

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY,
MARCH 30, 2004

+ + + + +

The Morning Session of the Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice, at 9:45 a.m., Geoffrey Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
RUTHANNE G. MILLER	Vice Chairperson
CURTIS ETHERLY, JR.	Board Member
JOHN MANN, II	Board Member (NCPC)

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Deputy Sec., BZA
BEVERLEY BAILEY	Zoning Specialist
JOHN NYARKU	Zoning Specialist

OFFICE OF PLANNING STAFF PRESENT:

DAVID MCGETTIGAN	Office of Planning
KAREN THOMAS	Office of Planning

OFFICE OF CORPORATION COUNSEL STAFF PRESENT:

JANICE SKIPPER, ESQ.

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

9:42 a.m.

CHAIRPERSON GRIFFIS: Good morning, ladies and gentlemen. Let me call to order the 30 March 2004 Morning Public Hearing of the Board of Zoning Adjustment of the District of Columbia. My name is Geoff Griffis and I am Chairperson. Joining me today is the Vice Chair Ms. Miller. Representing the National Capital Planning Commission is Mr. Mann, and we are anticipating Mr. Etherly, who has been temporarily delayed, but he will join us briefly.

Copies of today's hearing agenda are available for you. They are located where you entered into the hearing room, so, please, pick one up and you will see the order of which we will proceed with. Please, also be advised that all proceedings before the Board of Zoning Adjustment are recorded. They are now recorded in two fashions. First, as you may well be familiar, a transcript is being created by the court reporter, who is sitting on the floor to my right. Second, we are proud to announce the live broadcast of all hearings and meetings of the Board of Zoning Adjustment on the Office of Zoning's website.

So attendant to those, there are several things that are of import. First of all, when coming

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1 forward to speak, you will need to fill out two
2 witness cards. Witness cards are available where you
3 entered into and also at the table in front of us
4 where you will give testimony. Those two witness
5 cards go to the recorder, prior to coming forward to
6 speak to the Board.

7 Additionally, when coming, have a seat.
8 You must speak into a microphone and we would ask that
9 you turn the microphone off when finished speaking, so
10 that we don't have a lot of feedback, which may cause
11 difficulty in creating the recording. I would also
12 ask that people turn off cell phones and beepers, at
13 this time, so that we don't have any disruptive noises
14 for anyone that is providing testimony before us.

15 The order of procedure for special
16 exceptions and variances is, first, we will hear
17 statements and witnesses of the applicant. Second, we
18 will hear Government reports attendant to the
19 application, such as the Office of Planning or
20 Department of Transportation. Third, we will hear
21 from the Advisory Neighborhood Commission within which
22 the property is located. Fourth, we will hear from
23 persons and parties in support of the application.
24 Fifth, would be persons and parties in opposition.
25 And, sixth, finally we will have closing remarks by

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1 the applicant.

2 Cross examination of witnesses is
3 permitted by the applicant and parties that are
4 established in each application. The ANC within which
5 the property is located is automatically a party in a
6 case and, therefore, is afforded cross examination
7 privileges. Nothing, of course, prohibits this Board
8 from giving direction during cross examination,
9 limiting time or actually stopping the questioning if
10 we find it to be redundant or going off point.

11 The record will be closed at the
12 conclusion of each hearing on the case, except for any
13 material that is specifically requested by the Board
14 and we will be very specific on what is requested and
15 when it should be submitted into the Office of Zoning.

16 After that information is received, of course, it
17 goes without saying that the record would then be
18 finally closed and no other additional information
19 would be accepted into the record.

20 The Sunshine Act requires that this Board
21 conduct all hearings on each case in the open and
22 before the public. This Board may, however,
23 consistent with the Sunshine Act and its Rules of
24 Procedure, enter into Executive Session. Executive
25 Session is used for the purposes of reviewing records

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1 and/or deliberating on a specific case.

2 The decision of this Board in contested
3 cases must be based exclusively on the record that is
4 created before us, and so all those things I have said
5 prior are very important if you want us to deliberate
6 on any information that should be submitted into the
7 record, either in writing or orally today with a
8 microphone on. We also ask that people not engage
9 Board Members today in conversation, so that we don't
10 give the appearance of receiving information outside
11 of the record that is created in the public before us
12 today.

