the previous permit from --

17 MS. BROWN: No, they don't supersede it,
18 because the original permit is what gets you the full
19 interior structure of the building, the front facade.

20 BOARD MEMBER ZAIDAIN: Well, in regards to
21 those issues you just rattled off.

22 MS. BROWN: Only those three limited
23 issues.

24 BOARD MEMBER ZAIDAIN: Right, but as far
25 as those three issues go, those permits superseded the

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1 previous ones on those issues?

2 MS. BROWN: As the drawings, only the
3 drawings? Yes, with respect to those drawings that
4 were submitted with the October 6th and 16th permits
5 that either supplemented or replaced the original.

6 BOARD MEMBER ZAIDAIN: Okay. And could
7 you tell me your opinion of what those cover again, so
8 I can get that down?

9 MS. BROWN: Yes. The height of the
10 building itself was changed from -- and I believe it's
11 that direction.

12 BOARD MEMBER ZAIDAIN: Okay. You know, I
13 mean, we don't have to -- you don't have to refer to
14 that.

15 MS. BROWN: If I could just refer to the
16 drawing to make sure that I give it to you accurately.

17 To change the height of the front of the building
18 from 71 feet, 3 inches at the parapet, removal of the
19 parapet, so that the building height then measures to
20 69 feet, 9 inches and 3/8.

21 BOARD MEMBER ZAIDAIN: Okay. And then you
22 said FAR?

23 MS. BROWN: The FAR has never changed in
24 the building. It was a request from DCRA to provide
25 detailed calculations of the FAR, so they could --

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1 BOARD MEMBER ZAIDAIN: Okay.

2 MS. BROWN: -- better understand it.

3 BOARD MEMBER ZAIDAIN: And then what was
4 the third one?

5 MS. BROWN: And the third was the desire
6 to change a full Gable roof to the roof structure to,
7 essentially, half Gable and the --

8 BOARD MEMBER ZAIDAIN: Okay.

9 MS. BROWN: -- back part of it was changed
10 at the rear of the building.

11 BOARD MEMBER ZAIDAIN: Okay. Thank you.

12 MS. BROWN: You're welcome. If, for some
13 reason, you don't want to look at the March 19th as the
14 triggering point when the drawings were before the
15 ANC, the second triggering event would be September
16 11th when it reached that building height when it was
17 built out. And at that point, several days --

18 CHAIRPERSON GRIFFIS: When you say built
19 out, was it framed?

20 MS. BROWN: Framed out.

21 CHAIRPERSON GRIFFIS: It was enclosed?

22 MS. BROWN: I would have to check with the
23 developer and architect to get the full -- but I
24 understand it was framed out.

25 CHAIRPERSON GRIFFIS: I believe that it

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1 was submitted that it was framed.

2 MS. BROWN: Framed out, yes.

3 CHAIRPERSON GRIFFIS: Okay.

4 MS. BROWN: And, in fact, I believe that
5 there is no disagreement from the appellant that that
6 is the triggering date. In their submission, they can
7 probably speak to that better than I can, but that's
8 what I read in their opposition to the motion to
9 dismiss.

10 CHAIRPERSON GRIFFIS: And noting the
11 somewhat unique massing of this, just viewing the
12 framing, it's your legal understanding that one could
13 assess what the height of the building was?

14 MS. BROWN: If someone wanted to go out
15 and do a measurement, yes, my understanding is that it
16 could be done, at that point, because it was
17 sufficiently framed out to make that determination.
18 But regardless, that was, at that point, within, you
19 know, the next week or so that they went to DCRA and
20 Jim Graham to request that a Stop Work Order be
21 issued. So they know, at that point, and, you know,
22 they may have not gotten exact drawings, but they
23 certainly got a Stop Work Order issued.

24 CHAIRPERSON GRIFFIS: Okay.

25 MS. BROWN: So at that point, they knew,

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1 as well, and again at the ANC meeting and the KCA
2 meetings there were resolutions requesting that they
3 be granted some sort of waiver from the time limit,
4 because they didn't have all the documents. So again,
5 even assuming every single thing that they say, all
6 the triggering events that I listed were true, they
7 still failed to appeal it.

8 CHAIRPERSON GRIFFIS: Anything else?

9 MS. BROWN: Let me just look at my notes
10 real quick. I would just reiterate that the three
11 things that they are complaining of, that the railing
12 and deck exceed the roof height, are not shown on the
13 March 11th permits. There is an outline of the roof
14 deck and the -- I'm sorry, on the October permits,
15 there is no indication of a change in the roof deck
16 and railing. While there may be an outline of them on
17 the drawing, they don't reflect the material. They
18 don't show how it's going to be constructed. That's
19 all part of the March 11th permit, so you can't reach
20 that issue, because it's part of the March 11th permit.

21 Secondly, there is no change in the
22 position of the side walls. Those were already fixed
23 by the March 11th permit. The fact that they changed
24 the rear wall and changed that dimension does not get
25 you to the fact that the side walls are built on the

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1 interior walls. And third, you know, the FAR, if you
2 want to get to that issue, we have got that. I
3 believe that that gets more to the estoppel and laches
4 issue, but if you want to get to the FAR, there is
5 just a clarification. The numbers didn't change.

6 CHAIRPERSON GRIFFIS: What was clarified
7 if it needed a revised permit?

8 MS. BROWN: It was to ensure that -- DCRA
9 wanted to make sure that every allegation that was
10 made in the KCA letter to DCRA was answered
11 consistently, properly and to the letter of the law.

12 CHAIRPERSON GRIFFIS: But wouldn't the
13 same permit hold? Why would a revision need to be
14 made?

15 MS. BROWN: Because it was requested of
16 DCRA that the applicant provide a very detailed
17 analysis that is not normally provided on a space by
18 space area. We have the drawing. We actually
19 provided a very conservative estimate on the FAR,
20 because we did not exclude chase space and certain
21 things that you do not have to include in FAR. We
22 included it to make sure that it was the most
23 accurate, conservative calculation.

24 CHAIRPERSON GRIFFIS: Okay.

25 MS. BROWN: And thirdly, with respect to

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1 the estoppel argument, I think that that does appeal
2 to the entire appeal, not necessarily because of
3 whether KCA made a timely filing. It goes to how
4 Montrose, LLC will be harmed if this Board takes
5 action and says that the roof structure is not in
6 compliance or something isn't in compliance.

7 It's too far along now, at this point, for
8 the Board to go back after Montrose has relied in good
9 faith on the affirmative acts of the District and has
10 proceeded in good faith. Another allegation is that
11 they proceeded in bad faith, which they did not.
12 There are no unclean hands here. Permits were posted.
13 There were offers to consult with.

14 VICE CHAIR MILLER: When were permits
15 posted?

16 MS. BROWN: Permits were posted at the
17 second floor windows of the building, because there
18 was no glass in the windows of the first floor level
19 to post them, so they were put in the second floor
20 windows to make sure that they were protected from the
21 elements.

22 VICE CHAIR MILLER: My question was when?
23 When was the March 11, 2003 permit posted?

24 MS. BROWN: When it was issued on the part
25 of the -- and I would have to consult with Montrose

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1 very quickly, but it was soon after. When it's
2 required to be posted, they put it in the window.
3 They are an experienced developer. They know what
4 needs to be done.

5 It was then moved down to the first floor
6 level, still because there was complaint about it not
7 being as visible from the second floor window. They
8 moved it down, put a tarp over it to protect it from
9 the elements, and it was just lifting it up,
10 apparently, to help make it -- to see it. And I
11 believe that there is only -- well, I won't go into
12 that, because I don't want to start testifying on
13 behalf of Montrose.

14 So in conclusion, I would take exception
15 to the fact that you have jurisdiction over this
16 matter. I do not believe you have any jurisdiction
17 over the March 11th permit. There was plenty of time
18 to appeal it. No one did. They had knowledge and,
19 again, looking at things in a light most favorable to
20 the appellant, which is a standard for summary
21 judgment, which we don't need to apply here, but even
22 if you look at it most favorably to them, they still
23 failed to appeal it and, you know, it's not just a
24 minor technicality that needs to be fixed. It's a
25 significant omission and you just can't go back and

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1 amend it now. So thank you very much.

2 CHAIRPERSON GRIFFIS: Thank you. Mr.
3 Etherly?

4 BOARD MEMBER ETHERLY: Mr. Chair, if I
5 could, just one quick question for Ms. Brown. If I
6 understand correctly, 3-11 clearly is a key date,
7 because that's permit issuance. Your argument is
8 okay, if you don't buy 3-11, let's move to 3-19 when
9 the ANC held its Zoning Planning and Transportation
10 Committee Meeting. Then, and I'm just trying to
11 follow the logic of your argument, if you don't
12 necessarily buy that particular date, the absolute
13 latest time should have been September 11, 2003.

14 Now, what I want to be sure I understand
15 is keep in mind what the law here is. An appeal must
16 be filed within 60 days from either the date the
17 appellant had notice or knowledge of the decision
18 complained of or the date the appellant reasonably
19 should have known of such complaint.

20 So if we buy, let's say for example, March
21 11th, I'm not comfortable with that, just for the sake
22 of argument, and let's say also further that I'm not
23 comfortable with March 19th, wouldn't this appeal be
24 timely if you settle on September 11th as the date by
25 which point the appellants should have known of the

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1 decision of which they are complaining of?

2 MS. BROWN: By my count, 60 days after
3 September 1 would be November 1, and they still
4 haven't. It's only March 2nd that they have appealed.

5 BOARD MEMBER ETHERLY: Okay. You're on
6 the September date. You're saying September 1 should
7 be the date, not September 11th?

8 MS. BROWN: Okay. That's what I say.
9 Let's even take it further out.

10 BOARD MEMBER ETHERLY: Okay.

11 MS. BROWN: Let's say the first time that
12 they had a full set of drawings, let's say October
13 17th, so then we get to November 17th, December 17th,
14 they still only are appealing this March permit on
15 March 2nd when they filed this, and it's veiled in
16 their -- that's the only time we have seen this.
17 That's the first time we have seen a request to amend
18 the appeal to include the March 11th permit.

19 BOARD MEMBER ETHERLY: Okay. Okay.
20 Thank you, Mr. Chair.

21 CHAIRPERSON GRIFFIS: Anything else from
22 the Board? Okay. Ms. Ferster?

23 MS. FERSTER: Thank you. As you know, we
24 have submitted a joint opposition with the Advisory
25 Neighborhood Commission, which I think sets out in

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1 great detail the legal arguments that we have made in
2 opposition to the motion to dismiss and I will not
3 repeat them now. I will also draw your attention to
4 the fact that we have submitted three declarations on
5 behalf of persons who had personal knowledge of the
6 facts in this case to rebut the factual statements
7 that were made by counsel from Montrose in its motion
8 to dismiss, which were not substantiated by any
9 affidavits or declarations of their own going to the
10 issues relating to posting of the permit, for example,
11 or what was or was not displayed at the May meeting.

12 At this point, those are unrebutted. I
13 will respond very briefly just to the proffer of
14 testimony that Ms. Brown has provided regarding the
15 posting of the permits. As you know, they have
16 submitted no evidence that they posted the permits
17 attached to the motion to dismiss, other than the In-
18 Towner article, which, in fact, said the opposite.
19 The In-Towner article indicated that a reporter had
20 gone into the building, asked to see the posted
21 permits and inquired about where they were, and was
22 asked to leave the premises by Montrose's
23 representative and told that the permits would be
24 posted "when we feel like it."

25 Now, Ms. Brown says permits were, in fact,

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1 posted on the second floor window, and I submit simply
2 again to the extent that she can offer witnesses that
3 support that testimony, a permit posted in the second
4 floor window, particularly when there is a denial of
5 access, is simply not going to give anybody knowledge
6 of the fact that the permit was issued or its
7 contents, and certainly not of the plans.

8 Anyway, our witnesses are available. They
9 are prepared to swear to the statements they have made
10 in their declarations, and they are available for
11 cross examination should the Board see fit. Let me
12 just point out the following then just to conclude and
13 not add to, but to not repeat the arguments we have
14 made in our opposition, but to just summarize them.

15 Kalorama Citizen's Association, due in
16 large measure to its zoning chair, Mrs. Ann Hargrove,
17 is probably one of the most sophisticated and
18 knowledgeable citizen's associations in this city and
19 the most vigilant. It's difficult to see how anybody
20 could suggest that this citizen's association has
21 slept on its rights, because as far as I can see, they
22 don't sleep at all.

23 The Hargrove Declaration and the
24 declarations of Alan Roth and Dennis Weaver both
25 demonstrate the level of attention of vigilance that

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1 was devoted to this issue, both in monitoring the
2 project, asking questions and attempting to obtain
3 information about the project, and the extent to which
4 they were frustrated at each stage of the process. I
5 cannot think of a single thing that they could have
6 done differently that would have given them the
7 information they needed to take this appeal any
8 earlier than they did.

9 The basic problem is this. Permitting
10 decisions are made, insofar as the public is
11 concerned, behind closed doors where only the
12 applicant and the code official have access to the
13 plans and the information, and have the opportunity to
14 ask the questions and understand what is built. The
15 one opportunity that the public has to obtain
16 information and to review that is through the Freedom
17 of Information Act. So that's why this appeal process
18 is really so important.

19 With all due respect to code officials,
20 errors can be made in the permitting process, and the
21 appeal process provides the accountability that is
22 required to ensure that if appeal -- if errors are
23 made, that they are corrected. And it stands to
24 reason that permitting officials will simply be more
25 careful if their decisions are subject to review by

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1 this Board, but this appellate process is not likely
2 and cannot serve that function, that accountability
3 function, if appeals must be filed within 60 days of
4 the issuance of a building permit, even where the
5 issues involve the area zoning requirements, putting
6 aside all the questions about posting and disclosure
7 that are raised by this particular cases.

8 Zoning errors, for example, in making FAR
9 calculations and other measurements affecting height
10 and set-back of buildings are simply not apparent on
11 the face of building permits, and if the Board grants
12 the developer's motion here, the message it would send
13 Kalorama Citizen's Association and every other
14 neighborhood association is that they need to file
15 protective appeals with respect to each and every
16 building permit that's issued in their respective
17 service areas and this cannot be required.

18 It's not fair to place that responsibility
19 on citizen's groups to appeal every single permit,
20 even including obviously innocuous permits based on
21 the assumption that it might contain the kind of gross
22 errors that this particular permit contained.
23 Citizens, instead, are entitled to presume that
24 Government officials are doing their job.

25 And just to provide you with an example,

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1 if 100 permits are issued in a particular service
2 area, that's \$800 per permit to appeal it, \$80,000 a
3 year. Citizens just cannot foot the bill for doing
4 that level of monitoring, which would be required if,
5 in fact, they had to file appeals within 60 days.

6 CHAIRPERSON GRIFFIS: Okay.

7 MS. FERSTER: Of permits being issued.

8 CHAIRPERSON GRIFFIS: Let's move away from
9 the general discussion of changing our regulations.
10 As they do state, it's going to be 60 days from the
11 knowledge of a decision, and then from that decision
12 date you have 60 days to put together whether there is
13 a successful appeal or not in the file.

14 What are you saying that the milestone is,
15 in this case, because the Board has the jurisdiction
16 to find that there were particular or extenuating
17 circumstances by which we could extend that timing,
18 but when was constructive knowledge known? And it's
19 not when was the error, when was the noncompliance
20 known. When was constructive knowledge known that
21 something was happening there of which they should
22 have been attended to?

23 MS. FERSTER: Well, I think we have set
24 that out in our opposition, but let me just --

25 CHAIRPERSON GRIFFIS: Yes, but now I'm

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1 giving you the opportunity to say it.

2 MS. FERSTER: Yes, I would be happy to
3 resay it. I would be happy to restate it. We think,
4 of course, that the facts, as set forth in the
5 declarations that we have submitted, show precisely
6 the type of exceptional circumstances that
7 substantially impair this citizen's association's
8 ability to appeal the permits within 60 days.

9 BOARD MEMBER ETHERLY: But, Ms. Ferster,
10 what --

11 MS. FERSTER: The point.

12 BOARD MEMBER ETHERLY: Just to interrupt
13 you for a moment to follow-up on the Chair's question,
14 what is your key date here?

15 MS. FERSTER: The key --

16 BOARD MEMBER ETHERLY: The way the test is
17 kind of worded in the case law, it's almost two part.
18 To get to exceptional circumstances, you have to
19 first, of course, miss the 60 day window.

20 MS. FERSTER: Yes.

21 BOARD MEMBER ETHERLY: So help us
22 understand, by your account, when should your 60 day
23 clock have started?

24 MS. FERSTER: And I think we said that
25 very plainly in our opposition, October 17th.

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1 BOARD MEMBER ETHERLY: Okay.

2 MS. FERSTER: Is the date on which the
3 clock started running, because up until that time,
4 Kalorama Citizen's Association was obstructed in its
5 efforts to obtain the kind of information it would
6 need to understand that, in fact, the building, which
7 appeared to be too high, in fact, had a roof structure
8 that was not set-back in the appropriate requirement.

9 CHAIRPERSON GRIFFIS: When did it appear
10 to be too high?

11 MS. FERSTER: The declarations that we
12 have submitted indicated that not until mid September
13 did it appear that -- it appeared that it was too
14 high.

15 CHAIRPERSON GRIFFIS: So you would agree
16 that the 11th of September when it was framed, the
17 appearance of it being too high was there?

18 MS. FERSTER: Mid September it appeared to
19 be too high. However, at that point, the Kalorama
20 Citizen's Association was simply placed on notice that
21 it needed to see the plans. That is exactly what that
22 building told it right now.

23 CHAIRPERSON GRIFFIS: But there's distinct
24 issues for our timeliness, and I think they come
25 straight out of the regulations, as I have stated.

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1 There is a point, the milestone of which you know
2 something's going on, and it's not that you have your
3 whole appeal set. You have 60 days from that point to
4 put together your appeal, so you seem to be mixing the
5 two, because I keep hearing you say but they didn't
6 really know that there was such an error or there was
7 a big error. You know, our regulations state that the
8 time starts when the permit is issued, because that's
9 what you're appealing, is the decision of the Zoning
10 Administrator.

11 So outside of when they knew of the
12 specific error, when was it that they knew, had
13 constructive knowledge, of activity or of,
14 essentially, the problem, I guess, without knowing it
15 specifically?

16 MS. FERSTER: The only thing they could
17 have done in mid September was to file an appeal that
18 says it looks like this building is going to be too
19 high and, in fact, they did more than that. They
20 filed a Notice of Intent to Appeal. I don't see how
21 they could have protected their rights any further
22 than that. They formally filed a Notice of Intent to
23 Appeal, said the building looks like it's too high,
24 but we can't get hold of the plans and we can't
25 provide the information that your own appeal form

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1 requires citizens to provide to set out with
2 specificity why it is, in fact, too high.

3 It's possible that, in fact, it wasn't too
4 high. It looked like it was too high, but it could
5 have, upon reviewing the plans, indicated that, in
6 fact, the FAR calculations were correctly performed,
7 that the roof structure set-backs -- somehow, there
8 was an argument that the Zoning Administrator believed
9 was a compelling argument for why the roof structure
10 set-backs did not need to be placed at that, to occur
11 on the east and west sides of the building.

12 There could have been an argument that the
13 Zoning Administrator provided that, indicated that, in
14 fact, the height, indeed, came within the 70 foot
15 limit. It wasn't possible for them to formulate
16 anything, at that point, other than it looks like the
17 building is too high. And no doubt, had they done so,
18 Montrose would have been very quick to have then come
19 in and said that Kalorama Citizen's Association has
20 failed to plead its appeal with the required
21 specificity and that its appeal, as it would
22 eventually formulate, be formulated when it was
23 provided the plans, that the Board was without
24 jurisdiction to hear all the issues that became
25 identified when it did get the information.

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1 I mean, Kalorama Citizen's Association is
2 in a situation here where either it's too early or
3 it's too late, and I think in this case, Kalorama
4 Citizen's Association did every single thing that you
5 would want a citizen's association to do to file a
6 timely appeal, and it was frustrated at every turn.
7 So to the extent that you require that you need to
8 make a finding that extraordinary circumstances exist.