13 The Board will now consider any
14 preliminary matters. Preliminary matters are those
15 which relate to whether a case will or should be heard
16 today, such as requests for postponements,
17 continuances or withdraws or importantly whether
18 proper and adequate notice of the application and
19 hearing has been provided. If you have a preliminary
20 matter for the Board, if you believe the Board should
21 not hear a case today or you are not prepared to
22 present a case today, I would ask that you come
23 forward and just have a seat at a table in front of us
24 as an indication.

25 I will ask staff and also say a very good

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1 morning to Ms. Bailey, representing the Office of
2 Zoning, and Mr. Moy, also here from the Office of
3 Zoning, if they have any preliminary matters for the
4 Board, at this time.

5 MS. BAILEY: Mr. Chairman and Members of
6 the Board, good morning. Staff has no preliminary
7 matters, sir.

8 CHAIRPERSON GRIFFIS: Good. And not
9 seeing any indication of preliminary matters then, I
10 would ask that all individuals here today that are
11 thinking about or planning on testifying if you would,
12 please, stand and give your attention to Ms. Bailey
13 and she is going to administer the oath.

14 (Whereupon, the witnesses were sworn.)

15 CHAIRPERSON GRIFFIS: Very well. Then I
16 think we're ready to call the first case.

17 MS. BAILEY: Thank you, sir. And that is
18 Application No. 17103 of Stanton Glenn Limited
19 Partnership, pursuant to 11 DCMR 3104.1, for a special
20 exception to allow Child Development Center that is
21 for 60 children, ages infant to 14, and 20 staff under
22 section 205. The application was last approved by BZA
23 Order No. 16568 on May 1, 2000. The property is
24 located in the R-5-A District at premises 3040 Stanton
25 Road, S.E., Square 5879, Lot 11.

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1 CHAIRPERSON GRIFFIS: Good morning.

2 MR. RIGELSKY: Good morning, Mr. Chairman.

3 MR. GELL: Good morning.

4 CHAIRPERSON GRIFFIS: Let's roll.

5 MR. GELL: Well, actually, Ms. Bailey has
6 said pretty much what I was going to say in
7 introduction, so I will simply ask Mr. Steve Rigelsky
8 to lay out our case for you. He is the property
9 manager for Castle Management and for this Stanton
10 Glenn property.

11 CHAIRPERSON GRIFFIS: Very well. I'm
12 sorry, and your name was?

13 MR. RIGELSKY: Stephen Rigelsky.

14 CHAIRPERSON GRIFFIS: And your address?

15 MR. RIGELSKY: 3040 Stanton Road, S.E.,
16 Suite 101, Washington, D.C.

17 CHAIRPERSON GRIFFIS: You've been before
18 us before. Is that correct?

19 MR. RIGELSKY: Yes.

20 CHAIRPERSON GRIFFIS: What was the case?

21 MR. RIGELSKY: And I promise not to bring
22 those kinds of issues up this time.

23 CHAIRPERSON GRIFFIS: I don't remember the
24 case. You just have a familiar face.

25 MR. RIGELSKY: 2412 17th Street.

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1 CHAIRPERSON GRIFFIS: That rings a bell.
2 Okay. Let's proceed then.

3 MR. RIGELSKY: Mr. Chairman and Members of
4 the Board, I represent Castle Management Corporation,
5 who is the managing general partner of the limited
6 partnership that owns and manages Stanton Glenn
7 Apartments. The community recently, from beginning in
8 April of 2000 and through the summer of 2002, went
9 through an extensive renovation process. We took what
10 was a mostly vacant and relatively high crime area and
11 cleaned it up, made it an asset to the community. It
12 now operates at anywhere from 97 to 100 percent
13 occupancy consistently.

14 And what we are looking to do in this
15 application is provide for a day care center that was
16 originally planned for this community in the original
17 development plans. In fact, I was before this Board
18 early in 2000 for the very same special exception in
19 order to get the zoning clearance to get the building
20 permit to do the renovation. It was kind of a chicken
21 and egg situation. We didn't have an operator at that
22 time, because it was difficult to get into serious
23 discussions with an operator when you haven't even
24 started your renovation. Yet to start your
25 renovation, you had to have your zoning in place to

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1 get your building permit.

2 We also encountered several difficulties
3 with our general contractor during the renovation
4 process of him not meeting scheduled turnover of
5 buildings, which forced us to move into the day care
6 center to have an on-site presence during the
7 renovation.

8 CHAIRPERSON GRIFFIS: Who moved into the
9 day care center?

10 MR. RIGELSKY: Excuse me?

11 CHAIRPERSON GRIFFIS: Who moved into the
12 day care center?

13 MR. RIGELSKY: Castle Management.

14 CHAIRPERSON GRIFFIS: I see. So you took
15 it over temporarily?

16 MR. RIGELSKY: Yes.

17 CHAIRPERSON GRIFFIS: Okay. And the Board
18 is pretty well aware of the past application, but,
19 obviously, we are here or rather the cumbersomeness of
20 putting it all together. I think it might move things
21 along fairly quickly if we just focus on 205, which,
22 of course, is what we're here for in terms of granting
23 or denying the special exception. And that really
24 goes to the impact of the development center and some
25 of the specifics. In fact, if you would like, you

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1 could just take Board questions, at this time, and
2 then just do a summary at the end.

3 MR. RIGELSKY: That's fine.

4 CHAIRPERSON GRIFFIS: Okay. Let me do
5 this. First of all, there is 388 spaces on the
6 property. Is that correct?

7 MR. RIGELSKY: Parking spaces, yes.

8 CHAIRPERSON GRIFFIS: Yes, I'm sorry, yes,
9 parking spaces. There are probably a lot of other
10 types of spaces. And it is my understanding, from the
11 submission, your's, that the required is 378, based on
12 the units. Is that correct?

13 MR. RIGELSKY: Yes.

14 CHAIRPERSON GRIFFIS: Okay. So my math,
15 being simple of mind, leaves 10 left over.

16 MR. RIGELSKY: Yes.

17 CHAIRPERSON GRIFFIS: Okay. And what are
18 you saying that the requirement for the day care
19 center is?

20 MR. RIGELSKY: We think there would be a
21 maximum of 20 employees, and that is based on having a
22 high infant count, because the ratio of employees to
23 children is at 4 children to 1 employee for infants.
24 Whereas, older children it is 15 children to 1. So I
25 don't see that we can possibly ever have more than 20

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1 employees, and that would be five spaces.

2 CHAIRPERSON GRIFFIS: Okay. And for
3 clarity, of course, the application is coming to us
4 for 20 staff?

5 MR. RIGELSKY: Yes.

6 CHAIRPERSON GRIFFIS: And that's full,
7 part-time, you know, 20 total number of people working
8 in there?

9 MR. RIGELSKY: At any one time.

10 CHAIRPERSON GRIFFIS: No, total.

11 MR. GELL: Well, we imagine, I mean, the
12 20 on-site at any one time would be the maximum. If
13 you want us to change the definition, then --

14 CHAIRPERSON GRIFFIS: That's correct.

15 MR. GELL: We would have to figure in to
16 what extent part-time people would be used. Back when
17 we put this together, I think the Board --

18 CHAIRPERSON GRIFFIS: So 20 staff is what,
19 20 persons on-site at one time?

20 MR. RIGELSKY: Yes.

21 MR. GELL: That was our intention.

22 CHAIRPERSON GRIFFIS: Part-time, full-
23 time, whatever it is?

24 MR. GELL: That's correct.

25 CHAIRPERSON GRIFFIS: And what is your

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1 understanding of how the parking is calculated? Is it
2 the total number on-site at one time?