9 I think this case, the facts of this case, make that
10 case very strongly.

11 I would only add the following. In this
12 case and, in fact, I don't think I have anything more
13 to say. I just think it's the strongest case that I
14 can possibly put to you right now, is that this
15 citizen's association did everything it could to bring
16 this appeal to you on a timely basis, and it could not
17 possibly have brought that to you earlier.

18 CHAIRPERSON GRIFFIS: Thank you very much.

19 Clarification questions from the Board? Mr. Etherly?

20 BOARD MEMBER ETHERLY: Thank you, Mr.
21 Chair. Mrs. Ferster, should we be -- in the context
22 of your argument, is it problematic or is it a red
23 herring to -- I think if I hear Montrose's argument
24 correctly, there is also kind of a subtle allegation
25 here that what you appealed doesn't get you, let's

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1 assume, arguendo, that you were timely. Even if you
2 were, what you appealed were only the first and second
3 revisions and not that, not the original March permit.

4 Why not simply appeal all of it in
5 September or at the October 17th date? Why not simply
6 go for the gusto and throw it all on paper? I mean, I
7 appreciate your use of the phrase, and I will give you
8 credit, the coining of the phrase protective appeals,
9 so to speak, but why not simply do it?

10 MS. FERSTER: Well, as I think the
11 Hargrove Declaration explains or opposition explains,
12 the thinking of Kalorama Citizen's Association, at the
13 time it formulated the appeal, is that this was, in
14 fact, a piecemeal permitting process and it wanted to
15 make sure that their appeal focused on the project as
16 it is now configured, and that's why the focus was on
17 the October 6th and 17th permits, because as Kalorama
18 Citizen's Association perceived it, that was the
19 project. It was the authoritative version of the
20 project, and that references to the March permit would
21 simply be confusing, because that project is no longer
22 the project.

23 But to the extent that we have -- there is
24 a question of the scope of our appeal. We did
25 provide, indicate that we would move, that we would be

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1 allowed to amend our appeal. If there is any
2 unveiling of that motion in our opposition that needs
3 to be done, I will unveil it now.

4 BOARD MEMBER ETHERLY: Okay.

5 MS. FERSTER: We ask that you amend our
6 appeal to include the March 11th permit, and I would
7 also point out that there is no prejudice whatsoever
8 for granting that motion to amend. The Montrose was
9 plainly on notice from back in September throughout
10 this proceeding that the issues that are on appeal
11 here relate to the roof deck and the roof railing and
12 the set-back of the roof structure. So they know
13 what's on appeal and there is no -- to the extent that
14 there is any technical deficiency, it can be remedied
15 right now without any prejudice to anybody else.

16 And then I would just simply say that if
17 you look at the wording of our appeal, it clearly says
18 roof structure, roof height, roof structure set-back,
19 FAR. I mean, there is no ambiguity there. The only
20 technical question is that the numbers of the March
21 11th permit are not there, and that can be remedied if
22 it's necessary.

23 BOARD MEMBER ETHERLY: Okay. Okay. So
24 just to be sure I'm clear without going into the whole
25 amendment of the appeal piece for right now, the

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1 argument is there wasn't enough knowledge or
2 understanding regarding the breadth of this project in
3 mid September or, arguably, even into early October,
4 such that KCA felt that it had a workable or a
5 specific enough appeal to bring before this body.

6 Part of that argument, I think, you didn't
7 reference it directly, but I think that's also where
8 your concerns regarding the DCRA role that is being
9 alleged here or lack of responsiveness, so to speak,
10 that is being alleged, that also, I think, is part of
11 your argument here, that you just simply, because of
12 the alleged lack of cooperation, you weren't able to
13 pull the full story together and you waited until you
14 absolutely felt you could, which was, essentially,
15 November to actually put the full appeal on paper.

16 MS. FERSTER: That's correct.

17 BOARD MEMBER ETHERLY: Okay. Thank you.
18 Thank you, Mr. Chair.

19 CHAIRPERSON GRIFFIS: Do you have a
20 question?

21 BOARD MEMBER ZAIDAIN: Yes, I have a
22 question for Ms. Ferster. Are there issues, the best
23 way to word this, are there issues that are raised or
24 that are dealt with in the October 6th and 16th permits
25 that you are not appealing that are contained in the

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1 March 11th permits?

2 MS. FERSTER: Well --

3 BOARD MEMBER ZAIDAIN: Basically, what I'm
4 asking is why do you want to roll in the March 11th
5 permits, because it seems to me the same general, and
6 let me put it out there, the issues you're dealing
7 with, to me in my mind, were contained in the October
8 6th and 16th permits, which I think we can get into to
9 more in the deliberation, so I'm trying to understand
10 why you're trying to roll in the March 11th permits.

11 MS. FERSTER: Well, because we are trying
12 to protect our rights to appeal all the issues. In
13 fact, I think, as we pointed out --

14 BOARD MEMBER ZAIDAIN: Well, are there
15 additional issues in the March 11th permit that are not
16 in the October 6th and 16th permit?

17 MS. FERSTER: In fact, if you look at the
18 plans for the October 6th and the October 16th permits,
19 all the features that we are appealing here are right
20 in the plans for the October --

21 BOARD MEMBER ZAIDAIN: October 6th and 16th?

22 MS. FERSTER: The October permits, which
23 is again one of the reasons why we felt that, in
24 effect, the reference to the October 6th and 16th
25 permits were sufficient. But again, we don't want to

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1 have any technical deficiency cutting off the issues
2 that we want to substantively appeal.

3 BOARD MEMBER ZAIDAIN: Okay.

4 MS. FERSTER: So by all means, if you
5 wish, allow us to amend our appeal to include
6 reference to the March 11th permit. However it gets
7 our issues before this Board, we're amenable to it.

8 BOARD MEMBER ZAIDAIN: Okay. And you
9 answered the question, I think, from Mr. Etherly
10 earlier about when you felt like your clock started
11 running, and you said October 17th. Am I correct?

12 MS. FERSTER: That's correct.

13 BOARD MEMBER ZAIDAIN: And just to make
14 sure I'm clear, what was your basis for saying that,
15 because of the permits?

16 MS. FERSTER: October 17th was the first
17 date in which Kalorama Citizen's Association was given
18 access to the plans associated with the permit.

19 BOARD MEMBER ZAIDAIN: Okay. Thank you.

20 MS. BROWN: If I may just interject very
21 quickly, I think that the applicant would take, I'm
22 sorry, the developer would take exception to the fact
23 that there is no prejudice. There is, indeed,
24 prejudice based on, in our argument, that if you do
25 start going back and grabbing the March 11th permit,

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1 it's getting to issues that are not pertinent to the
2 October permits.

3 So we would be prejudiced, and I think
4 that it would set up a bad precedent for every other
5 applicant who has permits that need to be revised, and
6 that you can reach back and get something else that
7 just happens to be on the drawing as well. And again,
8 you know, while the roof deck and railing are there,
9 there was no change and there is no dimension or
10 identification material, so I just don't know how you
11 can get to it.

12 CHAIRPERSON GRIFFIS: Okay. Mr. Etherly?

13 BOARD MEMBER ETHERLY: Mr. Chair, one
14 final question and actually, if I could, let me
15 redirect back to Mrs. Brown for a moment here, because
16 I think I'm beginning to kind of flush this out in my
17 head in terms of thinking. I know we still have DCRA
18 and the ANC to hear, but with regard to -- actually, I
19 will hold that question off, Mr. Chair.

20 CHAIRPERSON GRIFFIS: Good. Ms. Gilbert?

21 And then I want to hear from the ANC.

22 MS. GILBERT: Hi, Laura Gisolfi Gilbert,
23 Department of Consumer and Regulatory Affairs, Office
24 of the General Counsel, and I think you asked for the
25 address, 941 North Capitol Street, N.E., Washington,

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1 D.C. 20002. I am going to be very brief. I will be
2 less than your original five minutes.

3 I just want to say that first, I think it
4 is very relevant that the appellants did not appeal
5 the original permit, the March 11th permit, when they
6 filed their appeal on November 10th. So clearly, at
7 that point, they had notice of the issues and, you
8 know, at that point, if they had any thoughts that
9 there were any issues with relation to the original
10 permit, they should have included the original permit
11 in their appeal even with the thought that well, it
12 might get kicked out as being untimely, but let's
13 throw it in here.

14 It seems to me that the appellants
15 themselves, possibly, either they only wanted to
16 appeal the issues in the two revised permits or they
17 themselves were aware or believed that the appeal of
18 the March 11th permit would be untimely.

19 The only second point that I want to make
20 is that the regulation, 11 DCMR 3112.2(a), simply says
21 within 60 days from the date the person appealing the
22 decision had notice or knowledge of the decision
23 complained of or should have known, whichever is
24 earlier. DCRA typically or I shouldn't say typically,
25 routinely is the word I'm looking for, sends out

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1 notice to ANCs every two weeks of the permits that
2 have been issued within that two week period, and we
3 also email that notice.

4 CHAIRPERSON GRIFFIS: What does that
5 notice look like?

6 MS. GILBERT: I don't have one with me.

7 CHAIRPERSON GRIFFIS: What is the
8 information provided on it?

9 MS. GILBERT: A list of the permits that
10 are issued.

11 CHAIRPERSON GRIFFIS: So it's the permit
12 number?

13 MS. GILBERT: A list of the permits that
14 have been applied for and a list of the permits that
15 have been issued with the address.

16 CHAIRPERSON GRIFFIS: So it would have an
17 address?

18 MS. GILBERT: It would have an address.

19 CHAIRPERSON GRIFFIS: Of 1889 Belmont?

20 MS. GILBERT: 1819.

21 CHAIRPERSON GRIFFIS: Permit No. B455873
22 issued?

23 MS. GILBERT: That's correct.

24 CHAIRPERSON GRIFFIS: That's what it would
25 be, a whole list of that?

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1 MS. GILBERT: Right.

2 CHAIRPERSON GRIFFIS: Okay.

3 VICE CHAIR MILLER: But it is your
4 position then that they are noticed about a permit and
5 that it's up to them to go find out if there are any
6 problems at that point?

7 MS. GILBERT: Well, what I wanted to say
8 is that even, you know, looking at the March 19th
9 meeting, that there is a dispute in the facts as to
10 exactly what issues were raised, but even if we take
11 that, as the appellants have suggested, that the issue
12 was the curb cut and they were not really focused upon
13 the height of the building and that kind of thing.

14 Certainly, over the next couple of months,
15 based on the appellant's own chronology, they -- well,
16 let me step back a moment. They had notice of the
17 permit, I would say, easily within two weeks after it
18 was issued, if not sooner, from DCRA. So that would
19 be the first point, the first date that we're looking
20 at.

21 VICE CHAIR MILLER: Does that permit --

22 MS. GILBERT: And I think in the --

23 VICE CHAIR MILLER: Excuse me. Does that
24 permit describe what the permit is for?

25 MS. GILBERT: You know, I --

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1 VICE CHAIR MILLER: For instance, here
2 there are other permits that were posted in that
3 building. Would they --

4 MS. GILBERT: Does the notice describe? I
5 think it's fairly brief. It's been awhile since I
6 looked at one of those notices. I was trying to get
7 one in hand this morning and didn't succeed, but
8 generally it's the permit numbers and the address, I
9 know were included in those notices, and I believe,
10 you know, it tells you whether it's a building or a
11 raze permit.

12 CHAIRPERSON GRIFFIS: Right. There is no
13 narrative involved.

14 MS. GILBERT: You know, it may have some
15 additional wording like addition or something like
16 that.

17 CHAIRPERSON GRIFFIS: Right.

18 MS. GILBERT: It's not detailed.

19 CHAIRPERSON GRIFFIS: And you said
20 periodically, they go out or are supposed to go out
21 every two weeks?

22 MS. GILBERT: They go out every two weeks.

23 CHAIRPERSON GRIFFIS: Mr. Roth, who I'm
24 sure we're going to hear from, has pages, in fact, of
25 how difficult the not receiving, receiving and all

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1 that. Do you dispute any of that aspect?

2 MS. GILBERT: I can only say, I mean,
3 we're not taking factual testimony here. I can only
4 say that our people say they do go out.

5 CHAIRPERSON GRIFFIS: Okay. Okay.

6 MS. GILBERT: And the only other thing I
7 was going to mention in that vein is that that will be
8 the first date, is what I was going to say, the date
9 that they had notice of the permit.

10 Beyond that, what I wanted to say is that
11 even, you know, if having notice of the permit itself
12 didn't alert the appellants to the other issues that
13 were involved, I think that, based on their own
14 chronology in which they talked about the March 19th
15 meeting where the curb cut became an issue, let's
16 assume that they were not provided with any specific
17 height information and were not alerted to that issue,
18 at that time, over the period of the next couple of
19 months, as the construction took place, it's apparent
20 that they had a number of issues, at least from an
21 aesthetic standpoint, with the construction that was
22 going on, so that from that perspective, it would
23 appear that the ANCs would have made further inquiries
24 to DCRA.

25 Our practice, and I cannot, you know, I'm

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1 not trying to testify here as to what happened
2 specifically in this case, our practice with ANCs is
3 not to require a FOIA request to get copies of plans,
4 but to allow ANCs to look at plans for things that
5 have to do with projects in their District that may
6 have an impact on neighborhood and planning and
7 development during the process.

8 VICE CHAIR MILLER: Excuse me, but we are
9 talking about this case and why was a FOIA request
10 necessary in this case?

11 MS. GILBERT: As I say, it would not have
12 been for the ANCs.

13 VICE CHAIR MILLER: Oh, because it wasn't
14 the ANC making the request. Is that what you're
15 saying?

16 MS. GILBERT: I'm saying if it was not an
17 ANC making the request, then a FOIA would have been
18 required. If the ANC is making the request, a FOIA is
19 not supposed to be required based on our usual
20 practice.

21 VICE CHAIR MILLER: Okay. That's all I
22 have.

23 BOARD MEMBER ETHERLY: Two quick
24 questions. Perhaps not quick, but the first one is
25 how do you then dispose of the argument, Mrs. Gilbert

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1 that, once again let's assume that ANC did receive
2 notice, is that notice chargeable to KCA who is the
3 appellant in this case? That's kind of --

4 MS. GILBERT: Right.

5 BOARD MEMBER ETHERLY: Think on that for a
6 moment.

7 MS. GILBERT: Okay.

8 BOARD MEMBER ETHERLY: But perhaps the
9 larger question is does DCRA have a position or a
10 response to, I think, a lot of the -- I don't want to
11 be flippant by using the term game, but a lot of the
12 game here is the back and forth that took place or did
13 not take place between KCA and DCRA.

14 Does DCRA have a position on whether or
15 not that back and forth, and KCA's allegation is we
16 didn't get the cooperation we needed from DCRA, we
17 didn't get the documentation, so we couldn't put the
18 appeal together, how do you respond to that concern?

19 MS. GILBERT: Well, what I want to say is
20 even if that were the case, they didn't appeal the
21 original permit in November when they appealed the
22 other permits, so I can't -- you know, I don't want to
23 stand here and dispute the declarations that have been
24 submitted by KCA. On your first question, I would say
25 that, you know, the ANCs are members of KCA. Now,

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1 whether that constitutes legal notice to KCA is
2 another question.

3 BOARD MEMBER ETHERLY: Is that a question
4 you're prepared to opine on, because I think it's a
5 critical one?

6 MS. GILBERT: Right.

7 BOARD MEMBER ETHERLY: You know, from a
8 notice standpoint.

9 MS. GILBERT: Right.

10 BOARD MEMBER ETHERLY: And feel free to
11 demure here.

12 MS. GILBERT: Right.

13 BOARD MEMBER ETHERLY: I'm not trying to
14 catch you in a snare.

15 MS. GILBERT: I'll demure for the moment.

16 BOARD MEMBER ETHERLY: But I think it is a
17 critical question.

18 MS. GILBERT: Right, right.

19 BOARD MEMBER ETHERLY: Thank you, Mr.
20 Chair.

21 CHAIRPERSON GRIFFIS: Mr. Roth?

22 MR. ROTH: Thank you, Mr. Chairman. For
23 the record, Alan Roth, Chairperson of ANC-1C and
24 Commissioner Brian Weaver sitting alongside me whose
25 single member District is where this property is

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1 located. Thank you for allowing me this opportunity
2 to briefly add a few points. I originally had five
3 specific points I wanted to hit based upon everything
4 that had come before me, but I have to add a sixth
5 based on the --

6 CHAIRPERSON GRIFFIS: Can we put the
7 photographs down, please?

8 MR. ROTH: I have to add a sixth based on
9 some things that Ms. Gilbert just said. First, I just
10 checked with Commissioner Weaver, but neither he nor I
11 are members of the Kalorama Citizen's Association.

12 CHAIRPERSON GRIFFIS: Should we ask you to
13 leave the room?

14 MR. ROTH: Well, I think it may be the
15 first time in my political career where that has been
16 an advantage in our neighborhood, but suffice it to
17 say I think Mr. Etherly hit the nail on the head,
18 which is that whatever notice there may have been to
19 the ANC, and I stress the word may, it certainly does
20 not constitute knowledge or notice to the KCA and as a
21 matter of interpretation or law or policy for the
22 District as a whole, I would think it would be a
23 terrible mistake for the Board to interpret those
24 regulations to mean that notice to the ANC, which in
25 many parts of the city either don't function well or

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1 don't have any relations of any nature with local
2 citizen's associations.

3 CHAIRPERSON GRIFFIS: Okay. But we're not
4 arguing the larger issue. The regulations state that
5 within 60 days from the date the person appealing the
6 administrative decision had notice or knowledge of the
7 decision complained of, knowledge of the decision
8 complained of, or reasonably should have known.

9 MR. ROTH: Reasonably should have known.

10 CHAIRPERSON GRIFFIS: Should have had
11 notice or knowledge of the decision complained of.

12 MR. ROTH: Right.

13 CHAIRPERSON GRIFFIS: Whichever is
14 earlier. When should they have known or did they know
15 of the decision?

16 MR. ROTH: Well, this goes back to -- and
17 let me say first I concur with all of Ms. Ferster's
18 points, but this goes back to the question of
19 September 11th versus October 17th, and I want to go
20 back again to this issue of protective appeals,
21 because I think it's relevant to how you interpret
22 that provision.

23 It is not just a matter of somebody
24 walking into the office next door, asking for a form,
25 filling it out and submitting it. First of all, there

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1 is an expense attached to that. Second, there is an
2 issue of whether it's appropriate for somebody to just
3 walk in and say I don't like the way that building
4 looks. I think it looks too high. I think it looks
5 like the sides of that building are too far out. I
6 want to file an appeal.

7 I mean, I don't know what kind of legal
8 exposure that puts the appellant to in that case for
9 filing what could turn out to be a completely
10 baseless claim, but I don't think that that's
11 something that the Board wants to countenance. And so
12 I think it was totally appropriate for the KCA to take
13 the position that we cannot determine, particularly
14 because, as it turns out, the height of the building
15 after the parapet came down and after changes in the
16 pitch of the roof were made and so forth and so on, it
17 ended up being 69 feet, 9 and 3/8 inches, 5/8s of an
18 inch off of 70 feet.

19 CHAIRPERSON GRIFFIS: It better be level,
20 huh?

21 MR. ROTH: I think it was completely
22 appropriate, at that point, for the KCA and other
23 interested parties to come down to DCRA and say let's
24 see the plans. Let's see what the truth of the matter
25 here is. I don't think that the Board would want

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1 people walking in and just filing those kinds of
2 appeals on a whim. So I agree, October 17th is the key
3 date and should be the key date. You can't just say
4 you don't like a building.

5 And interestingly, as late as October 1st
6 at an ANC meeting, the ANC meeting where Ms. Brown
7 made reference to an ANC resolution supporting the
8 KCA's filing of a Notice of Intent to Appeal, which
9 was filed, by the way, on September 16th, as late as
10 October 1st, at least five days before they had their
11 revised permits, Montrose came to that ANC meeting and
12 continued to insist that they were in full compliance
13 with the zoning laws and with the Height Act.

14 And so, if as late as October 1st, they
15 themselves are coming to a public meeting and
16 insisting that they are still saying they are doing
17 everything right, then it certainly seems appropriate
18 in that case for the KCA to be given the latitude to
19 say we're going to wait until we see the final plans.

20 And at least with respect to the issue Ms.
21 Gilbert raises here at the end about what we could
22 have given to the ANC without any problem, Jim Graham
23 couldn't get them. We were all gathered in a meeting
24 in his office. We had Ms. Lewis on the telephone with
25 Mr. Noble. They terminated the conversation. They

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1 were supposed to reschedule it the next morning. They
2 failed to come back to the phone the next morning.

3 Later that afternoon, eventually the KCA
4 got the plans, which gets to another point that I was
5 going to make, which is the appellant in this case is
6 the KCA, but the appellee is not the developer. The
7 developer certainly is a party in interest, but the
8 appellee is DCRA. DCRA bears some responsibility here
9 for whatever time problem may have occurred. They
10 stalled. They stonewalled. They canceled this phone
11 call that was supposed to take place. The council
12 member himself, who is not subject to FOIA legally --

13 CHAIRPERSON GRIFFIS: Where are we going
14 with that, Mr. Roth?

15 MR. ROTH: The point is here, again, on
16 the issue of timeliness, I guess this goes to the
17 exceptional circumstances. If you get beyond the 60
18 day issue, if you were to come to the conclusion that,
19 you know, we missed the 60 days, that the KCA missed
20 the 60 days, there is no question in my mind that with
21 regard to exceptional circumstances, in addition to
22 all of the covering up and the deceptions and
23 everything else recited in the declarations, which, by
24 the way, I'm sure Commissioner Weaver and I are both
25 prepared to adopt under oath here, that in addition to

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1 all of the actions of the developer, the appellee,
2 DCRA's, conduct itself is responsible to a great
3 degree for the KCA being unable to file its appeal
4 quicker than it did. It finally got these plans on
5 October 17th and the appeal was filed just a tad over
6 two weeks beyond that.

7 CHAIRPERSON GRIFFIS: Okay. Thank you
8 very much. I think that's good information. This
9 isn't the first appeal the Board has gone through.
10 It's not the first preliminary matters that are
11 identical. It's fairly clear, in fact, to the Board
12 that we have difficulty with our regulations and how
13 we ask people to file appeals and what the regulations
14 actually require in terms of timeliness, the 60 days.

15 It goes to when they knew of a decision.
16 Obviously, we have heard great extent of the fact of
17 how difficult it is to think that you need to file an
18 appeal without knowing the substance of it. You may
19 well-know the decision, but whether 60 days is a
20 viable amount of time to actually substantiate that
21 there was an error made by the Zoning Administrator
22 and then to put together an appeal, all those are the
23 large issues. I think the Board will certainly
24 continue to look at that and to recommend to the
25 Zoning Commission any changes that seem to be

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1 appropriate to do so.

2 However, let's get to the specifics of
3 this case and look at the time. I think we have had
4 ample opportunity now to, as I promised, 25 minutes of
5 brief summation. That's right, everyone check your
6 watches. We're going on close to 60 minutes on that,
7 but it's appropriate time and I think it was well
8 used. Mr. Zaidain, did you have further? Very well.

9 I would open it up to Board discussion at this point.

10 BOARD MEMBER ZAIDAIN: Mr. Chair, I guess
11 I'll go ahead and hop in just because I think this is
12 pretty, at least in my mind and I'm definitely looking
13 at this in a different light, and a lot of these
14 issues with DCRA stonewalling and who didn't receive
15 plans and whatever, I frankly don't get to, not to say
16 that they are without merit and let me explain why.
17 Our regulations are 60 days from the decision of an
18 administrator, and in these instances, decision of the
19 Zoning Administrator certifying the legality of some
20 elements of a building under the Zoning Regulations.

21 So if you look at KCA's claims in their
22 submission, in their prehearing submission from the
23 first go-round, it had to deal with height of the
24 building, FAR, roof structure, etcetera. So in my
25 mind, when it comes to the timeliness issue, you look

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1 at those elements and you go okay, when was the last
2 decision made about those elements, and to me it's the
3 October 6th and 16th permits. It's right there.

4 And this Board has held that revised
5 permits restart the clock, and it reopens those
6 issues, because citizens need to be able to second
7 guess the revised permits. Just because you go pull
8 one permit and the 60 days go by does not mean you are
9 relieved of all requirements if you pull revised
10 permits. That's another decision that has merit in
11 being appealed.

12 In regards to the piecemealing aspect, and
13 I'm sure we'll hear more about this in the hearing
14 once we get to it, which I'm certain we will, it
15 doesn't seem like this project was being piecemealed
16 at all. I mean, if construction began in September
17 and the building was almost framed, you know, not
18 thereafter, and then they pull revised permits to
19 clarify FAR and height and roof structures, that's not
20 piecemealing. It sounds like the project was still
21 evolving in my mind, so how can we hold the community
22 -- I mean, seriously, I mean if --

23 CHAIRPERSON GRIFFIS: How does a project
24 evolve when a base building permit has been applied
25 for and granted?

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1 BOARD MEMBER ZAIDAIN: Well, I mean, how
2 can you start construction when you're not clear on
3 what your FAR is and you're not clear on the height of
4 the building.

5 CHAIRPERSON GRIFFIS: That's not the
6 question. How can you get a permit if you're not?

7 BOARD MEMBER ZAIDAIN: I mean, well,
8 that's a good point. I don't know the answer to that,
9 but to me the bottom line is for all the issues that
10 KCA has raised, I think they are clearly encompassed
11 in the October 6th and 16th permit, and I think that the
12 appeal is timely.

13 CHAIRPERSON GRIFFIS: So if I understand
14 you correctly, you find that the scope in the revised
15 permit of October 6th and 16th encompassed the roof
16 structure, the height?

17 BOARD MEMBER ZAIDAIN: Yes.

18 CHAIRPERSON GRIFFIS: The FAR?

19 BOARD MEMBER ZAIDAIN: I think from my
20 understanding of what we have heard and what I have
21 read, they are recertifying the legality of those
22 elements, and I think they're right to an appeal.

23 CHAIRPERSON GRIFFIS: Okay. And what
24 about the roof deck and railing? Is that part of the
25 roof structure, the height? Is it all attendant to

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1 those issues?

2 BOARD MEMBER ZAIDAIN: In my mind they
3 are. I would like to hear some more discussion about
4 that.

5 CHAIRPERSON GRIFFIS: Okay.

6 BOARD MEMBER ZAIDAIN: But I think that
7 they are certainly, certainly they are.

8 CHAIRPERSON GRIFFIS: And the attic space,
9 how does the attic space fit in?

10 BOARD MEMBER ZAIDAIN: I think that's
11 attendant to height.

12 CHAIRPERSON GRIFFIS: To height and roof
13 structure?

14 BOARD MEMBER ZAIDAIN: Yes.

15 CHAIRPERSON GRIFFIS: I see. Others? I'm
16 sorry, unless you have more to say.

17 BOARD MEMBER ZAIDAIN: No, that's it.

18 CHAIRPERSON GRIFFIS: Okay. Oh, actually,
19 Mr. Zaidain, following up on your point of the
20 piecemeal, that always gives me great pause, too,
21 because I think there is oftentimes a misunderstanding
22 of how many permits it might take to do a standard
23 project. I mean, to do a demolition and to do a
24 sheeting and shoring, that's not piecemeal.

25 BOARD MEMBER ZAIDAIN: Well, I -- yes.

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1 CHAIRPERSON GRIFFIS: But let me finish.

2 BOARD MEMBER ZAIDAIN: Go ahead. I'm
3 sorry.

4 CHAIRPERSON GRIFFIS: Until I started to
5 look at what the base building permit was articulated
6 as, and then started to look at the revisions, it
7 seems to me on the face of what the revision permits
8 actually were labeled, there seems to be some
9 substantial amount of scope of work that was done, and
10 a full understanding of what was to be completed, it
11 seems to be, could have been in question, whether that
12 goes substantially to the specific circumstances that
13 would extend our timeliness, I don't know.

14 However, if we follow in your frame of
15 mind that the revised permits are appealable and
16 timely and they follow the scope that's under the
17 appeal, I don't disagree with that.

18 BOARD MEMBER ZAIDAIN: Okay. I mean, and
19 just to follow-up the conversation on piecemeal, I
20 mean, a lot of the issues, to me, you know, getting
21 revised permits in this piecemeal type of approach
22 would be for, you know, clarifying for administration
23 or minor elements. I mean, when you're trying to get
24 clarity on FAR and basic components of what a building
25 would be, you know, almost six months or so after you

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1 have pulled your original base permit, I mean, to me
2 that's problematic. But regardless of all that, I
3 think that the revised permits encompass all of the
4 issues raised in the appeal and certainly make it
5 timely.

6 CHAIRPERSON GRIFFIS: Okay. Ms. Miller?

7 VICE CHAIR MILLER: Well, first I would
8 like to concur that I think the issues in the March
9 11, 2003 permit were intended to be included in the
10 appeal of the revised permits and could be, upon the
11 reading of the description, that it alleges
12 noncompliance with plans with FAR, height and set-
13 back. And we often will allow parties to amend
14 appeals to include other permits that they haven't
15 appealed, but I think we look at at least two things.

16 One is it is a new issue, totally
17 unrelated, and that is not the case here, in which
18 case we might not allow it and second of all, is it
19 timely, and I think that the facts that we have heard
20 are at least that September 11th or 12th was the first
21 date that we could say that the parties had notice of
22 the decision complained of, being that building
23 permit, and since the appeal was filed November 10th,
24 we can conclude that this appeal is timely, within
25 those 60 days.

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1 Secondly, I don't know if we have gotten
2 to the next prong, but if, for some reason, the appeal
3 wasn't timely, I think that this certainly falls
4 within the exceptional circumstances that allow for
5 this Board to extend the time for an appeal, and I
6 think the exceptional circumstances in this case would
7 be that the appellants didn't have access to the plans
8 that would allow them to actually articulate a solid
9 appeal in this case.

10 And I also think that the facts show that
11 the appellant acted very diligently on this, and it's
12 not a case where they sat on their rights. And so for
13 all those reasons, I think that it is timely.

14 BOARD MEMBER ZAIDAIN: I'm sorry, I was
15 kind of trying to reorganize my files while Ms. Miller
16 was talking. Are you trying to roll in the March 11th
17 permit to this appeal?

18 VICE CHAIR MILLER: Yes.

19 BOARD MEMBER ZAIDAIN: Okay.

20 VICE CHAIR MILLER: I think that they
21 didn't know until September and this appeal was filed
22 within the 60 days from when the evidence shows that
23 they knew about that building permit, given that we
24 allow them to amend their complaint to reflect that
25 permit.

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1 BOARD MEMBER ZAIDAIN: Okay.

2 CHAIRPERSON GRIFFIS: Are you saying
3 that --

4 BOARD MEMBER ZAIDAIN: And it kind of puts
5 me in an awkward position, because I don't think --
6 and this is what I was questioning Ms. Ferster on, is
7 I don't think they necessarily need to have the March
8 11th permit rolled into it, because I think that the
9 issues that they are raising were covered in the
10 revised permits. So, please, keep that in your mind
11 when I say that I disagree with you. I am not sold
12 that the March 11th permit needs to be rolled into the
13 application.

14 CHAIRPERSON GRIFFIS: Right.

15 BOARD MEMBER ZAIDAIN: And I think there
16 are still some questions of -- I appreciate the
17 testimony we have heard from the citizen's groups and
18 Mr. Roth, and I think there is certainly some merit
19 there, but like I said, I have a hard time getting to
20 that, because I think the October permits is where we
21 need to be and if we were going to roll the March 11th
22 permits in there, I think there needs to be some more
23 significant factual testimony taken.

24 CHAIRPERSON GRIFFIS: Right. How can you
25 be outside and in front of this building that is

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1 entirely framed up and not have knowledge that a
2 decision was made by DCRA for a permit?

3 VICE CHAIR MILLER: You can have
4 knowledge, and I think that what I'm saying is they
5 did have knowledge based on what we have heard as of
6 September 11th, and that an appeal was filed within 60
7 days of the knowledge of that information.

8 CHAIRPERSON GRIFFIS: What was the
9 information they had knowledge of?

10 VICE CHAIR MILLER: That there were
11 problems or concerns about FAR, height, set-back with
12 respect to this building and that a building permit
13 had been -- a few building permits had been issued,
14 and I think that there may be a mistake in belief that
15 the revised permits encompassed all the issues that
16 the first permit raised, and I'm not sure that they
17 do.

18 CHAIRPERSON GRIFFIS: Okay.

19 VICE CHAIR MILLER: And I think that's an
20 understandable mistake if there, in fact, is a
21 mistake, and I don't see any harm to Montrose by
22 including those issues, given that I believe they fall
23 under FAR, height and set-back, which they are on
24 notice in the appeal that was filed.

25 CHAIRPERSON GRIFFIS: Okay. Mr. Etherly?

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1 BOARD MEMBER ETHERLY: Once again, let me
2 just return to my text to center myself here. An
3 appeal must be filed within 60 days from either the
4 date that the appellant had notice or knowledge of the
5 decision complained of or the date the appellant
6 reasonably should have known of such complaint. I
7 think we have, essentially, three dates that are at
8 issue here, and the question is, I think for this
9 body, do you buy any of those three dates? If you
10 don't, then I think you have to get to exceptional
11 circumstances.

12 Here is why I'm just not convinced that
13 March 11th, which was the permit date, is the actual
14 trigger date. Keep in mind that the permit that was
15 granted read, I believe, and I'm looking for the
16 actual permit to take a look at it, but I believe on
17 its face it reflected "Alteration or repair of
18 existing building, addition and rear, add two floors
19 plus attic; retaining wall and stair at rear" with the
20 additional notation indicating "five stories plus
21 basement," and I am reading from Clause 5 of the
22 Hargrove Declaration from the KCA, appellants, that we
23 received in preparation for today's proceedings.

24 I'm just not comfortable with March 11th
25 being as clear cut as I would like it to be. From a

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1 notice to the ANC's standpoint, I think we have heard
2 enough testimony that raises a significant doubt in my
3 mind as to whether the ANC actually received that
4 notice. But once again, with respect to the question
5 that I raised, even if the ANC received notice, I'm
6 not inclined to reach a finding that KCA would be
7 chargeable with that notice. That is my concern about
8 the March 11th date as the trigger.

9 If you then move to March 19th, once again,
10 we had substantial discussion about the infamous or
11 famous Planning and Zoning Transportation Committee
12 Meeting of ANC-1C. We also have submitted in the
13 declaration from Mr. and Mrs. Hargrove discussion with
14 regard to what was presented at that meeting, and I
15 quote from the declaration. "We saw no such
16 elevations at the meeting and none were shared with
17 KCA," and those quotes are provided by the declarants
18 in this case, but there is enough of a question there
19 of what actually was presented to KCA at the March 19th
20 meeting.

21 I haven't heard sufficient comment to
22 rebut that from Montrose in this particular instance.

23 I have used the expression once before, but I will
24 take the old baseball adage, when you have a tie at
25 first base, I think the tie goes to the runner. In

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1 this case the runner, to me, is KCA.

2 With respect to the 9/11 date as a
3 trigger, because of the framing, as a trigger date, I
4 am still inclined to side with the appellant on this
5 particular point, because I am thinking, to some
6 extent, about the larger context here. We have dealt
7 with the issue of appeals before and timeliness, and
8 this -- I believe it was really, for us, 2003 was
9 something of a watershed year where we really started
10 to grapple with waste management with Sisson and with
11 a number of other cases that tried to flush the Zoning
12 Commission's rule out in terms of their efforts to
13 clarify timeliness.

14 9/11 and the framing piece also just
15 really isn't compelling to me, because I am concerned
16 about the suggestion that our citizens have to play
17 Hardy Boy or Nancy Drew to the extent of trying to
18 really ferret out exactly what's happening here. I
19 think we have had some testimony and submissions,
20 which have spoken to efforts on the parts of parties
21 from the appellants and other outside entities that
22 tried to gain access to the site met with varying
23 degrees of success and failure, but clearly the
24 posting, I believe, of the second floor piece in this
25 particular instance doesn't give me the level of

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1 comfort that, from a posting standpoint, the permits
2 were accessible enough for members of the public or,
3 in this instance, for members of KCA to be able to
4 absolutely take note of what was happening on-site
5 based on the discussion that we had around posting.

6 What that leaves me with, Mr. Chairman, is
7 arriving at the date of October the 17th, which is the
8 date that KCA absolutely, positively, unequivocally
9 did receive plans from DCRA. That, in my mind, Mr.
10 Chairman, gets me to the component of the Waste
11 Management case that I think speaks to actual
12 knowledge and clearly speaks to constructive knowledge
13 that, by that point, the appellants clearly should
14 have known, because you have your plans in hand. So
15 in my thinking, Mr. Chairman, I don't think it's
16 necessary to even get to exceptional circumstances
17 here, because I'm saying that I believe the actual and
18 constructive trigger date should be that October 17th
19 start date.

20 Now, I'll just kind of back up a little
21 bit and state -- once again, I don't feel I have to
22 get there, but with respect to exceptional
23 circumstances, clearly, the give and take that took
24 place or did not take place between DCRA and KCA is
25 somewhat troubling here. I'm not making an overall

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1 statement to characterize, as we heard from some
2 parties, was it out and out stonewalling? Clearly,
3 there was a breakdown in communication.

4 Let me simply leave it at that, and I
5 think that breakdown in communication did prevent the
6 appellant, in this instance, from being able to assess
7 the full impact and full scope of the project. And
8 that is why I reach back to the March 11th permit. I
9 think it's a very important distinction, Mr. Chair,
10 that you identify between where Mr. Zaidain is and
11 perhaps where my colleague, Mrs. Miller, is, because
12 that is an important issue here, how far back do you
13 reach. But I want to be very clear that I am reaching
14 back to the March 11th permit with my position. Thank
15 you, Mr. Chair.

16 CHAIRPERSON GRIFFIS: Mr. Parson?

17 COMMISSIONER PARSONS: Mr. Chairman, I
18 align myself with Mr. Etherly and Ms. Miller. It's
19 quite simple to me that until the plans were in hand,
20 true knowledge of this project was not available, and
21 that did not occur until October 17th and that is
22 pretty easy to do the math. Two weeks later they
23 filed an appeal. It's that simple, but I think we
24 would all be benefitted by reaching back to the March
25 11th permit as well.

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1 CHAIRPERSON GRIFFIS: Very well. Think we
2 have flushed this out? Any additional deliberation or
3 is there a motion?

4 BOARD MEMBER ETHERLY: With that motion in
5 mind -- I'm sorry, Mr. Chair, with that deliberation
6 in mind, it would be my inclination, if I can get my
7 bearings straight here, that I would move to deny the
8 motion of Montrose, LLC to dismiss based on
9 timeliness. I want to make sure I parse this out
10 correctly, so I will actually look to my colleagues to
11 help me make sure I hit all the points here, because I
12 think we had a few nuances in terms of the precise
13 counts of the appeal, but one --

14 BOARD MEMBER ZAIDAIN: Well, if you just
15 leave it like that, I'll vote for it.

16 BOARD MEMBER ETHERLY: Okay. So my motion
17 would be to deny the motion of Montrose, LLC to
18 dismiss.

19 VICE CHAIR MILLER: Second.

20 BOARD MEMBER ETHERLY: Thank you.

21 CHAIRPERSON GRIFFIS: We have a motion
22 before us that has been seconded. I think there is
23 just some clarification, because the motion that came
24 before us, although we have couched the time, it
25 actually went to the scope of the appeal, the

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1 appropriate scope of the appeal.

2 BOARD MEMBER ZAIDAIN: Well, I think --

3 CHAIRPERSON GRIFFIS: So I think it
4 wouldn't be adverse, Mr. Etherly, if you wanted just
5 to include in your motion that based on timeliness,
6 the scope and scope of the appeal, the motion to
7 dismiss is denied.

8 BOARD MEMBER ZAIDAIN: Can I make a
9 suggestion? It was my understanding before we got
10 into this, and I don't mean to be contrary of your
11 direction there, but it was my understanding going
12 into this that we were going to treat the March 11th
13 appeal as kind of an amended appeal motion, so to
14 speak. Is there any way we can treat that separately?