3 MR. GELL: It's one for each four
4 employees on-site at one time.

5 CHAIRPERSON GRIFFIS: And where does it
6 say on-site at one time?

7 MR. GELL: It doesn't.

8 CHAIRPERSON GRIFFIS: It doesn't?

9 MR. GELL: No. It doesn't define what
10 they mean by employees, whether it means on-site at
11 one time or whether they mean on the rolls as
12 employees. That's an issue that I understood that the
13 Zoning Commission was going to be taking up to further
14 define what they mean by that. But as far as I know,
15 it has not been concluded. So if that's incorrect,
16 please, disabuse me.

17 CHAIRPERSON GRIFFIS: Well, it's certainly
18 an ambiguity that we have run across often many times.
19 Ms. Miller?

20 VICE CHAIR MILLER: Well, how do you
21 monitor how many employees are on-site at one time?

22 MR. GELL: We would certainly know how
23 many are needed to be there, depending on the hours
24 that it would be open and the numbers of children that
25 would be enrolled in the program. I'm sorry, I'm

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1 testifying. I really should let Mr. Rigelsky do that.

2 MR. RIGELSKY: Any conditions that this
3 Board would put on the approval of the special
4 exception will be written into the RFP that we put out
5 for operators and will also be written into their
6 lease.

7 VICE CHAIR MILLER: Well, if you had a
8 figure, such as 20 on-site at any one time, would you
9 be able to come up with a cap as to how many total
10 employees that would be maximum?

11 MR. RIGELSKY: I would like to be able to
12 give you an answer, but I do not operate the day care
13 center. I have no experience in that field. I would
14 just be guessing.

15 CHAIRPERSON GRIFFIS: Okay. Well, let's
16 assume for the time that we're talking about 20,
17 because it goes back to the issue. There seems to be
18 some ambiguity about the spaces and are there
19 dedicated spaces for the development center?

20 MR. RIGELSKY: No, we do not have assigned
21 parking.

22 CHAIRPERSON GRIFFIS: You have 388 units.

23 MR. RIGELSKY: Yes, 378.

24 CHAIRPERSON GRIFFIS: And you have 10 --

25 MR. RIGELSKY: 378.

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1 CHAIRPERSON GRIFFIS: Rather, 378 and you
2 have 10 spaces left over for guests. Are there
3 assigned parking for the units?

4 MR. RIGELSKY: No, there are not.

5 CHAIRPERSON GRIFFIS: Is there a
6 restriction on whether people can own one, three, 10
7 cars?

8 MR. RIGELSKY: If people started showing
9 up with 10 cars, not only would we be surprised, we
10 would put that into our rules and regulations.

11 CHAIRPERSON GRIFFIS: I see.

12 MR. RIGELSKY: Parking to date has not --

13 CHAIRPERSON GRIFFIS: Right now, it's --

14 MR. RIGELSKY: -- been a problem.

15 CHAIRPERSON GRIFFIS: Right. I understand
16 that.

17 MR. RIGELSKY: And especially the use of
18 these spaces will be Monday to Friday during the work
19 day when the people who have cars, a good number of
20 them, leave the site to go to work.

21 CHAIRPERSON GRIFFIS: I understand.

22 MR. RIGELSKY: Not all of our residents
23 have cars.

24 CHAIRPERSON GRIFFIS: I understand the
25 availability of swing use. I don't question that

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1 there is going to be available parking. Our problem,
2 of course, is we look straight to the regulations.

3 MR. RIGELSKY: I understand.

4 CHAIRPERSON GRIFFIS: The regulations tell
5 us this is the number required, so we have to make
6 sure the number required is being met. Otherwise, we
7 need to hear a case on relief. So I'm just trying to
8 get the base facts of it before we render judgment.
9 And it seems to me that if you have -- I mean, what I
10 understand you saying is that you have 10 flexible
11 spaces and five you want to count towards the day
12 care, which leaves five open for visitors or five
13 units that actually own two cars. So it's just
14 something we need to factor in.

15 Is there a reason why you wouldn't
16 dedicate like just assign that it would go to the day
17 care center? It would be a nice perk for the
18 director, you know, who drives up.

19 MR. RIGELSKY: I understand. There are
20 two schools of thought in property management on
21 parking. One is for assigned spaces and one is
22 definitely against. The companies I have been
23 involved with most of my career have been against,
24 because of some of the altercations that evolve as a
25 result of assigned parking and somebody taking my

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1 space.