15 CHAIRPERSON GRIFFIS: We have to treat it
16 separately.

17 BOARD MEMBER ZAIDAIN: Okay.

18 CHAIRPERSON GRIFFIS: It's coming in as a
19 separate motion. As I laid out, we had three major
20 issues to do.

21 BOARD MEMBER ZAIDAIN: Okay.

22 CHAIRPERSON GRIFFIS: And I summarized
23 just in terms of what was appropriately before us is
24 the scope of the appeal under the motion to dismiss as
25 timeliness, and that's what we have gone through. The

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1 second we have to pick up is, of course, laches and
2 estoppel and then the third would be whether the March
3 -- although, you may be able to roll it in if we find
4 the scope and define the scope, the March 11th permit
5 may be dispensed of.

6 BOARD MEMBER ZAIDAIN: Okay. I'm sorry.
7 Maybe I jumped the gun a little quick, which I may do
8 sometimes, but we're not dealing with the March 11th
9 permit issue in this motion?

10 CHAIRPERSON GRIFFIS: Mr. Etherly?

11 VICE CHAIR MILLER: Mr. Chairman?

12 CHAIRPERSON GRIFFIS: Ms. Miller?

13 VICE CHAIR MILLER: First of all, I don't
14 think there is an argument that the October, the
15 appeal of the revised permits is untimely.

16 BOARD MEMBER ZAIDAIN: Okay.

17 VICE CHAIR MILLER: So that I think we are
18 dealing with the March 11, 2003 issue.

19 CHAIRPERSON GRIFFIS: Okay.

20 VICE CHAIR MILLER: Also, I would say that
21 if we want to be specific as to what this is actually
22 covering, it also challenged whether we had
23 jurisdiction to consider that March 11, 2003 permit,
24 and then the issue of estoppel and laches. So do you
25 want to address it all in one motion?

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1 BOARD MEMBER ETHERLY: Well, what I might
2 suggest, as maker of the motion, is to break it up
3 piecemeal, because I believe we probably do have
4 enough cleavages along, we have a few fault lines that
5 probably need to be vetted separately in the context
6 of three separate motions, and I would be comfortable
7 doing that. So let me rephrase it this way and see
8 whether or not the second still holds. I think
9 perhaps, Mrs. Miller, we might be in disagreement on
10 how to proceed, but I will offer the motion in this
11 format, because I am in agreement with the Chairman.

12 So my motion, my first motion, would be to
13 deny the motion to dismiss based upon the issue of
14 timeliness, finding that the appeal was brought in a
15 timely fashion, and I would invite a second.

16 VICE CHAIR MILLER: Second.

17 BOARD MEMBER ETHERLY: Thank, you Mrs.
18 Miller.

19 CHAIRPERSON GRIFFIS: We have a motion
20 before us. It has been seconded. Mr. Etherly, a
21 brief discussion, is any needed?

22 BOARD MEMBER ETHERLY: I think we have
23 already cleared up those issues, Mr. Chairman.

24 CHAIRPERSON GRIFFIS: I would ask for all
25 those in favor of the motion signify by saying aye.

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1 ALL: Aye.

2 CHAIRPERSON GRIFFIS: And opposed,
3 abstaining?

4 MS. BAILEY: The vote is recorded as 5-0-0
5 to deny the motion of Montrose, LLC based on
6 timeliness. Mr. Etherly made the motion. Ms. Miller,
7 second. Mr. Griffis, Mr. Zaidain and Mr. Parsons are
8 in agreement.

9 VICE CHAIR MILLER: Mr. Chairman, at this
10 point then, I would move to deny the motion to dismiss
11 on grounds of lack of jurisdiction.

12 BOARD MEMBER ETHERLY: Seconded, Mr.
13 Chair.

14 CHAIRPERSON GRIFFIS: Thank you, Mr.
15 Etherly. The motion before us has been seconded. Ms.
16 Miller, additional comments on that?

17 VICE CHAIR MILLER: Just to revisit what
18 this motion was. The developer, Montrose, allege that
19 we do not have jurisdiction to amend, to consider the
20 March 11, 2003 permit in the application, because it
21 would be too late to allow the party to amend the
22 appeal.

23 BOARD MEMBER ZAIDAIN: Okay. It's just
24 based on whether or not we have the ability to allow
25 the appellant to amend the application, so to speak?

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1 VICE CHAIR MILLER: Yes.

2 BOARD MEMBER ZAIDAIN: Okay. Not the
3 substance.

4 VICE CHAIR MILLER: I think I had argued
5 substantively that we do this in many appeals and
6 there is nothing precluding us from doing it,
7 particularly if we find that the appeal of the March
8 11, 2003 permit would be timely in any event with
9 respect to the way we have interpreted timeliness in
10 this case.

11 CHAIRPERSON GRIFFIS: Okay. Questions?

12 BOARD MEMBER ZAIDAIN: Well, just from the
13 way it's been worded, I'm going to -- I'm not
14 comfortable voting for the motion, but I think it will
15 pass, so, please, feel free to call the roll.

16 CHAIRPERSON GRIFFIS: I'm not even sure
17 what the hell it is.

18 BOARD MEMBER ETHERLY: Let me be sure I'm
19 clear, because perhaps it could just be a matter of
20 sequence, and apologies to the audience for the
21 minutia of process, but it is what it is. With regard
22 to -- would it be the maker of the motion's intent,
23 Mrs. Miller, that the March 11th issue is being
24 resolved with your motion or is it just simply to
25 rebut the contention that we cannot amend?

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1 VICE CHAIR MILLER: Okay.

2 BOARD MEMBER ETHERLY: Because I'm not
3 sure if we even need get to the amendment issue. If
4 we resolve the 3/11 issue one way or another, that
5 might make this motion moot.

6 VICE CHAIR MILLER: Okay. In my view, we
7 somewhat resolved it with respect to denying the
8 motion to dismiss on grounds of timeliness, but I
9 think that I am satisfied to have this motion that we
10 have jurisdiction to amend if we so choose, and then
11 we can deal with the amending of the complaint in a
12 separate motion. So does it move to deny motion to
13 dismiss on the grounds that we do have the authority
14 to amend?

15 BOARD MEMBER ETHERLY: Under the Board's
16 rules. Okay. Seconded, Mr. Chair.

17 CHAIRPERSON GRIFFIS: Okay. The motion
18 before us has been seconded. All those in favor
19 signify by saying aye.

20 ALL: Aye.

21 CHAIRPERSON GRIFFIS: And opposed?

22 MS. BAILEY: The Board has voted on the
23 motion to dismiss based on lack of jurisdiction under
24 the Board's rules. The motion was made by Mrs.
25 Miller, seconded by Mr. Etherly. Mr. Griffis, Mr.

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1 Zaidain are in support. So the vote is 5-0-0.

2 Ms. Miller, did I say that correctly?

3 CHAIRPERSON GRIFFIS: Yes. Okay. It
4 seems to me that lastly, we need to take up the motion
5 to dismiss based on laches and estoppel unless I'm
6 incorrect, that we would have other issues. It seems
7 to me that's what's left. Mr. Etherly, do you agree?

8 BOARD MEMBER ETHERLY: I just want to be
9 clear as to whether we have resolved the 3/11 permit
10 issue.

11 VICE CHAIR MILLER: I think until we
12 resolve it, we might want to grant a motion to amend
13 the appeal, but we haven't considered that yet.

14 BOARD MEMBER ETHERLY: Okay.

15 CHAIRPERSON GRIFFIS: So moved. Is there
16 a second?

17 BOARD MEMBER ETHERLY: Seconded.

18 CHAIRPERSON GRIFFIS: Thank you. There is
19 a motion before us by Ms. Miller, seconded by Mr.
20 Etherly, to amend the 11 March permit to the appeal.
21 Is there discussion that's needed on that, any
22 required? I think, Mr. Etherly, the concerns that
23 some of the Board Members may have had is throwing in
24 timeliness in terms of the March. I think there was
25 an extensive amount of specific circumstances, which

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1 would allow us to waive our rule and accept that into
2 the appeal, and I think we have flushed numerous
3 amounts out.

4 Going back to the wording of the permits
5 themselves, even if they could have been seen or
6 posted on the property, it was difficult to ascertain
7 the full scope of the work. We talked briefly about
8 the piecemealing of the permitting, and I don't think
9 this rises to the precedential case of which was cited
10 here, but I think it comes into play a little bit, and
11 that is there was concern from the community as they
12 started to investigate, revisions started to come in.

13 There were several revision permits. How was one to
14 gather the entire scope or what was actually going to
15 be constructed?

16 I think the substance of this appeal will
17 arise out of the revision permits, but I think it will
18 be important for this Board to understand the basis of
19 where those revisions were required to come from, and
20 that all establishes back at the 11 March permit. And
21 to that then and for those reasons then, the others
22 that have been stated, I would also support your
23 motion, Ms. Miller. Any other discussions?

24 BOARD MEMBER ZAIDAIN: Yes, just very
25 briefly. I will be speaking against the motion just

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1 for the same reasons I stated earlier, and I think
2 that we don't need to get to that as the October
3 permits, I think, are holding and cover the issues
4 that have been raised, and I think that I have not
5 been given enough factual evidence, although some
6 claims that I think have some merit, but enough to
7 give me comfort to accept an appeal on a permit that
8 was issued some eight months prior to the appeal being
9 filed, but be that as it may.

10 BOARD MEMBER ETHERLY: And I'll speak in
11 support of the motion, Mr. Chair, just to echo your
12 discussion of the piecemeal component here. I do
13 believe that we are in a somewhat different footing
14 compared to Sisson. I don't think this is an instance
15 where we saw Montrose piecemealing, per se, but I see
16 more of the piecemealing having taken place from the
17 standpoint of the efforts of the appellant to pull
18 together an adequate understanding of what was at
19 issue in this proposed project. And I think the
20 manner in which the appellants were able to pull that
21 information together was piecemeal and did evidence
22 some difficulty.

23 Once again, I don't think we have to get
24 to the issue of exceptional circumstances, but I think
25 the difficulties that were encountered by the

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1 appellant did rise to a sufficient level to hinder
2 their ability to get an adequate picture of this full
3 piece here, and I'm just hopeful that as we move
4 through this deliberation, I don't think it's this
5 Board's desire to ever point a finger of blame or, you
6 know, make accusations here, but I just want to be
7 sure that this supports the message that it is
8 definitely our intent for bodies of the District
9 Government to work together at every possible turn to
10 ensure that our citizens get access to the appropriate
11 information that they need to make determinations
12 about whether they want to exercise or protect certain
13 rights that may be available to them.

14 And once again, I just think, clearly, the
15 communication channel here had some difficulties for a
16 lot of different reasons, and I won't characterize
17 those reasons, but I think it's important to
18 understand that and that frustrated the efforts of KCA
19 in this instance. Thank you, Mr. Chair.

20 CHAIRPERSON GRIFFIS: Good. Thank you
21 very much, Mr. Etherly. We have a motion before us.
22 It has been seconded. Let me ask for all those in
23 favor to signify by saying aye.

24 ALL: Aye.

25 CHAIRPERSON GRIFFIS: And opposed?

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1 BOARD MEMBER ZAIDAIN: Opposed.

2 CHAIRPERSON GRIFFIS: Abstaining?

3 MS. BAILEY: The Board has voted to amend
4 the appeal to include the March 11, 2003 building
5 permit. The motion was made by Mr. Griffis, seconded
6 by Mr. Etherly. Mr. Parsons and Ms. Miller are in
7 support. Mr. Zaidain is opposed to the motion. So
8 the vote is 4-1-0.

9 CHAIRPERSON GRIFFIS: Good. Thank you
10 very much. I think we're going to take a 10 minute
11 break. We're going to come back and start the -- oh,
12 I'm sorry, you have got one more issue. But the
13 reason I brought that up is the fact of the appeal, as
14 stated, may go forward is in regards to the FAR, the
15 height and the set-back requirements, and I think we
16 have now just established the basis of which we can
17 have a factual discussion on those. I don't see an
18 extensive amount of scope that we'll expand beyond
19 that, if it would expand at all.

20 Ms. Miller, let's go to laches and
21 estoppel.

22 VICE CHAIR MILLER: Mr. Chairman, we seem
23 to have broken out our motion to dismiss with respect
24 to the various arguments made by Montrose, and so just
25 to make sure there aren't any pieces hanging out

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1 there, their last argument was that we should dismiss
2 on grounds of estoppel or laches, and I just want to
3 make very few comments.

4 One is that these are equitable doctrines
5 that are rarely invoked in zoning cases, and estoppel
6 is usually invoked against the Government and not a
7 private party. And in this case, I just felt it very
8 unusual that Montrose, in fact, invoked it against the
9 District, but attempted to use it as a reason to
10 dismiss an appeal of a private party, and I don't see
11 any merit to that.

12 And laches usually involved unreasonable
13 delay. There is no evidence in this case that I can
14 see that appellants sat on their rights and delayed
15 and, in fact, it's to the contrary, that they acted
16 diligently and expeditiously to get information and
17 file their appeal.

18 There are questions about unclean hands,
19 etcetera, and I don't want to go there. I don't think
20 we have that much information nor that we need to, but
21 I would say that I don't believe that Montrose had
22 made the case for estoppel or laches, and I would move
23 to deny the motion to dismiss on those grounds as
24 well.

25 CHAIRPERSON GRIFFIS: Is there a second?

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1 BOARD MEMBER ETHERLY: Second, Mr. Chair.

2 CHAIRPERSON GRIFFIS: Thank you. Further
3 discussion, deliberation? The motion before us has
4 been stated and articulated. I would ask for all
5 those in favor to signify by saying aye.

6 ALL: Aye.

7 CHAIRPERSON GRIFFIS: And opposed,
8 abstaining? Thank you.

9 MS. BAILEY: The Board has voted to deny
10 the appellant, the property owner's request to dismiss
11 the application based on the arguments associated with
12 laches and estoppel. Mrs. Miller made the motion.
13 Mr. Etherly, second. Mr. Parsons, Mr. Zaidain and Mr.
14 Griffis are in agreement. The vote is 5-0-0.

15 CHAIRPERSON GRIFFIS: Thank you very much.
16 We're going to take 10 minutes. KCA is going to be
17 prepared to move forward when we return. Is that
18 correct?

19 MS. FERSTER: Correct.

20 CHAIRPERSON GRIFFIS: Okay.

21 (Whereupon, at 3:53 p.m. a recess until
22 4:22 p.m.)

23 CHAIRPERSON GRIFFIS: Very well. Let's
24 resume. Let's have people take their seats. Ms.
25 Ferster, whenever you're ready. Thank you.

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1 MS. FERSTER: Ready?

2 CHAIRPERSON GRIFFIS: Yes.

3 MS. FERSTER: Thank you. We envision a
4 succinct appeal today. I estimate no more than 45
5 minutes for our case, and that's probably generous.
6 I'm going to make a very, very brief opening statement
7 about our appeal.

8 This appeal raises three legal challenges
9 to the permits issued to Montrose at 1819 Belmont
10 Road. First, the first challenge raises the issue of
11 whether the permits exceed the Height Act. We will
12 show that the permits authorized the construction on
13 the roof of a structure, a roof deck and a railing,
14 that is not on the list of roof structures that the
15 Height Act allows to exceed the height limits and
16 that, in fact, exceeds the height limits by more than
17 11 feet.

18 Second, we will show that the permits
19 authorize a type of penthouse roof structure, which
20 does not comply with the requirements laid down by the
21 Height Act in the Zoning Regulations, that it be set-
22 back from all exterior walls by a distance equal to
23 its height above the roof.

24 And then third, we'll show that the
25 permits authorized a building that substantially

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1 exceeds the maximum 3.5 floor area ratio allowed in
2 the Zoning District. They did this by improperly
3 excluding from the FAR calculations certain floor area
4 in the first and the sixth levels of the buildings,
5 the basement and the so-called attic, that the Zoning
6 Regulations require to be included.

7 We will start with Ann Hargrove, who is
8 Kalorama Citizen's Association's Zoning Chair, who
9 will provide the context for this appeal to be
10 followed by testimony from Don Hawkins, a registered
11 architect, who we would ask be qualified as an expert
12 witness, and then I will present our legal argument on
13 the Height Act issue explaining how the permits
14 granted to Montrose for this project were contrary to
15 the Zoning Regulations and the Height Act.

16 CHAIRPERSON GRIFFIS: The first question,
17 a legal question, do you believe that this Board has
18 jurisdiction over the Height Act and the issues
19 attendant to the Height Act?

20 MS. FERSTER: Yes, we do. The Board's
21 regulations, the regulations of the Zoning Commission,
22 in effect, repeat the Height Act requirements and, in
23 fact, the regulations also specifically provide that,
24 to the extent that there is any conflict between the
25 Zoning Regulations and the Height Act, the Height Act

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1 controls.

2 CHAIRPERSON GRIFFIS: Okay.

3 MS. HARGROVE: Thank you. This is a very,
4 very brief statement, simply to point out that we
5 understand that this is an R-5-D area, which is a
6 strange anomaly since the area happens to be moderate
7 density on the land use map and it was made R-5-D by a
8 zoning case several years ago when there were no map
9 cases held after a decision was made to change the
10 characteristics of R-5-C and R-5-D.

11 But that notwithstanding, if you look at
12 this little two page thing that we just recently put
13 up at the podium, this shows very clearly in two
14 fashions what we're up against. The first is a
15 picture, which shows very dramatically the rise of
16 this building over the landscape of Adams Morgan. I
17 want you to keep that in mind. Don Hawkins will
18 provide better pictures to show you what this is like
19 than I have done here.

20 The second thing is just to renew our
21 comments a little bit about the zoning and the land
22 use in the form of a map, which is attached to this
23 document. You will see the black line is this
24 particular building. It's less than 17 feet wide, so
25 it doesn't have a mass for a high height. It has a

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1 very narrow spire type height reaching far into the
2 clouds. All of the other buildings you will see in
3 the vicinity of it are much lower.

4 Similarly, across the street you will see
5 the same thing. Now, at each end of the block you
6 have a different zoning altogether. You expect large
7 buildings from Belmont Road to Connecticut Avenue
8 where, for example, the first one of which is at the
9 bottom of the picture on the left hand side. I'm
10 simply saying this, so that we'll be clear on the
11 context of what we're dealing with. This is an area
12 also presently to be studied. We have a historic
13 preservation grant for our possible historic District
14 status or expansion of an adjacent District.

15 CHAIRPERSON GRIFFIS: Can I interrupt you?

16 MS. HARGROVE: Yes.

17 CHAIRPERSON GRIFFIS: In terms of the
18 context that you're laying out, you have indicated the
19 zoning, when it was adopted in that area, the adjacent
20 buildings, do they maximize the R-5-D zoning
21 restrictions?

22 MS. HARGROVE: No, they don't, because,
23 you know, there are two problems. It's not just
24 restrictions in terms of the height limit. You have
25 to plow in the FAR, which is 3.5. So the question is

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1 on these lots what you could conceivably get. None of
2 these buildings do. Well, no, some are possibly over
3 their FAR limit, I take that back, but not over their
4 height limit, and that would include a building down
5 at the end of the block toward Columbia Road, which
6 happens to be Zone C-2-B. A building across the
7 street in the R-5-B District is slightly taller than
8 it should be and possibly exceeds its lot occupancy.

9 CHAIRPERSON GRIFFIS: So aren't we
10 actually looking at two contexts though? We're
11 looking at existing condition contexts, the existing
12 buildings that are there of a certain height.

13 MS. HARGROVE: Right.

14 CHAIRPERSON GRIFFIS: But the second
15 context is the zoning context, what R-5-D would
16 actually allow them to be.

17 MS. HARGROVE: R-5-D, unfortunately, for
18 those of us who had this rezoning without having a map
19 case attendant to what the land use in the area was
20 would allow a 90 foot zoning. However, to get to 90
21 foot zoning, you would have to have lot
22 characteristics, which would make it possible, once
23 you plow in the other considerations, to get a 3.5
24 FAR.

25 In this instance, we believe that the FAR

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1 is wrong, that the height would have to be lower on
2 this particular lot to accommodate the FAR, and our
3 architect will discuss that further. But if you look
4 at the surrounding buildings and the nature of the
5 area, except for these occasional apartment houses,
6 which you see interspersed in the inner city that were
7 built at the turn of the century, which have large
8 mass, for example, there is one in the middle of the
9 block that is labeled as two stories high, it's quite
10 big, but it only is two stories high, and one is
11 labeled five stories with a basement on that same side
12 of the block. That particular building is zoned C-2-B
13 and it's pretty close to its height limit under C-2-B,
14 which is 65 feet with the same FAR, 3.5.

15 Across the street, however, you see in the
16 pattern that says R-5-B, which is the residential
17 area, you have a building right in the middle of that,
18 which is a large apartment building, again, built at
19 the turn of the century, which is five stories plus a
20 basement. And of course, whatever its height is, its
21 higher height looks just fine with the mass of the
22 building itself, because it's not a little spire that
23 was once a beautiful row house with a turret, as was
24 the building, which was destroyed by these people.

25 But I would like just to make two

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1 additional comments real quickly without belaboring
2 this any further, and that has to do with what this
3 row house situation is for areas like ours, and I
4 think we need to go over that, because we have to
5 understand what the implications of the proper
6 interpretation and application of the Height Act would
7 mean for our row house District, for example.

8 The memorandum, which you will see later,
9 will show a strong policy favoring protecting light
10 and air in the Height Act, as well as the aesthetic
11 quality of the District streetscapes, and when applied
12 to the question of roof structures, that policy
13 translates into a scrupulously strict consideration of
14 the Act's requirements, including that of set-back
15 from all exterior walls. The word all, as you will
16 hear later, was added after NCPC came forward in the
17 1986 decision on roof structures.

18 But in any event, we can understand the
19 impetus for making of a disposition occasionally in
20 non-Height Act cases of allowing someone perhaps to
21 have a side wall used, what we call a side wall
22 exterior wall, as distinguished from a party wall, for
23 a roof structure, but that can't be done in certain
24 situations and we think that in all situations other
25 than Height Act cases, at least, enforcement of the

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1 special exception provisions should be strictly
2 enforced, because they are all through your coding and
3 don't just apply to the Height Act.

4 But the first, a very feature of the row
5 house that would bar the roof structure under the
6 Height Act, it's relative narrowness provides a
7 compelling reason for not relaxing the set-back
8 requirements as to side walls. The narrower the
9 building, the more the mass of any roof structure in
10 relation to the mass of the building. So that's a
11 very big consideration in looking at this case.

12 Secondly, Washington row house
13 neighborhoods and the individual structures within are
14 extremely diverse as you have already seen by this
15 map, and they call for careful consideration on an
16 individualized basis. Clearly, in a situation such as
17 you will hear about, the walls that we're talking
18 about are exterior walls with windows jutting up
19 higher than the adjacent structures. Any layman on
20 the street, who will not be hung up by the semantics
21 of what people sometimes refer to in Zoning and BOCA
22 Codes, would readily see well, that's an exterior
23 wall. What are you talking about? It juts right up
24 in the sky. It has windows in it. It's open to the
25 air. There's no question that that's an exterior

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1 wall. It's not a party wall.

2 So we make these two points, because both
3 of them can hardly be more clearly illustrated than in
4 the present case where the difference in elevation
5 between the row house under construction, if that's
6 what we want to call it, and neighboring structures of
7 similar width is the equivalent of several stories
8 with soaring side walls that are clearly exterior and
9 a radical adverse effect on light and air and from the
10 streetscape. And with that, I would like to turn to
11 Don Hawkins.

12 MR. HAWKINS: Thank you. Good afternoon.

13 I feel slightly chastened, but I have some very nice
14 pictures to show. May I just prop these up, so that
15 you can see?

16 CHAIRPERSON GRIFFIS: Chastened, because I
17 wouldn't let you put that up before?

18 MR. HAWKINS: Well, that's yes.

19 CHAIRPERSON GRIFFIS: Indeed. Now would
20 be the appropriate time as we're in the case and you
21 can present the evidence.

22 MR. HAWKINS: Okay. Good. Thank you very
23 much.

24 CHAIRPERSON GRIFFIS: I believe we have a
25 copy of a similar photograph in front of us now. Have

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1 all the parties and participants in the case been
2 provided copies of this?

3 MR. HAWKINS: No, but there are --

4 CHAIRPERSON GRIFFIS: Have you
5 distributed?

6 MS. FERSTER: I'm sorry. All the photos
7 that are attached to our prehearing submission were
8 served on the property owner.

9 CHAIRPERSON GRIFFIS: Okay. Anything else
10 that's coming in right now though, let's make sure
11 everyone has it, so we don't have furtive action in
12 the hearing room.

13 MR. HAWKINS: I appreciate the opportunity
14 to speak with you about this today, and I wanted you
15 to see these photographs, because you will not get
16 this information from the drawings. Almost any part
17 of what you see here you will not get from the
18 drawings. It has been a puzzlement to me since the
19 beginning of this case that side elevations, the east
20 and west elevations of this building, have apparently
21 never been drawn.

22 Now, it is common in the case of building
23 an in-fill building not to do elevations when the
24 elevation doesn't rise above the adjacent buildings.
25 But in our case, we're talking about something, which,

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1 if it had been seen at all by almost anybody in the
2 ANC, whatever committee or subcommittee they might
3 have been a part of, if they had seen drawings of
4 this, they would have been alerted to a situation that
5 needed to be looked into.

6 When I saw the building, I could not
7 believe that they had gotten the permit, and
8 especially when I found that there were no drawings of
9 what the building was going to look like. These
10 windows that you see here do not appear on any
11 drawings, plans, elevations or anything else, the side
12 wall windows, as far as we have been able to tell.

13 On the plans, there is on one floor an
14 indication of a fixed glass block window. It would
15 just be, I guess, a light panel, not an operable
16 window. These are operable windows, and it's not
17 within your jurisdiction to talk about the fire code,
18 but I don't know how we get a two hour separation with
19 these windows. I also don't know how you get a permit
20 without showing 4,000 square feet of wall, without
21 describing properly what is supposed to be covered by
22 the permit, and I am also unclear on the basis of the
23 drawings. There is one section that is a cross
24 section through the building.

25 As recently as yesterday we were trying to

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1 determine the nature of the wall that we're looking at
2 here. The cross section is ambiguous at best and does
3 not describe exactly where this wall is relative to
4 the property line. If it is as it kind of appears to
5 be, it is a wall on the neighbor's side of the
6 property line or at least the largest portion of it
7 is, but if you look at that drawing, and it may be
8 that the drawing that you have got, you can't read at
9 all.

10 CHAIRPERSON GRIFFIS: Let me interrupt
11 you.

12 MS. BROWN: Excuse me, Mr. Chair, I'm just
13 kind of concerned that this really is venturing into
14 building permit issues.

15 CHAIRPERSON GRIFFIS: Right.

16 MS. BROWN: As opposed to zoning issues.

17 CHAIRPERSON GRIFFIS: Okay.

18 MR. HAWKINS: Well --

19 CHAIRPERSON GRIFFIS: I tend to agree.
20 Help us understand. We clearly understand that you
21 don't understand how a permit could be issued, but you
22 need to help us understand if there was an error in
23 that. So let's get directly attentive to the issues
24 of --

25 MR. HAWKINS: Okay.

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1 CHAIRPERSON GRIFFIS: -- of the three
2 elements of the appeal.

3 MR. HAWKINS: Okay.

4 CHAIRPERSON GRIFFIS: And let me also ask,
5 at this point, when last we left off we were looking
6 at having plans submitted for your review. I don't
7 have any indication that we have got additional plans
8 in our record, except for some of the mechanical
9 plans. You have now spoken to floor plans and
10 possibly some others.

11 What documents are you actually looking
12 at?

13 MR. HAWKINS: I was given a set of
14 drawings, which I considered to be pretty complete.
15 The additional mechanical made it, I think, maybe an
16 entirely complete set.

17 CHAIRPERSON GRIFFIS: Okay. That's fine.
18 Ms. Ferster, what drawings was he looking at?

19 MS. FERSTER: Perhaps it would be helpful
20 if you would like to follow along.

21 CHAIRPERSON GRIFFIS: Yes.

22 MS. FERSTER: With the drawings. I
23 believe they are in our prehearing submission.
24 Exhibit 6 shows the roof deck and attic, and then the
25 cross section drawing is at Exhibit 7.

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1 MR. HAWKINS: I believe it's in that
2 neighborhood.

3 MS. FERSTER: No, is that not it? Yes.

4 CHAIRPERSON GRIFFIS: Okay.

5 MS. FERSTER: And my client tells me that
6 larger, more readable copies of these documents are in
7 Montrose's motion to dismiss, Exhibits C, I believe,
8 and D, so if you want one where you can pull it out in
9 an oversized version.

10 CHAIRPERSON GRIFFIS: The 11 x 17s? But
11 did you receive new plans since our last hearing?

12 MS. HARGROVE: Excuse me. We received the
13 things that we wanted. We received FAR worksheets,
14 which were the newer ones, rather than the old ones.
15 They have never appeared. We did receive the
16 mechanical drawings, which gives us a better insight
17 into the attic, and we did receive the certification
18 document for the height. That was all we had
19 requested and repeatedly requested since, say, October
20 or November.

21 CHAIRPERSON GRIFFIS: Okay. And that's
22 the information we also have. Is that correct?

23 MS. HARGROVE: You should have been served
24 by the appellee with that.

25 CHAIRPERSON GRIFFIS: Okay.

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1 UNIDENTIFIED SPEAKER: Do you know what
2 exhibit when you are talking about drawings?

3 MR. HAWKINS: Now, my reason for bringing
4 up the nature of this wall is that I believe that the
5 permit should -- that the zoning permit approval
6 should not have been given for a wall that appears to
7 be on the neighbor's property to the east according to
8 the drawing, so that, you know, this is a zoning issue
9 and I just figured it was relevant because of that.

10 But if we want to start with the issues
11 that have been most directly involved here and start
12 at the top, way up at the top. We have a roof
13 structure, which has been reduced in size, we're not
14 going to deal with esthetics now, but leaving a pretty
15 arbitrary looking roof structure. The roof structure
16 serves only one purpose, that is to reach the roof
17 deck. The roof deck is now allowed under the Building
18 Heights Act.

19 CHAIRPERSON GRIFFIS: Okay. What are you
20 classifying as the roof structure in that photograph?

21 MR. HAWKINS: The roof structure is what
22 appears as a triangular section on this side. On the
23 other side it's rectangular with a little tip on the
24 top. The area --

25 CHAIRPERSON GRIFFIS: So it's just that

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1 portion?

2 MR. HAWKINS: Right. Just for purposes,
3 just to help you orient yourself, this is the roof
4 structure. Below it is the attic. These four windows
5 are part of the attic and this is the fifth floor, as
6 designated in the drawings, and then fourth and third.

7 BOARD MEMBER ZAIDAIN: What functions does
8 the roof structure cover, as far as you know?

9 MR. HAWKINS: It is only covering a
10 stairway whose only purpose is to reach the roof deck.
11 It's not required for --

12 BOARD MEMBER ZAIDAIN: For venting,
13 mechanical, nothing like that?

14 MR. HAWKINS: Nothing else, no.

15 BOARD MEMBER ZAIDAIN: Okay.

16 MR. HAWKINS: The mechanical equipment --

17 CHAIRPERSON GRIFFIS: But there is a stair
18 in it? Is that what you're saying?

19 MR. HAWKINS: -- seems to be going to the
20 back lower roof here, so the roof structure is not
21 required in any way even for the roof deck. If the
22 roof deck were legal, the roof structure would not
23 really be required. But we are submitting that it is
24 entirely unnecessary and it is not set-back, its own
25 height from the exterior walls of the building. Since

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1 its own height is about 10 feet and since the building
2 lot is only 16.67, 15.67, I'm sorry, feet wide, there
3 is not room to have a roof structure legally under the
4 Building Heights Act.

5 The deck, which is not allowed in any case
6 under the Building Heights Act to exceed the height of
7 the building, stands -- its railing stands 5 feet or
8 more, we have not been able to go up and measure it.

9 CHAIRPERSON GRIFFIS: And why is it not
10 allowed?

11 MR. HAWKINS: It's not among the listed
12 roof structures allowed.

13 CHAIRPERSON GRIFFIS: And it would be
14 above the height of the roof or parapet?

15 MR. HAWKINS: It is above the height of
16 the roof. The parapet that you can see on the far
17 side there, the front, there is not a parapet anymore,
18 but the front of the roof is a fraction of an inch
19 below 70 feet from the measuring point in front of the
20 building, so that the roof deck is entirely above it,
21 and we are assuming a foot of space, a foot of
22 structure and 3 feet of railing as a minimum, and so
23 that means it's 5 feet higher than the Building Height
24 Act allows.

25 CHAIRPERSON GRIFFIS: Now, when you --

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1 BOARD MEMBER ZAIDAIN: What do -- I'm
2 sorry. Go ahead, Mr. Chair.

3 CHAIRPERSON GRIFFIS: When you say that
4 the roof deck is not one of the enumerated or
5 allowable roof structures --

6 MR. HAWKINS: Yes.

7 CHAIRPERSON GRIFFIS: Where do you find
8 the enumeration of the allowable roof structures?

9 MS. FERSTER: Mr. Chair, we will -- I
10 don't want to interrupt Mr. Hawkins' testimony, and
11 perhaps that goes to the order of our presentation,
12 but I was going to provide a synopsis of the Height
13 Act issues and where they can be found within the
14 statute and the regulations. And if you want to have
15 that before Mr. Hawkins --

16 CHAIRPERSON GRIFFIS: That's okay. As
17 long as we get to it.

18 MS. FERSTER: I would be happy to provide
19 it, but otherwise we'll be doing it that way.

20 CHAIRPERSON GRIFFIS: What are some of the
21 allowable roof structures that you are aware of?

22 MR. HAWKINS: Such structures as the one
23 we see here, if it were conforming with the set-back
24 requirement.

25 CHAIRPERSON GRIFFIS: And what is the one

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1 we see here?

2 MR. HAWKINS: It's a stairway.

3 CHAIRPERSON GRIFFIS: Enclosure.

4 MR. HAWKINS: Enclosure.

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. HAWKINS: An elevator penthouse would
7 be another.

8 BOARD MEMBER ZAIDAIN: I just got
9 confused. Are we in the realm of the Height Act or
10 the Zoning Regulations in that question?

11 MR. HAWKINS: The Height Act, I believe,
12 deals with the set-backs. That's it.

13 BOARD MEMBER ZAIDAIN: The Height Act
14 deals with set-backs of penthouse structures, roof
15 structures?

16 MS. FERSTER: Yes, it does, it does.
17 Would you like me to just briefly go through those
18 legal issues? Would that be more helpful, so that we
19 don't -- so they frame Mr. Hawkins' specific
20 testimony?

21 CHAIRPERSON GRIFFIS: Okay.

22 MS. FERSTER: Unless you would -- I mean,
23 it's up to you. I had planned to go through all that
24 as the third presentation, and Mr. Hawkins was going
25 to indicate, you know, the architecture perspective,

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1 but he is not a lawyer.

2 BOARD MEMBER ZAIDAIN: Don't be offended
3 by that.

4 MS. BROWN: If I may interject. Carolyn
5 Brown for the record. I think it's important to hear
6 what Mr. Hawkins' interpretation is of the 1910 Height
7 Act since he is the architect trying to apply the
8 standard, and the legal argument may be separate from
9 that.

10 CHAIRPERSON GRIFFIS: I tend to agree.
11 Let me clarify. Ms. Ferster, you're saying that the
12 Height Act comes into the roof structure. Actually,
13 no. You are saying that the Height Act comes into
14 play with the roof structure. Is that correct?

15 MR. HAWKINS: That's right.

16 CHAIRPERSON GRIFFIS: Okay. And you say
17 that, because in section 411 it says that it cannot be
18 in conflict with the June 10 Act? Do you have the
19 section in front of you?

20 MR. HAWKINS: Let me look in there.

21 MS. FERSTER: And again, I would just say
22 that Mr. Hawkins is not providing a legal testimony
23 here. He is simply walking you through the drawings
24 and showing you the height and where the set-back is,
25 and explaining the FAR issues. So to the extent that

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1 you have legal questions, we would be perfectly
2 amenable to reversing the order of our presentation
3 and I could start.

4 CHAIRPERSON GRIFFIS: Okay. Well, I think
5 we skipped over one. You were going to offer the
6 architect as an expert witness. Is that correct?

7 MS. FERSTER: I did offer the architect as
8 a witness.

9 CHAIRPERSON GRIFFIS: Okay.

10 MS. FERSTER: And I heard no objection.

11 CHAIRPERSON GRIFFIS: Indeed. Let's take
12 a quick moment, and is there any objection from
13 participants in the case? Any objections? Do we
14 have --

15 MS. BROWN: Carolyn Brown for Montrose, no
16 objection just as long as then we don't have, again,
17 my previous point. If he is being offered as an
18 expert, then we need to hear what his expert
19 interpretation is of the 1910 Height Act and not have
20 it supplied by counsel.

21 CHAIRPERSON GRIFFIS: Right.

22 UNIDENTIFIED SPEAKER: Here is the
23 provision.

24 COMMISSIONER PARSONS: Mr. Chairman, could
25 we take a five minute recess, please?

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1 CHAIRPERSON GRIFFIS: Certainly.

2 COMMISSIONER PARSONS: I'm confused.

3 UNIDENTIFIED SPEAKER: Can you ask them if
4 they submitted these?

5 (Whereupon, at 4:47 p.m. a recess until
6 4:51 p.m.)

7 CHAIRPERSON GRIFFIS: Very well. Let's
8 resume. We have Mr. Hawkins' resume in front of us to
9 establish the expert status in architecture. Are
10 there any renewed or any objections, having reviewed
11 it, by any participants in the case? Not seeing any
12 indication of objections, Board Members, did you have
13 any comments?

14 UNIDENTIFIED SPEAKER: No objection, Mr.
15 Chair.

16 CHAIRPERSON GRIFFIS: I would note that it
17 has been a long and prosperous history, Mr. Hawkins,
18 and associated with numerous elements, lectures and
19 affiliations. And most importantly, I think the
20 connection with residential and possibly not noting
21 the actual projects, but also multi-family
22 residential, I think we can establish the expert level
23 of Mr. Hawkins in terms of architecture. So let us
24 proceed.

25 I believe we were looking at just the

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1 direct question, Mr. Hawkins, of --

2 MS. FERSTER: Mr. Chairman?

3 CHAIRPERSON GRIFFIS: Yes?

4 MS. FERSTER: While we were on break, my
5 clients and I have conferred and in light of the
6 Board's questions specifically about the Height Act,
7 we have decided to change the order of our
8 presentation and I will go first and provide a general
9 background on the Height Act issues that we have
10 raised in this case, and then we will proceed to Mr.
11 Hawkins unless you object to that.

12 CHAIRPERSON GRIFFIS: Okay. Here is our
13 consternation. It's the Board's opinion that we do
14 not have jurisdiction over the Height Act. It is
15 clear that the Zoning Regulations lay out certain
16 aspects that regulate, be it the height, but also
17 regulate set-backs. 400, I think, is some of the
18 controlling aspects for this particular case. And if
19 you look at those, it goes without saying that most
20 were adopted from the Height Act, but I think that
21 there is an important distinction before we start
22 moving into arguing the appeal based on Height Act
23 issues, as opposed to our 11 DCMR Zoning Regulations.

24 Do you have reaction to that?

25 MS. FERSTER: Well, we have a couple of

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1 reactions and one is, of course, there are two Height
2 Act issues here. With respect to the set-back issue,
3 of course, your regulations clearly set forth the
4 requirement that roof structures be set-back.

5 So to the extent that you have any
6 jurisdictional issue, the only one that would be
7 possible would be the question of the height of the
8 roof's -- well, the question of whether or not the
9 roof deck is a permitted roof structure than can
10 exceed the Height Act, and that is a statutory
11 question and our position, but you may want us to
12 brief this in more detail, but our position is that to
13 the extent that the permit is at issue and the permit
14 provides for a certain height of the building, and in
15 this case the roof deck is 75 feet from the curb level
16 of the building, to the extent that the Zoning
17 Regulations make it very clear that in the event that
18 there is a stricter requirement, zoning requirement
19 established by any other law, that should control.