2 CHAIRPERSON GRIFFIS: Yes, I'll say.
3 Okay. Not going to any of those schools of property
4 management, we'll move on. There is an indication in
5 this submission that most of the kids are -- I mean,
6 we don't have an actual program, so you don't have
7 enrollment at this time. Is that correct?

8 MR. RIGELSKY: That's correct.

9 CHAIRPERSON GRIFFIS: So your statement of
10 most of the kids come from the center, let me see if I
11 can find that, is a speculation?

12 MR. RIGELSKY: From our community itself?

13 CHAIRPERSON GRIFFIS: I mean, from the
14 community, right.

15 MR. RIGELSKY: Yes.

16 CHAIRPERSON GRIFFIS: But there is nothing
17 that precludes them from having enrollment from all
18 across the city?

19 MR. RIGELSKY: Theoretically, no.

20 CHAIRPERSON GRIFFIS: Okay. So going to
21 my point then, if someone is coming in and dropping
22 off and/or kids walking from the community itself,
23 explain to me a little bit of the process for doing
24 that. How do kids come and go?

25 MR. RIGELSKY: Well, within the community,

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1 there is an internal sidewalk system which leads out
2 to the city sidewalk along Stanton Road. All of the
3 roads within the community are private roads. They
4 are not dedicated to the city.

5 CHAIRPERSON GRIFFIS: Are there sidewalks
6 on all of them?

7 MR. RIGELSKY: Yes.

8 CHAIRPERSON GRIFFIS: Sidewalks are such a
9 great thing. Okay. And so someone coming in, driving
10 in, they need to drop their child off. Is there a
11 space in front of the facility that they can drop off
12 or they need to find a parking spot?

13 MR. RIGELSKY: Yes.

14 CHAIRPERSON GRIFFIS: There is a lay-by?
15 What is it?

16 MR. RIGELSKY: There is an enclosure for a
17 dumpster location. There is a space between that and
18 the next parking space, which is a handicapped space,
19 which has the striped area for the handicapped on the
20 side of that space closest to the dumpster. So, in
21 essence, you have a 10 to 12 foot wide space and the
22 stairs or sidewalk leading up to the day care center
23 is right at that point.

24 CHAIRPERSON GRIFFIS: Well, why is that
25 space there? I mean, why didn't you put a parking

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1 space there?

2 MR. RIGELSKY: Well, we were purposely
3 trying to keep some open space.

4 CHAIRPERSON GRIFFIS: Just keep it open.

5 MR. RIGELSKY: So that children weren't
6 walking between cars.

7 CHAIRPERSON GRIFFIS: And you would have
8 to pull in straight. Is that correct? It's a
9 perpendicular space, essentially, that you would use?

10 MR. RIGELSKY: Straight or on a little bit
11 of an angle.

12 CHAIRPERSON GRIFFIS: Okay. I'll take
13 your word that that's a very appropriate place,
14 because that wasn't the most flourishing description
15 between dumpster and the space handicapped.

16 MR. RIGELSKY: Well, I knew that when I
17 was saying it, but I don't know what else to call it,
18 sir.

19 CHAIRPERSON GRIFFIS: Okay. And we're
20 looking at 10 to 12 feet, obviously, so that's clear.
21 Well, it raises another issue, but okay, and
22 conceivably that will be right. Conceivably, they
23 also will be able to utilize parking in a very quick
24 manner.

25 MR. RIGELSKY: Yes.

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1 CHAIRPERSON GRIFFIS: How do people get
2 into the gated community?

3 MR. RIGELSKY: Gates are open during
4 daytime hours. In the evening, we have been currently
5 working with a security company physically checking
6 ID.

7 CHAIRPERSON GRIFFIS: Okay.

8 MR. RIGELSKY: As opposed to we do have a
9 keypad control also for the gates.

10 CHAIRPERSON GRIFFIS: Okay. And it is
11 your testimony the center is capable of meeting all
12 applicable codes and licensing requirements?