20 So our position is the Zoning
21 Administrator is bound by the Height Act, because it
22 imposes a stricter height limit, insofar as roof deck
23 is concerned, than do the Zoning Regulations.

24 CHAIRPERSON GRIFFIS: There is no question
25 that the Zoning Administrator is bound by the Height

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1 Act and, in fact, it is DCRA that is the arbitrator of
2 the Height Act. I mean, in order to establish whether
3 something is in compliance with it or not, it is the
4 Zoning Administrator's jurisdiction.

5 BOARD MEMBER ZAIDAIN: Well, I was going
6 to ask Ms. Ferster. I mean, are you aware of any
7 other avenue to appeal Height Act issues other than
8 this Board?

9 MS. FERSTER: No.

10 BOARD MEMBER ZAIDAIN: There is no other
11 avenue through DCRA, through BAR or any type of body
12 such as that?

13 MS. FERSTER: Not that I know of. It
14 appears to be a zoning issue and this Board would have
15 authority. I mean, the Zoning Code, the statute, in
16 fact, D.C. Code codifies the Height Act. I mean, it's
17 in the Zoning Code. So it's a zoning issue and I can
18 quote you the section.

19 MS. MONROE: Mr. Chairman, if I can --

20 CHAIRPERSON GRIFFIS: Ms. Monroe?

21 MS. MONROE: If I can interject maybe and
22 try to help a little bit. It has been the traditional
23 interpretation of OCC that any question under the
24 Height Act, the ZA definitely has authority through
25 DCRA, through the mayor, but that would be appealable

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1 to the Board of the BAR, the Board of Appeals and
2 Review, which has now been changed over to the Office
3 of Hearings and Adjudications, I think is the -- that
4 is the way it has been handled in the past.

5 It's a very close connection and many of
6 the provisions in the Height Act are now in the Zoning
7 Regulations, and you can take an appeal to the BZA
8 under those regulations, which are, essentially, the
9 same as the provisions in the Height Act. And
10 section, what was it, 2510.1 specifically says, that's
11 a Zoning Regulation, specifically says "All buildings
12 in D.C. must comply with the Height Act," but that
13 does not subsume that Act into the regulations.

14 It was as if it said all buildings within
15 D.C. must comply with the D.C. Environmental
16 Protection Act. That doesn't make that Act part of
17 the Zoning Regulations, so our position is that the
18 Height Act is separate from the Zoning Regulations.
19 That does not preclude an appeal under the Zoning
20 Regulations on the same issues, but we can't discuss
21 the Height Act. We would be discussing it only within
22 the context of the Zoning Regulations, because that's
23 what the Zoning Act gives the BZA authority and
24 jurisdiction over.

25 CHAIRPERSON GRIFFIS: Ms. Gilbert, did you

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1 have something in response?

2 MS. GILBERT: Well, in light of what Ms.
3 Monroe has said, I really don't have anything to add.

4 I had intended to reference section 411 in the Zoning
5 Regulations, which references the Height Act and says
6 when not in conflict with the Height Act, which would
7 suggest you would have jurisdiction, but we have a
8 different interpretation from the Office of
9 Corporation Counsel, so I will not quarrel with that.

10 Thank you.

11 MS. MONROE: One last thing, Mr. Chairman,
12 just to make it clear. If you look at section
13 400.3.4.8, 400.7(b), those sections, essentially, are
14 Zoning Regulations that are similar, I don't think
15 it's exact same wording, they may not be verbatim, but
16 to the Height Act. The Board would have authority to
17 appeals under those regulations, if that helps.

18 CHAIRPERSON GRIFFIS: Ms. Brown?

19 MS. BROWN: I would defer to the Office of
20 Corporation Counsel on this.

21 CHAIRPERSON GRIFFIS: Interesting. Does
22 the ANC have any comment? We'll wait a moment, but go
23 ahead.

24 MS. FERSTER: I mean, again, our position,
25 you know, would be, as Corporation Counsel just

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1 pointed out, that pretty much everything in our
2 appeal, where we referenced the Height Act, is
3 restated in the Zoning Regulations.

4 CHAIRPERSON GRIFFIS: That's right. So
5 what we're going to do is concentrate on your case
6 presentation in regards to the Zoning Regulations, and
7 we'll have the cite of the zoning sections that you
8 think would be important for us to look at. With that
9 said, let's proceed.

10 BOARD MEMBER ZAIDAIN: Just one quick
11 point of clarification.

12 CHAIRPERSON GRIFFIS: Mr. Zaidain?

13 BOARD MEMBER ZAIDAIN: I think you did
14 state one aspect of it that you think may not be
15 reflected in the Zoning Regulations and that is the
16 status of the deck and whether or not it qualifies as
17 something that could be exempted from the Height Act.
18 Am I clear on that?

19 MS. FERSTER: No, I don't think so.

20 BOARD MEMBER ZAIDAIN: Or do you think
21 that's reflected in the zoning as well?

22 MS. FERSTER: No, I think the Zoning
23 Regulations reflect everything in our appeal.

24 BOARD MEMBER ZAIDAIN: Okay. Okay. Thank
25 you.

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1 CHAIRPERSON GRIFFIS: Let's proceed then.

2 MS. HARGROVE: Well, if we're not going to
3 discuss the Height Act --

4 CHAIRPERSON GRIFFIS: Let's get to the
5 architecture.

6 MS. HARGROVE: We'll go through the
7 architecture.

8 CHAIRPERSON GRIFFIS: And then we can get
9 to the legal, give her time to strike all the Height
10 Act stuff, put in regulations.

11 MR. HAWKINS: I hope you'll forgive my
12 hesitation in answering your question earlier. If the
13 question comes at that level, I obviously can't
14 resolve it myself. It's not architectural. But
15 moving down a bit from the roof where the roof
16 structure, I believe, if the roof deck were allowable
17 under the code, it would have to be set-back its
18 height from each of the exterior walls making it an
19 entirely different thing from what it is now. In
20 fact, it would make it about a 5 foot wide deck and,
21 again, not worth bringing a roof structure of the size
22 of the existing one up to it.

23 But moving down a bit to the next level,
24 the top floor of this building is called an attic and
25 one of the reasons for this is that it is under the

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1 roof, but above a floor, which is, in part, the
2 ceiling of what they are calling the fifth floor.
3 This is a very difficult thing to discuss, but there
4 is a section in Exhibit 6, which helps.

5 It would seem that every definition of
6 attic, which is the space between the roof rafters and
7 -- the bottom of the roof rafters and the top of the
8 ceiling joists of the top floor. That definition fits
9 the sliver of space that only exists towards the front
10 of the building where the sloping roof is separated
11 from the ceiling joists.

12 CHAIRPERSON GRIFFIS: Absolutely. Let's
13 step back for a minute. First of all, Exhibit 6 of
14 what filing?

15 MR. HAWKINS: I'm sorry, the filing of the
16 last, what am I looking at, of the February 7th.

17 CHAIRPERSON GRIFFIS: Okay. Your 8.5 x
18 11s?

19 MS. HARGROVE: This is from Montrose.
20 This is their larger maps.

21 CHAIRPERSON GRIFFIS: Okay. That's fine.
22 I think, let me reference the Board to Exhibit C,
23 which is the 11 x 17s, and see if that's actually the
24 same.

25 MR. HAWKINS: Actually --

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1 CHAIRPERSON GRIFFIS: So that we can all
2 be looking at the documentation.

3 MR. HAWKINS: That's a much more legible
4 one.

5 CHAIRPERSON GRIFFIS: And what you're
6 stating is the fact that there is, at the level that's
7 called attic, and it's showing a dimension to the
8 underside of what looks like the ceiling structure
9 there of 6 feet, 5 and 1/4 inches.

10 MR. HAWKINS: That's right.

11 CHAIRPERSON GRIFFIS: There is a second
12 structure above that and you're saying that the
13 interstitial space, the space between those two, is
14 actually more definable as an attic?

15 MR. HAWKINS: That is an attic by the
16 definition, by any definition, I think, that you would
17 find. That is --

18 CHAIRPERSON GRIFFIS: How about that.
19 What definition would you find?

20 MR. HAWKINS: You would find the
21 definition --

22 CHAIRPERSON GRIFFIS: If you are going to
23 call this an attic, where do you find the definition
24 of attic?

25 MR. HAWKINS: An attic is the space that's

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1 between the bottom of the roof rafters and the tops of
2 the ceiling joists of the topmost story.

3 CHAIRPERSON GRIFFIS: And where is that
4 definition from?

5 MR. HAWKINS: It is in BOCA. It is in the
6 dictionary. An extended definition of it would
7 include that the roof structure -- that the floor
8 would be -- let me get it straight. The roof
9 structure would be standing on the walls, the tops of
10 the walls, partially or wholly on the walls. And I
11 guess a question arises in looking at the presentation
12 that the architects have made and in understanding
13 what an attic is.

14 The question arises how did they manage to
15 make the topmost floor of this building such that they
16 could call it an attic? And I don't understand how
17 that can be. It has been rendered, at least
18 temporarily, not a habitable space by lowering the
19 ceiling, but that ceiling is not integral to the
20 structure of the roof and could be removed giving the
21 tenants of the space a higher than 6.5 foot ceiling,
22 and a very habitable former attic with windows all
23 around and a view of the city out over the living room
24 of the fifth floor apartment. We are simply puzzled
25 as to how that could ever have been called an attic.

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1 BOARD MEMBER ZAIDAIN: I just want to make
2 sure I'm clear on your argument. It seems like
3 there's two different things that I'm hearing. One is
4 you're referring to the space that, as the Chair
5 mentioned, is measured 6.5, 5 inches and a 1/4 and
6 that's what you're referring to?

7 MR. HAWKINS: That's --

8 BOARD MEMBER ZAIDAIN: Or that's what they
9 referred to as the attic and that's what you're
10 questioning?

11 MR. HAWKINS: That's right.

12 BOARD MEMBER ZAIDAIN: But the point you
13 made before was in what you think can be called an
14 attic, and I think I understand you, is the sliver of
15 space between the two, between the rafter and the top
16 ceiling, well, the roof effectually?

17 MR. HAWKINS: That's right. It's a very
18 thin wedge.

19 BOARD MEMBER ZAIDAIN: And are you saying
20 that that could be defined as an attic?

21 MR. HAWKINS: That is. That fits the
22 definition of an attic.

23 BOARD MEMBER ZAIDAIN: There is no
24 definition that you have seen of attic in BOCA or a
25 dictionary as to the functionality of the space? It's

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1 just defined by the fact that it's a rafter and a
2 roof?

3 MR. HAWKINS: In the dictionary, a
4 secondary definition includes its use, but it's not --
5 its use is not a part of the definition in the
6 building code, and the fact that the ceiling is lower
7 does not contribute to it being an attic.

8 BOARD MEMBER ZAIDAIN: What do you think
9 the dimension of that space is?

10 MR. HAWKINS: The dimension of it? These
11 are approximately --

12 BOARD MEMBER ZAIDAIN: Right.

13 MR. HAWKINS: -- 16 foot bays, so it's
14 about 48 feet by the width of the building, 15 feet.

15 CHAIRPERSON GRIFFIS: What dimension are
16 you asking for, Mr. Zaidain?

17 BOARD MEMBER ZAIDAIN: I'm referring to
18 the space that you are claiming could be considered an
19 attic?

20 MR. HAWKINS: Oh, the space that I'm
21 talking about?

22 BOARD MEMBER ZAIDAIN: Yes.

23 MR. HAWKINS: It's a foot high at the most
24 on one end.

25 BOARD MEMBER ZAIDAIN: Right.

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1 MR. HAWKINS: And nothing at the other
2 end. I should say that every building doesn't have to
3 have an attic. This happens to have a very small
4 attic. Now, the purpose of the --

5 BOARD MEMBER ZAIDAIN: I guess I have to
6 be frank. I guess what I'm struggling with, and I
7 work on zoning a lot, I don't do a lot of BOCA stuff,
8 but I'm just struggling with the fact that you're
9 questioning. They are calling a space that is 6.5 and
10 5 inches and a 1/4 high, you're questioning that being
11 called an attic, but then you're going to claim that a
12 space that is not even a foot high can easily be
13 called an attic. I mean, that's just something that
14 I'm kind of struggling with understanding.

15 MR. HAWKINS: Well, I think, let me give
16 the dictionary definition if it would help. Webster's
17 Unabridged, which is what the Zoning Office uses,
18 defines attic in relevant part as the part of a
19 building immediately below the roof and wholly or
20 partly within the roof framing.

21 BOARD MEMBER ZAIDAIN: Yes.

22 MR. HAWKINS: The BOCA relied on by
23 developers, Exhibit 10, defines attic as the space
24 between the ceiling beams of the top story and the
25 roof rafters. There are a couple of ways of looking

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1 at these drawings to define the attic, but there are
2 other implications besides the obvious ones.

3 The front of the -- the mansard part of
4 the roof at the front of the building is standing on
5 the fifth floor. If the roof is -- if the attic is
6 the part between where the roof -- the part of the
7 wall where the roof stands and the tops of the joists,
8 that would make the entire fifth floor an attic. We
9 don't get to choose which is going to be the attic if
10 we begin at the top, the obvious place, and find that
11 there is an attic up right under the roof.

12 An attic doesn't have to be even an inch
13 to be an attic, but in this case what we have is what
14 might possibly be temporary ceiling structure injected
15 into the process, so that the space that they want to
16 call an attic will not be counted in the FAR.

17 BOARD MEMBER ZAIDAIN: Okay.

18 MR. HAWKINS: And we would posit that this
19 is absolutely space, rearing up as it does as high
20 over everything else, that the lack of a fraction of
21 an inch in the temporary ceiling height does not
22 render it uncountable.

23 BOARD MEMBER ZAIDAIN: Okay.

24 MR. HAWKINS: Under FAR.

25 CHAIRPERSON GRIFFIS: Okay. Why don't we

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1 have submitted in, of course, that definition that you
2 just read.

3 BOARD MEMBER ZAIDAIN: Yes, and I heard
4 you reference Exhibit 10 really quick. Are you
5 referring to your Exhibit 10? Did I misunderstand
6 you?

7 MR. HAWKINS: I was referencing Exhibit 6.

8 BOARD MEMBER ZAIDAIN: Oh, Exhibit 6.

9 MR. HAWKINS: But we got a better drawing
10 here.

11 BOARD MEMBER ZAIDAIN: Well, yes, I'm
12 looking at Exhibit 6, but I thought when you said the
13 BOCA definition referenced in Exhibit 10.

14 MR. HAWKINS: Oh, I'm sorry, in the --
15 what I was reading. I'm sorry. This is one where I'm
16 not sure what the date of --

17 UNIDENTIFIED SPEAKER: We didn't make
18 copies.

19 BOARD MEMBER ZAIDAIN: Okay. What is
20 this?

21 MR. HAWKINS: We didn't submit the copies
22 of the piece of the BOCA Code.

23 BOARD MEMBER ZAIDAIN: Okay.

24 MR. HAWKINS: That would have been part of
25 Exhibit 10.

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1 BOARD MEMBER ZAIDAIN: Do we want these?
2 Yes, can we get those? I mean, they will make copies
3 if you just -- thank you very much.

4 MR. HAWKINS: But the point about the
5 attic is the artificiality of it, that it has been
6 made entirely for the purpose of having some
7 additional space, living space, though it's likely to
8 be sold to somebody who is not very tall to begin
9 with, but then they will still discover the
10 flexibility of the space and they could easily remove
11 these ceiling joists, because they are not structural.
12 They are not part of the roof structure. There are
13 some tie beams in one bay.

14 MS. BROWN: Excuse me, could I voice an
15 objection? This is pretty speculative about what some
16 future owner of the property might do or not do about
17 getting rid of what, we would argue, are permanent
18 features of the building, so I think that he should
19 not be testifying as to such speculative items.

20 CHAIRPERSON GRIFFIS: Very well. I think
21 we don't need to continue on it. I think the point is
22 made, in fact, and in your statement of the
23 artificiality of the attic and it has been illustrated
24 as such unless you have any other further
25 documentation that shows us, in fact, that roof, that

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1 ceiling framing is something of a different nature.

2 MR. HAWKINS: The ceiling framing does not
3 show, does not appear in the framing drawings. There
4 are, I think, I'm not looking at them now, there are
5 three tie beams in one bay of the -- one of the three
6 bays of the attic. There are three tie beams shown on
7 the framing drawing. That's the structural drawings
8 that were submitted for approval to DCRA. If they
9 don't appear, I assume that they are not necessary.

10 CHAIRPERSON GRIFFIS: Or they are not
11 structural is what you mean by necessary?

12 MR. HAWKINS: They are not structural.
13 That's right.

14 CHAIRPERSON GRIFFIS: Okay. Anything
15 else?

16 MR. HAWKINS: Well, moving down, this is
17 an FAR question.

18 COMMISSIONER PARSONS: Mr. Hawkins, Mr.
19 Hawkins?

20 MR. HAWKINS: Yes.

21 COMMISSIONER PARSONS: Excuse me. Staying
22 with the ceiling a minute.

23 MR. HAWKINS: Sure.

24 COMMISSIONER PARSONS: Is it possible,
25 looking at this drawing --

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1 MR. HAWKINS: Okay.

2 COMMISSIONER PARSONS: -- that this
3 horizontal line extending across from left to right
4 all away the cross the building is a measuring line
5 and not a ceiling line?

6 MR. HAWKINS: There is a measuring line
7 aligning with the ceiling.

8 COMMISSIONER PARSONS: What I wanted to
9 clarify, and I should probably ask the architect if we
10 get him, if this measuring line is really going to the
11 right rear of the attic --

12 MR. HAWKINS: That's right.

13 COMMISSIONER PARSONS: That's not a
14 ceiling at all.

15 MR. HAWKINS: Now, it --

16 COMMISSIONER PARSONS: See what I mean?
17 See how it comes out at the other end?

18 MR. HAWKINS: Yes.

19 COMMISSIONER PARSONS: And that is the 6.5
20 foot point at which it touches the ceiling. If you
21 look at --

22 MR. HAWKINS: That's why I sympathize with
23 your difficulty with the drawing. The larger drawing
24 makes it clearer that there is a line there that
25 represents some ceiling joists.

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1 COMMISSIONER PARSONS: Okay. Thank you.

2 MR. HAWKINS: The small drawings are
3 difficult, yes, I agree.

4 MS. FERSTER: Exhibit C, Montrose's motion
5 to dismiss.

6 MR. HAWKINS: One aspect of this lowered
7 ceiling is that the fire exit from the roof, from the
8 roof deck would necessarily pass under that ceiling,
9 and the fire exit is required to have 6 foot, 8 inch
10 headroom its entire was as a minimum, and so that this
11 would render the access from above to down below in
12 case of an emergency, dangerous and not according to
13 code.

14 If I go down to the bottom of the building
15 now, and keep in mind that we'll come back to the FAR
16 and the attic, on the ground floor, which is being
17 called the basement, the FAR calculation was done
18 through a method that has a vague appearance of
19 legitimacy, but is really nonsensical, because you can
20 see that. I'll demonstrate how their calculations
21 were done and how they are supposed to have been done.

22 A grade plane is defined as, essentially,
23 the mean between a point either at the property line
24 or if the property line is some distance from face of
25 an exterior face of the wall from a point 6 feet from

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1 the face of the wall. So a diagonal line drawn from
2 the back, and that would be an elevation of,
3 approximately, 6 feet above the floor level, the
4 bottom floor level, a line drawn from that point to a
5 point at grade in front of the building would be -- it
6 would end up being 6 feet at the back. That means
7 that the 3 feet would be the mean. And we could get
8 into fractions of inches if necessary, but I think
9 that's not necessary.

10 That means that the entirety of the
11 basement is more than 4 feet. The ceiling is more
12 than 4 feet above that grade plane. The calculation
13 that was made in applying for the permit was done by
14 taking the square footage of the so-called basement,
15 taking the proportion of its front wall, which is
16 exposed to light and air, to the entire perimeter of
17 the basement, and then allowing that that proportion
18 of the floor area of the basement would be calculated
19 in the FAR.

20 As I said, this is a nonsensical way.
21 There is no basis in the regulations for calculating
22 in this way, and to demonstrate how ineffective that
23 is, if we were to make the entire basement floor area,
24 it would increase the FAR, it would increase the floor
25 area that we included in our FAR calculations by only

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1 11 percent. If we were to take that back wall, the
2 back grade, and arbitrarily say we wanted to have it
3 be 20 feet higher, it would make very little
4 difference in how much of the floor area of the
5 basement was in the FAR calculation.

6 Obviously, any calculation that we make,
7 any formula that is derived for the purpose of
8 deciding what needs to be included, should have some
9 basis in the facts that we're dealing with, the amount
10 of space that is really going to be used and what its
11 relationship to the outside world is. If the property
12 next door were not built on, we would have an entirely
13 exposed side wall of the basement. Would it still be
14 a basement? Obviously, something other than the
15 calculation that they have used would be applicable.

16 CHAIRPERSON GRIFFIS: What is your
17 understanding of how the Zoning Administrator
18 calculates the FAR for a partial basement, partial
19 cellar?

20 MR. HAWKINS: That's right, that's right.

21 CHAIRPERSON GRIFFIS: No, what is your
22 understanding?

23 MR. HAWKINS: Oh, what is my
24 understanding?

25 CHAIRPERSON GRIFFIS: What is their

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1 process?

2 MR. HAWKINS: What's their process? Their
3 process is to establish the grade plane and determine
4 whether it is a basement or a cellar by its
5 relationship to the questioned space relationship to
6 that grade plane. If the floor above it were 6 feet
7 above the grade plane, then this would be a full
8 story. That's one way of -- then the whole thing, the
9 whole floor would be calculated. It would be included
10 in the calculation.

11 CHAIRPERSON GRIFFIS: Do you find that
12 there is a difference between a story, a basement, a
13 cellar in the FAR?

14 MR. HAWKINS: There is a difference
15 between the basement and a cellar in the FAR, yes.
16 The story, the denomination, whether it's a first
17 floor or a basement, I believe is not changed in the
18 FAR calculations.

19 CHAIRPERSON GRIFFIS: Is the basement a
20 story?

21 MR. HAWKINS: The basement can be a story
22 or not.

23 CHAIRPERSON GRIFFIS: How so?

24 MR. HAWKINS: In our case here it wouldn't
25 make any difference. We don't have a number of

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1 stories limit in this zone, so it's not really. Ms.
2 Brown referred to the posting of the permit in the
3 second story window. It looks like the second story,
4 but it's not --

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. HAWKINS: -- germane to the point
7 we're making. The entire -- we would include the
8 entire floor area of the basement in the FAR.

9 BOARD MEMBER ZAIDAIN: Can I ask a
10 question just to make sure that I'm clear, because I
11 may have a different understanding, and I think try to
12 break this down to as simple as it is. To my
13 understanding, and if you have a different
14 understanding or the Chair or whoever, please, correct
15 me if I'm wrong that the differences between an FAR
16 calculation, the difference between a story and a
17 cellar, if it's over 4 feet above grade then it's
18 considered a story and part of FAR. If it's less,
19 then it's considered a cellar.

20 MR. HAWKINS: Yes.

21 BOARD MEMBER ZAIDAIN: So, you know, and I
22 apologize if you have been rigoring this, so what is
23 the status with this first floor? Was this calculated
24 in the FAR or not?

25 MR. HAWKINS: It was not calculated in the

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1 FAR. A proportion of it was included in the FAR.

2 BOARD MEMBER ZAIDAIN: The portion that is
3 over 4 feet in height?

4 MR. HAWKINS: No, this proportion that was
5 derived by a brand new formula.

6 BOARD MEMBER ZAIDAIN: Okay.

7 MR. HAWKINS: The entire basement is more
8 than the -- the ceiling is more than 4 feet above the
9 grade plane.

10 BOARD MEMBER ZAIDAIN: Did you have a
11 submission that shows? Well, I'm looking at your
12 Exhibit 6.

13 MR. HAWKINS: Yes.

14 BOARD MEMBER ZAIDAIN: Where is the grade
15 in regards to this? I mean, I see the stairway down,
16 but is the whole entire story here where it says the
17 first floor line, is everything below that higher than
18 4 feet? Is that the right way to say that? Let's
19 see. It's hard to tell, yes.

20 MR. HAWKINS: The grade plane on this
21 drawing, on Exhibit 6, the grade plane would be a
22 little less than 3 feet above the bottom floor.

23 BOARD MEMBER ZAIDAIN: Okay. So when you
24 say the bottom floor, you're talking about --

25 MR. HAWKINS: Talking about the basement.

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1 BOARD MEMBER ZAIDAIN: I mean, I don't
2 mean to sound obvious, but the first floor line here.

3 MR. HAWKINS: No, it would be below that.

4 BOARD MEMBER ZAIDAIN: Okay.

5 MR. HAWKINS: Let's call it a basement.

6 BOARD MEMBER ZAIDAIN: Okay.

7 MR. HAWKINS: It would be a little under 3
8 feet above the basement floor.

9 BOARD MEMBER ZAIDAIN: Okay. And you say
10 it's a little under 3 feet?

11 MR. HAWKINS: A little under 3 feet lower.
12 The ceiling in there is a little over 7 feet,
13 apparently.

14 BOARD MEMBER ZAIDAIN: Okay. Wait, I'm
15 seeing a number. It says 8 feet, 2.

16 MR. HAWKINS: Okay. It's 8 feet, 2 from
17 floor to floor if you exhume about 12 inches that
18 gives a 7, 2 ceiling, we have --

19 BOARD MEMBER ZAIDAIN: But you're saying
20 only 3 feet of that is above grade?

21 MR. HAWKINS: No, I'm saying more than 4
22 feet of that is above grade.

23 BOARD MEMBER ZAIDAIN: More than 4 feet of
24 that?

25 MR. HAWKINS: Yes.

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1 BOARD MEMBER ZAIDAIN: Okay.

2 CHAIRPERSON GRIFFIS: Anything else? I
3 think to reiterate your argument, which I was trying
4 to pull out a little bit, you might want to submit and
5 keep the record open and you can serve it on
6 everybody, some sort of graphic that is representing
7 all that you have just laid out, because I would hate
8 to poll the Board on a pop quiz to see if they
9 followed it all.

10 BOARD MEMBER ZAIDAIN: Yes.

11 CHAIRPERSON GRIFFIS: But I think it's
12 important issues. I think the most critical aspect is
13 you are trying to point out why the zoning calculation
14 that was done for issuance of this permit was
15 incorrect?

16 MR. HAWKINS: That's right.

17 CHAIRPERSON GRIFFIS: Okay.

18 BOARD MEMBER ZAIDAIN: Yes, and just to be
19 clear, and I agree with the Chair, it is confusing,
20 because these elevations just don't show the
21 relationship to the grade very well and if there is
22 any other way you can present that, it would be really
23 helpful.

24 MR. HAWKINS: I would be. It's worth
25 keeping in mind that the grade at the back -- at the

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1 front the grade is a few inches below the floor level.

2 At the back the grade is -- that is basement floor
3 level. At the back the grade is 6 feet above that
4 floor level, but at the back the grade from which this
5 calculation is made is really nothing more than a
6 large stair landing as part of the sequence to get
7 from the stairs down to the driveway and the parking
8 spaces at the back. So the grade at the back is
9 really only, at any height, for a very few feet
10 behind, less than 6 feet behind the house.

11 BOARD MEMBER ZAIDAIN: So, I mean, you
12 know, just to help provide clarity on this, let's
13 break down what your argument is. Are you saying that
14 they should have only calculated that portion above 4
15 feet in the calculation or not counted all of it or
16 counted all of it?

17 MR. HAWKINS: What I'm saying is if the
18 ceiling is more than 4 feet above the grade plane, the
19 entire floor area --

20 BOARD MEMBER ZAIDAIN: The entire story
21 gets counted?

22 MR. HAWKINS: -- gets counted, yes.

23 BOARD MEMBER ZAIDAIN: Well, I shouldn't
24 say story, but the entire level?

25 MR. HAWKINS: The entire level gets

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1 counted, yes.

2 BOARD MEMBER ZAIDAIN: Okay. Thank you.

3 VICE CHAIR MILLER: Excuse me. And how do
4 we know that? What authority are you relying on for
5 that statement that if the ceiling is more than 4 feet
6 above, the entire level gets counted?

7 MR. HAWKINS: Zoning Code.

8 VICE CHAIR MILLER: Can you tell us where
9 in the Zoning Code? You can supplement later if you--

10 MR. HAWKINS: Yes, I will supply that to
11 you. When numbers are mentioned, I don't know what
12 they --

13 VICE CHAIR MILLER: Okay.

14 CHAIRPERSON GRIFFIS: All right. This is
15 the last question in terms of calculation. What is
16 the grade? If we set this up as the front of the
17 building, south, the back is north.

18 MR. HAWKINS: Yes.

19 CHAIRPERSON GRIFFIS: East and west. What
20 is the adjacent grade on the east and west side of
21 this structure?

22 MR. HAWKINS: There are structures on each
23 side, and I have not seen if there is, say, a dogleg
24 or open court or something, I have not seen into that
25 to tell, but I would --

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1 CHAIRPERSON GRIFFIS: So how would you
2 establish the grade of an attached row house on the
3 east and west side?

4 MR. HAWKINS: Well, all one has is that
5 average between. As I mentioned earlier, if there
6 were nothing on one side of it, it would be an
7 entirely different -- the calculation made by the
8 people who asked for the permit would have been
9 entirely against them, because if it was exposed
10 there, we don't know what that grade would be, so we
11 take the average between the front and the back.

12 CHAIRPERSON GRIFFIS: And the rear grade?

13 MR. HAWKINS: The rear grade is at,
14 approximately, plus 6. But the point I was making
15 about it being nothing more than a stair landing is
16 that the back yard has been dug out pretty
17 substantially and a stairway built in. There is a
18 steel stair coming down the back of the building and
19 when you get off that steel stair, you have a small
20 landing and then you go down the concrete steps to the
21 parking space. So that grade could be manipulated.
22 It hasn't been. It could be manipulated to change the
23 proportions if one were -- if there were any sense to
24 the calculation that was made in order to get the
25 permit. That grade could be raised and lowered

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1 easily, and then to get the results that they wanted.

2 BOARD MEMBER ZAIDAIN: Well, don't give
3 anybody any ideas.

4 MR. HAWKINS: I wouldn't think of it.

5 BOARD MEMBER ZAIDAIN: Well, like I said,
6 I mean, just to reiterate the points since I started
7 the argument, you know, I understand where you're
8 coming from. I just think it's hard for the Board to
9 tell exactly where the grade is, and I think you have
10 given an explanation, but if there is some way you
11 could reiterate to us graphically either through a
12 plan or a photo or something, you know, to show us
13 where exactly you're getting those grade elevations,
14 it would be really helpful.

15 CHAIRPERSON GRIFFIS: And what's the total
16 FAR on that floor in your calculations?

17 MR. HAWKINS: In fact, they calculated it
18 and then applied their proportion. The total is 736.6
19 square feet.

20 CHAIRPERSON GRIFFIS: And your
21 calculations for FAR, which is actually the total
22 square footage of the footprint of that floor?

23 MR. HAWKINS: Right. I am accepting their
24 calculation of what the actual square footage is.

25 CHAIRPERSON GRIFFIS: What is the FAR in

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1 your calculation?

2 MR. HAWKINS: In the FAR it would be --

3 CHAIRPERSON GRIFFIS: So you have the FAR
4 calculation of the basement level as 736.6 square
5 feet?

6 MR. HAWKINS: Right.

7 CHAIRPERSON GRIFFIS: As opposed to the
8 Zoning Administrator's calculations that were agreed
9 upon, which is 147.3 FAR square feet?

10 MR. HAWKINS: Right. We would have an FAR
11 of 3.78 if you only counted the additional --

12 CHAIRPERSON GRIFFIS: No, stick with one
13 issue at a time. We're getting slow here.

14 MR. HAWKINS: I thought this was what you
15 were getting at. Okay.

16 CHAIRPERSON GRIFFIS: Is that your
17 testimony?

18 MR. HAWKINS: My testimony is that if the
19 basement level were included as the Zoning Code
20 requires --

21 CHAIRPERSON GRIFFIS: I'm trying to
22 understand that, that it will flip it out of the
23 allowable FAR, but let's get to the calculations. Is
24 it correct then that you say that it's 100 percent
25 736.6 square feet, as opposed to 147.3?

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1 MR. HAWKINS: That's right.

2 CHAIRPERSON GRIFFIS: Good. And then
3 you're going to submit your graphic on how you
4 actually calculated that?

5 MR. HAWKINS: Yes.

6 CHAIRPERSON GRIFFIS: Okay.

7 MR. HAWKINS: And may I say there is a
8 drawing that I could find in a minute or two that was
9 submitted by the architect, in the architect's
10 drawings, that grade plane does appear in one of those
11 sections, and I will find it and you'll have it.

12 CHAIRPERSON GRIFFIS: Okay.

13 MR. HAWKINS: Now, let's see, in what
14 part? The set-backs above, I think we went past a
15 resolution of the fact that the structures above the
16 attic are not set-back and they -- whether it's the
17 building heights or building heights supported by
18 zoning or whatever, they are not set-back. There is a
19 requirement that they be set-back the equivalent of
20 their height from each exterior wall. And argument
21 had been made on the part of the applicants,
22 apparently, that a party wall did not have to be
23 treated as an exterior wall. This is so far off from
24 anybody else's thinking, especially based on looking
25 at the building.

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1 CHAIRPERSON GRIFFIS: What do you mean
2 anybody else's thinking?

3 MR. HAWKINS: Anybody looking at these
4 buildings would say --

5 CHAIRPERSON GRIFFIS: Well, we're not
6 anybody. You are the expert architect. You're
7 looking at this building.

8 MR. HAWKINS: The people on the street who
9 were alarmed only when this building went up, the
10 people on the street and the --

11 CHAIRPERSON GRIFFIS: Is there a
12 difference, in your expert opinion, between a party
13 wall and an exterior wall?

14 MR. HAWKINS: Yes, a party wall is a
15 subdivision type of exterior wall.

16 CHAIRPERSON GRIFFIS: Okay. What are we
17 looking at here?

18 MR. HAWKINS: We're looking at an exterior
19 wall, and I don't know whether for certain, based on
20 the drawings, I don't know for certain that it's a
21 party wall. It's either a party wall or it's a wall
22 on the neighbor's property. That is the property
23 line. Let me refer back to the --

24 CHAIRPERSON GRIFFIS: So this could be a
25 party wall and an exterior wall, but it can't be an

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1 exterior wall and a party wall?

2 MR. HAWKINS: Being a party wall does not
3 exclude it from being an exterior wall. The zoning
4 decision that was made when the application was made
5 was that a party wall might be considered to be not an
6 exterior wall. The code refers to exterior walls,
7 does not make an exception for party walls, so this is
8 an exterior wall from which the roof structures should
9 be set-back.

10 CHAIRPERSON GRIFFIS: But it could be a
11 party wall?

12 MR. HAWKINS: It is also. It may well be
13 a party wall. The one on the other side is a face on
14 line wall. Now, they didn't say, apparently, that a
15 wall, which is face on line, is specifically not an
16 exterior wall. It was treated as if it was. There
17 was some kind of special exception, which doesn't
18 exist in the code for a party wall. The party wall
19 reference is entirely irrelevant to this discussion.
20 There is a clear statement that the roof structures
21 should be set-back the equivalent of their height from
22 the exterior walls. We are looking at exterior walls
23 here.

24 CHAIRPERSON GRIFFIS: Okay.

25 MR. HAWKINS: I'm sorry for some of the

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1 vagueness. I'm responsible for some, but some of it
2 comes from the fact that the drawings are very
3 difficult to read and, in some cases, ambiguous and on
4 this point of the east wall, it is, at best,
5 ambiguous, what the section in the Montrose, what you
6 call it, submission, the motion to dismiss, what was
7 supplied in that is a drawing that one cannot tell
8 from, because it's not actually informative about that
9 wall at all, though it means to be.

10 When the attic is included, when the floor
11 area of the attic is included in the FAR calculations
12 and added to that of the basement, we get an FAR of
13 4.13, which is obviously far in excess of the 3.5
14 allowed. If we were to reduce that by the area of the
15 chases in the building, it would be something under 1
16 percent.

17 We're going to get some definitions from
18 Ms. Ferster. If there are any questions I could
19 answer, fingers I could point?

20 CHAIRPERSON GRIFFIS: I think we're all
21 set.

22 MR. HAWKINS: Thank you.

23 CHAIRPERSON GRIFFIS: What's your
24 question?

25 MR. HAWKINS: If I may, Exhibit 11 is a

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1 section through the building, which establishes the
2 grade plane. It's not big enough to see any of the
3 numbers, but it's there.

4 CHAIRPERSON GRIFFIS: And is that how you
5 made your calculations from that grade?

6 MR. HAWKINS: I first used their line and
7 then I did another slightly modified one and found
8 that the difference is not that great. So, you know,
9 they have established it. I believe that they had
10 done it when the grade to first floor was different
11 from the ultimate one. I think that this drawing came
12 from the earlier permit, that that height changed
13 between the one permit and the other. And so the
14 difference is not enough to make a difference, whether
15 it were theirs or mine it would end up being the same,
16 I believe.

17 CHAIRPERSON GRIFFIS: Okay. Any other
18 questions from the Board? Very well. Anything else?
19 Thank you very much. Ms. Ferster?

20 MS. FERSTER: Thank you. We have
21 submitted a legal memorandum that you should have
22 before you on the issues of the Height Act. Do you
23 have that?

24 CHAIRPERSON GRIFFIS: It was served today,
25 correct?

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1 MS. FERSTER: Yes, it was.

2 CHAIRPERSON GRIFFIS: Yes.

3 MS. FERSTER: What I'm going to do is I'm
4 not going to summarize the legal memo since you have
5 it. I'm not going to go through it in detail. I'm
6 just going to summarize the key points. Let me first
7 start by saying --

8 CHAIRPERSON GRIFFIS: What's your
9 objection first?

10 MS. BROWN: Carolyn Brown again for the
11 record. To the extent --

12 CHAIRPERSON GRIFFIS: Can we turn one of
13 those off, Ms. Ferster?

14 MS. BROWN: To the extent that you have
15 ruled that the Height Act is not controlling in the
16 zoning disputes, I would suggest that this memorandum
17 on the Height Act is stricken from the record.

18 MS. FERSTER: I did not hear this Board
19 rule, and I would suggest that before the Board rules
20 that the Board have some kind of briefing and hear the
21 argument.

22 CHAIRPERSON GRIFFIS: Very well. We'll
23 keep it in and allow briefing on the issue.

24 MS. FERSTER: Thank you. The first point
25 we make in our legal memorandum is that the Zoning

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1 Administrator was without authority to permit the
2 construction of a roof deck, which is 5 feet over the
3 Height Act, 70 foot limit on Belmont Street. We
4 understand there is a jurisdictional question that you
5 have put forth and we do intend to brief that issue
6 and right now, at this point, we will only draw your
7 attention to the fact that while the Zoning
8 Regulations do specify 90 foot height limit for the R-
9 5-D Zone, which this is in, that the Zoning Regulation
10 2520.1 specifically says "In addition to any controls
11 established from this title, all buildings or other
12 structures shall comply with the Act to regulate the
13 height of buildings in the District of Columbia."

14 And again, we will brief the question of
15 whether or not this Board has jurisdiction, but our
16 position is that that regulation does provide this
17 Board with jurisdiction to hear the roof deck issue,
18 and that is the one issue where the Height Act
19 supplies a height limitation, which is not in the
20 Zoning Regulations. The Height Act says that
21 buildings on Belmont Street cannot exceed 70 feet.
22 And so this roof deck structure exceeds that by 5
23 feet.

24 The point that we then go on to make is,
25 of course, that both the regulations and the Height

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1 Act specify in great detail the types of roof
2 structures that are permitted to be exceptions to the
3 Height Act, and they are detailed as spires, minarets,
4 domes, chimney stacks, tanks, and it's an exhaustive
5 list and roof decks are not enumerated in this
6 exhaustive list of structures that are permitted to
7 exceed the Height Act. Therefore, assuming you do
8 have jurisdiction over the Height Act issue, this roof
9 deck is plainly in excess of the Height Act by 5 feet.

10 CHAIRPERSON GRIFFIS: But if I understand
11 you correctly, you just said that under the list of
12 allowable structures that can exceed a height in a
13 certain zoned District, decks are not labeled as one.

14 Is that correct?

15 MS. FERSTER: That's correct.

16 CHAIRPERSON GRIFFIS: Okay.

17 MS. FERSTER: That's correct, and this is
18 a roof deck. So again, we will brief the
19 jurisdictional issue for you at a later point or
20 perhaps in accordance with the schedule that you might
21 set up for that.

22 Let me turn to the second issue, which is
23 the set-back issue. This is an issue where the Height
24 Act and the Zoning Regulations are consistent, so to
25 the extent that there was a jurisdictional issue with

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1 respect to the roof deck, there is no jurisdictional
2 issue here and I will refer to the Zoning Regulations,
3 as opposed to the Height Act.

4 My memorandum refers to both, but the
5 second issue is that we have identified, and Mr.
6 Hawkins has discussed, is that the Zoning
7 Administrator was without authority to permit
8 construction of the roof structure, which is not set-
9 back from all exterior walls by a distance equal to
10 the height of the roof structure, and this is
11 contained in the Zoning Regulations, 11 DCMR section
12 400.7(b).

13 And as Mr. Hawkins has pointed out, the
14 penthouse for this project is at least 11 feet, 7.5
15 inches above the roof and, therefore, it needs to be
16 set-back of an equal distance from all four sides.
17 However, as Mr. Hawkins has also pointed out and we
18 pointed out in our prehearing submission and the
19 drawings clearly indicate, the east wall of the
20 penthouse is flush with the east wall of the building
21 and the west wall of the penthouse is set-back only
22 about 6 feet from the west wall of the building and,
23 therefore, does not conform to the Zoning Regulations
24 set-back requirements relating to all exterior walls.

25 Now, Mr. Hawkins raised the question,

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1 because this was brought up by the Zoning
2 Administrator, of whether or not, because the two
3 interior lot line walls could be party walls, whether
4 they are, in fact, interior walls and not exterior
5 walls and, therefore, they are somehow exempt from the
6 set-back requirement. And indeed, while the Zoning
7 Administrator doesn't really explain its decision,
8 that is the only interpretation that would allow the
9 Zoning Administrator to have approved this roof
10 structure, because it is set-back only on the front
11 and the back and it is not set-back to the required 1
12 to 1 ratio on the sides.

13 And so let me address that point, whether
14 or not there is some kind of exemption for party walls
15 from the set-back structure based on the assumption
16 that party walls are interior walls. In our legal
17 memorandum, we have provided you with the legal
18 definition of the term party wall, and since the
19 Zoning Administrator was not interpreting the Zoning
20 Regulations, we think the legal definition of party
21 walls is the appropriate definition to apply here.
22 And that has been defined as, I quote, "A wall built
23 next to or astride a boundary line and designed to
24 serve simultaneously as the exterior wall of two
25 adjacent structures," and we quote from 9 Powell on

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1 Real Property, section 61.01, and that is a standard
2 legal treatise on property law principles, and we
3 don't provide copies, but we would be happy to do so
4 at some later point.

5 We also referenced in our legal
6 memorandum, and we have provided detailed attachments
7 for your information, that shows that the regulatory
8 history when the set-back requirement was adopted
9 indicates plainly that the Zoning Commission did
10 intend to require set-backs from all four walls, and
11 we particular reference the colloquy that occurred
12 between the National Capital Planning Commission and
13 the Zoning Commission when initially the Zoning
14 Commission had promulgated a regulation, which would
15 have required set-backs not from the exterior walls,
16 but from all lot lines of the lot, except in a C-5
17 District where 2 to 1 set-back from the perimeter of
18 the front roof fronting on a street was required.

19 And in comments to the Zoning Commission,
20 both the Office of Planning and the NCPC referred to a
21 reported Corporation Counsel opinion to the effect
22 that the Height Act imposes a still less restrictive
23 requirements, namely that penthouse set-backs only be
24 set-back only from the lot line on the side facing a
25 street. But the NCPC explicitly rejected that

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1 interpretation and directed the Zoning Commission to
2 require set-backs from all lot lines of the lot.

3 And we have quoted extensively from that
4 regulatory history, but we think that provides very
5 strong evidence that, in fact, in any context and
6 certainly within this context, all four exterior
7 walls, regardless of whether they are party walls or
8 they are row houses, must have a set-back that is of a
9 1 to 1 ratio equal to the height of the roof
10 structure, and that is evidenced by the fact that the
11 NCPC unequivocally rejected the lesser restrictive
12 set-back requirement that the Zoning Commission
13 initially proffered.

14 And I won't go into any more detail,
15 because I think that is plainly set out in our legal
16 memo in the interest of time and my child care
17 arrangements, I will stop here, but we would be happy
18 to provide an additional briefing on any questions
19 that you might have.

20 CHAIRPERSON GRIFFIS: Very well. Thank
21 you very much.

22 MS. FERSTER: If I might ask a question.
23 If we are going to continue beyond 6:00, can we take a
24 two minute recess for me to make a telephone call?

25 CHAIRPERSON GRIFFIS: I think what I would

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1 like to do is let's get through cross examination, and
2 then we can finish for today. So why don't we take a
3 break now and we'll come back for cross and depending
4 on the questions, that's where we'll end. Let's just
5 take five minutes and then we'll be back.

6 (Whereupon, at 5:49 p.m. a recess until
7 5:59 p.m.)
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1 E-V-E-N-I-N-G S-E-S-S-I-O-N

2 (6:00 p.m.)

3 CHAIRPERSON GRIFFIS: Okay. Let's resume,
4 please. We would like to start cross. We'll set the
5 order now. Does the Government, property owner, no
6 cross, Ms. Brown?

7 MS. BROWN: I just have --

8 CHAIRPERSON GRIFFIS: Let's go. Do you
9 want to pull a chair up at the edge?

10 MS. BROWN: I can do that.

11 CHAIRPERSON GRIFFIS: That would be good.

12 MS. BROWN: I have a few questions for Mr.
13 Hawkins, and then I think we can get out of here. I'm
14 just --

15 CHAIRPERSON GRIFFIS: You can. Okay.

16 MS. BROWN: I wasn't clear on your
17 testimony and where you were going on a lot of it. If
18 we could get back to the lower level and calculating,
19 having it count toward FAR.

20 Is it your testimony that you derived a
21 line from the front of the building to the back of the
22 building to determine whether or not it was above or
23 below 4 feet out of ground?

24 MR. HAWKINS: It was my testimony that I
25 saw what the architect had submitted. I went through

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1 the same process with the modified drawings, because
2 he had done it on the March drawings. I did it over
3 again with the changed proportions, because there was
4 a correction of the height of the first floor level,
5 and I duplicated his work and came up with slightly
6 different results.

7 MS. BROWN: So it's your assumption that
8 those drawings were what he based his FAR calculation
9 on?

10 MR. HAWKINS: The first drawing was
11 inaccurate in that the height of the second floor, the
12 height of what is called the first floor, was
13 different in the second one from the first.

14 MS. BROWN: I guess my question is a
15 little different.

16 MR. HAWKINS: Yes.

17 MS. BROWN: I'm asking you if you
18 understand that that is how the architect for this
19 project calculated the FAR for the basement level, for
20 the cellar level?

21 MR. HAWKINS: No.

22 MS. BROWN: Okay. And then my next
23 question is are you aware that the cellar level does
24 not project all the way to the back of the building?

25 MR. HAWKINS: Yes.

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1 MS. BROWN: My third question is are you
2 aware that there was no excavation done for this
3 project?

4 MR. HAWKINS: No excavation interior or
5 exterior?

6 MS. BROWN: For the cellar level.

7 MR. HAWKINS: Yes, I'm aware that there
8 was no interior excavation done.

9 MS. BROWN: Okay. I have no more
10 questions.

11 CHAIRPERSON GRIFFIS: Does the ANC have
12 any cross examination? No? Very well. I think we
13 are at -- yes?

14 MS. GILBERT: I have one very small
15 matter, which is a document that I would like to
16 submit for the benefit of everyone before we go
17 forward to the next hearing.

18 CHAIRPERSON GRIFFIS: It's a party
19 invitation, isn't it?

20 MS. GILBERT: It's a party invitation,
21 that's correct, and I had it a moment ago. Okay. Is
22 this an appropriate time to --

23 CHAIRPERSON GRIFFIS: I'm not sure.

24 MS. GILBERT: Okay.

25 CHAIRPERSON GRIFFIS: I don't know what it

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1 is.

2 MS. GILBERT: Essentially, what -- that
3 our testimony, and I just don't want anybody to accuse
4 us of waiting any longer than today to present this,
5 the appellants had requested from the appellee that we
6 submit the FAR calculations for this project.

7 CHAIRPERSON GRIFFIS: Right.

8 MS. GILBERT: The FAR calculations of this
9 project was initially reviewed by a third party
10 reviewer, right? Those calculations had not been
11 provided earlier, because the actual calculation could
12 not be -- which is sometimes a handwritten piece that
13 the reviewer uses --

14 CHAIRPERSON GRIFFIS: Okay.

15 MS. GILBERT: -- could not be located.

16 CHAIRPERSON GRIFFIS: So you're submitting
17 in the third party review of the FAR?

18 MS. GILBERT: No, what I'm submitting is
19 in response to the motion, which Ms. Hargrove filed,
20 the appellants filed, our zoning technician, Ms. Faye
21 Ogunneye, who will be testifying for the appellee, had
22 tried to prepare and provide an FAR calculation, which
23 was given to the members of the BZA and to the
24 appellants, and it says FY-03 on it. That was done,
25 essentially, after the original permit was issued and

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1 it was done just in order to provide our understanding
2 that the project met the FAR, but it's not the
3 original FAR calculation, which could not be located.

4 In preparing that document, Ms. Ogunneye
5 was under the impression in looking at the plans that
6 the bay window, is it, that the bay window was in
7 public space and, therefore, did not include it in her
8 FAR calculations. So therefore, for the benefit of
9 everyone, we would like to present an FAR calculation,
10 which was not prepared prior to the issuance of the
11 permit, but which is the Department's re-going back
12 over the FAR calculation to make sure that we're
13 satisfied in our minds that it meets the FAR
14 requirement.

15 CHAIRPERSON GRIFFIS: Okay.

16 MS. GILBERT: And I would like to just
17 present that.

18 CHAIRPERSON GRIFFIS: With all that
19 buildup, how could we refuse it?

20 MS. GILBERT: Okay.

21 CHAIRPERSON GRIFFIS: Let's get it in.

22 MS. GILBERT: All right. Thank you very
23 much.

24 BOARD MEMBER ZAIDAIN: So does this
25 include the bay window?

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1 MS. GILBERT: It does include the bay
2 window.

3 BOARD MEMBER ZAIDAIN: The bay window is
4 not in public space?

5 MS. GILBERT: But it does not include the
6 back staircases, which are open and are outside the
7 building.

8 BOARD MEMBER ZAIDAIN: Okay. They would
9 be calculated anyway, I guess, right?

10 BOARD MEMBER ETHERLY: And so, Ms.
11 Gilbert, this is a correction to the material provided
12 in Exhibit 39?

13 MS. GILBERT: That's correct.

14 BOARD MEMBER ETHERLY: Okay.

15 MR. ROTH: Mr. Chairman?

16 CHAIRPERSON GRIFFIS: Yes?

17 MR. ROTH: Alan Roth for the ANC. Ms.
18 Gilbert, just to clarify, are you, essentially,
19 acknowledging or is Ms. Ogunneye acknowledging now
20 that the bay windows are on private space?

21 MS. GILBERT: Yes.

22 MR. ROTH: Okay. Thank you.

23 CHAIRPERSON GRIFFIS: Okay. Any other
24 procedural questions tonight, things you want to bring
25 to our attention?

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1 UNIDENTIFIED SPEAKER: Thank you, sir.

2 CHAIRPERSON GRIFFIS: If not, let's run
3 through the course of events in the near future. I'm
4 going to set the continuation of this for the
5 afternoon of March 16th. We are squeezing it in here,
6 but I do not want to go too long away from this date.

7 So we will continue, at that point, and we can go
8 right to the Government's case when we resume on the
9 16th. I'm sorry, what? And we'll get as far as we can
10 through it. I would hope that we would get to the
11 ZA's and the property owner's case, at that time, and
12 cross examination and anything else that we can get
13 accomplished.

14 As we are setting this for the 16th, just
15 to be aware you are not the only case in the
16 afternoon. You will be, in fact, the third case in
17 the afternoon. We will be staying late in the evening
18 to try and get through a substantial portion of this
19 and I have put it here, because knowing I can't fully
20 anticipate, but I'm anticipating the first two cases
21 will not take a substantial amount of time. At this
22 point, our morning also looks to be of normal variety,
23 which won't run as late into the afternoon. Of
24 course, it never goes as I predict.

25 So that being said, otherwise we're set

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1 off until probably late April and June on this, and it
2 looks like we may need an additional day in any case.

3 Difficulties with the 16th?

4 MS. FERSTER: I need to ask a question,
5 and that is exactly how late do you anticipate us
6 going in the evening?

7 CHAIRPERSON GRIFFIS: I have been known to
8 keep the Board very late, so why don't you give me
9 some parameters of what would not be acceptable?

10 MS. FERSTER: I mean, I would like to be
11 out of here by 6:00. It will be very difficult for me
12 to find anybody to look after my kids between 6:00 and
13 8:00. I could possibly do that. I can't find anybody
14 after that.

15 CHAIRPERSON GRIFFIS: You know, okay, I'm
16 going to have staff note that we have to conclude that
17 session by 6:00 on the 16th in which case I'm going to
18 set it as the second case in the afternoon, which
19 means we will start fairly close to our beginning
20 opening of the afternoon.

21 I will move our now third case after this
22 appeal, so I will set a clear two hours of which we
23 will get through in that day unless we have additional
24 time and we can continue with that. So hopefully, we
25 will start this. Well, there it is. Not knowing

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1 timing, we'll set it that way and we'll get everyone
2 out by 6:00.

3 Any other questions at this point? Ms.
4 Brown?

5 MS. BROWN: You mentioned some briefing on
6 the Height Act issue, and I'm just not clear on what
7 additional documents that you're talking about or if
8 there is some sort of briefing scheduled.

9 CHAIRPERSON GRIFFIS: Oh, right. Do we
10 want to set a reschedule for that? Basically, the
11 question from the Board is to brief the issue of
12 whether the BZA has jurisdiction over the Height Act,
13 and we can keep the record open for that. I don't
14 think we necessarily need that by -- well, where are
15 we at, the 9th? No. Maybe we can give two weeks for
16 that to be submitted in.

17 MS. FERSTER: What's that date? I will be
18 out of the country until the 15th, so I would like a
19 few days between the 15th and whenever this is due.

20 CHAIRPERSON GRIFFIS: Two weeks is the
21 23rd.

22 MS. FERSTER: Okay.

23 CHAIRPERSON GRIFFIS: Am I right?

24 COMMISSIONER PARSONS: Is it possible, Ms.
25 Ferster, that you have a conversation with the

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1 Corporation Counsel and come to the same conclusion
2 they do or do you really think the BZA has
3 jurisdiction over the Height Act?

4 MS. FERSTER: Well, perhaps if you would
5 set a serial brief and if the corporation -- D.C. and
6 Montrose would provide opening briefs, for example, by
7 the 16th or the 23rd, and then we could have an
8 opportunity to respond. And if we agree with
9 Corporation Counsel, you know, then we wouldn't file
10 any response.

11 COMMISSIONER PARSONS: I guess where this
12 has been most recently discussed and determined is the
13 big tower on Wisconsin Avenue. That's why this is a
14 very current and recent decision as to who has
15 jurisdiction over this Act and it's not this Board.

16 MS. FERSTER: Okay.

17 COMMISSIONER PARSONS: It's the BAR, but
18 you're welcome to brief it.

19 MS. FERSTER: Okay.

20 COMMISSIONER PARSONS: But since you're
21 going to Europe and taking your kids, I hope.

22 MS. FERSTER: How did you know?

23 COMMISSIONER PARSONS: It's up to you.

24 MS. FERSTER: Well, I would like to see
25 Corporation Counsel's memorandum of law and if that

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1 would be amenable in a brief, sort of their filing a
2 brief and our replying, if necessary, would be
3 helpful.

4 CHAIRPERSON GRIFFIS: Okay.

5 MS. FERSTER: Excuse me.

6 CHAIRPERSON GRIFFIS: With the lateness of
7 the hour, we'll update you all on the 16th of how we're
8 going to go about it and we'll look for something
9 probably more towards the 30th.

10 MS. BROWN: Okay. And for clarifications,
11 I would not propose any oral argument on that.

12 CHAIRPERSON GRIFFIS: Well, I'm not going
13 to hear any. I think we'll get what we need in
14 writing. All right. Other questions, procedural
15 questions? Do we know the order when we resume? We
16 know when we're coming back? Mr. Zaidain?

17 BOARD MEMBER ZAIDAIN: Oh, I was just
18 going to state that I won't be here for next week's
19 hearing, but I do plan on participating in the case
20 and despite my status, I will continue and decide this
21 case.

22 CHAIRPERSON GRIFFIS: Excellent. Okay.
23 Anything else? Very well. You all are free to go. I
24 would ask, if you would, ask you get up and go just be
25 a little quiet, because we do have some other business

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1 to take care of. But most importantly, before David
2 leaves this evening, and you don't have to stay around
3 for this, but of course it would be most enjoyable, I
4 would like to present Mr. Zaidain with this
5 Certificate of Appreciation, because you know us
6 Government folks, I like to say I'm not one, but do
7 love to give these certificates.

8 BOARD MEMBER ZAIDAIN: Well, thank you
9 very much.

10 (Applause)

11 CHAIRPERSON GRIFFIS: And it is signed,
12 yes, by Mr. Kress and myself, and it does read "For
13 outstanding and dedicated service to the Board of
14 Zoning Adjustment and the residents of the District of
15 Columbia from May 21, 2002 to March 9th."

16 BOARD MEMBER ZAIDAIN: Well, thank you
17 very much.

18 CHAIRPERSON GRIFFIS: On behalf of the
19 Board.

20 BOARD MEMBER ZAIDAIN: I really appreciate
21 it.

22 CHAIRPERSON GRIFFIS: Excellent. And with
23 that happy and jocular aspect, you are buying the
24 first round. We also have minutes. Do we want to
25 postpone minutes until next week?

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1 BOARD MEMBER ZAIDAIN: I won't be here, so
2 I can't vote on them, but if you want to do them
3 tonight, we can.

4 CHAIRPERSON GRIFFIS: You could send in
5 absentee perhaps on that. Is there anything else for
6 our attention this evening? Ms. Bailey, thank you
7 very much.

8 BOARD MEMBER ZAIDAIN: Well, I just want
9 to say a couple things.

10 CHAIRPERSON GRIFFIS: Yes, please do.

11 BOARD MEMBER ZAIDAIN: I really appreciate
12 it. It has been kind of a flattering and humbling
13 day, and I really appreciate all of the thanks and it
14 has been a great experience being on the Board with
15 you guys, and staff is great and I think everybody's
16 dedication to really getting through these issues has
17 been -- it has been overly impressive, especially
18 coming from outside the city and being thrown right in
19 here. So I really appreciate the camaraderie and the
20 effort and the appreciation, and I look forward to
21 seeing all of you in different venues, so thank you
22 very much.

23 CHAIRPERSON GRIFFIS: Good, and thank you
24 very much. Very well. That's a nice way to end the
25 day, I think. So let's then adjourn the afternoon

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1 session.

2 (Whereupon, the hearing was concluded at
3 6:14 p.m.)

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