13 MR. RIGELSKY: Well, the license will have
14 to be obtained by the operator.

15 CHAIRPERSON GRIFFIS: Okay. But in order
16 for us to grant a special exception, you would need to
17 comply with 205.2, which is exactly what I have just
18 said, that the center will be capable of meeting all
19 applicable code and licensing requirements.

20 MR. RIGELSKY: Yes. Ultimately, it will.

21 CHAIRPERSON GRIFFIS: So your testimony is
22 that you will only be interviewing and then granting
23 RFP to somebody that is capable of being licensed?

24 MR. RIGELSKY: Yes.

25 CHAIRPERSON GRIFFIS: I see. Okay. We've

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1 touched on the fact of off-street or rather available
2 parking, and there is note in there regarding the
3 outdoor play space, which is provided, which is part
4 of the communal play space. Is that correct? Is
5 there a dedicated space?

6 MR. RIGELSKY: No, we have a separate
7 area. May I approach?

8 CHAIRPERSON GRIFFIS: Yes, if you could
9 give it to staff on the right?

10 MR. RIGELSKY: A separate area that is
11 fenced. We are adjacent to Parkland, that is land
12 that are park, not the Parkland Apartment Community,
13 and there is a fence between our property and Park,
14 and then we have installed a metal picket fence to
15 enclose the play area, which is, approximately, 6,370
16 square feet.

17 CHAIRPERSON GRIFFIS: What the total open
18 area?

19 MR. RIGELSKY: Yes, that is fenced in in
20 that rear and side yard.

21 CHAIRPERSON GRIFFIS: I see. You can play
22 baseball. Okay.

23 MR. RIGELSKY: 3,600 square feet is the
24 park.

25 CHAIRPERSON GRIFFIS: And you're saying

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1 there is a playground equipment? Is that correct?

2 MR. RIGELSKY: There is not currently
3 playground equipment.

4 CHAIRPERSON GRIFFIS: There is not. In
5 this green space you're anticipating playground
6 equipment?

7 MR. RIGELSKY: Yes.

8 CHAIRPERSON GRIFFIS: And do you know,
9 essentially, where it might be located and would it
10 create any objectable noises or anything else that
11 would be objectionable to the adjacent properties?

12 MR. RIGELSKY: The adjacent property is
13 Wooded Park.

14 CHAIRPERSON GRIFFIS: There is no other
15 structure close to this one particular structure?

16 MR. RIGELSKY: No, sir, there isn't.

17 CHAIRPERSON GRIFFIS: Okay. All right. I
18 think that's all I have. Board Members, any other
19 questions?

20 VICE CHAIR MILLER: I just have a general
21 question with respect to parking. I'm wondering is
22 there any formula that controls the number of parking
23 spaces that is required for this facility?

24 MR. GELL: Yes, in this Zone District, you
25 are required to have one space for each unit. The day

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1 care center is required to have one space for each
2 four employees.

3 VICE CHAIR MILLER: I heard you one space
4 per unit. But as far as where the day care center
5 fits in?

6 MR. GELL: The day care center is required
7 to have one space --

8 VICE CHAIR MILLER: As tied to the
9 employees.

10 MR. GELL: -- for four employees.

11 VICE CHAIR MILLER: Okay. Thank you.

12 MR. GELL: And you can see from this
13 diagram that this building is somewhat removed from
14 the other buildings. It backs up to the woods.

15 CHAIRPERSON GRIFFIS: Right. Okay.

16 MR. GELL: So the play area would be
17 behind the building.

18 CHAIRPERSON GRIFFIS: 2118.3, Mr. Gell,
19 I'm sure you're well aware of it is the Rules for
20 Interpretation which, of course, govern Chapter 21,
21 which is parking and the parking requirements. 2118
22 reads or 2118.3 reads "The number of teachers and
23 employees shall be computed on the basis of the
24 greatest number of persons to be employed at any one
25 period during the day or night, including persons

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1 having both full-time and part-time employment."

2 Does that substantiate or refute your
3 point of on-site at one time?

4 MR. GELL: It says during any one period.

5 CHAIRPERSON GRIFFIS: So that would
6 substantiate your point?

7 MR. GELL: The greatest number -- yes, I
8 would think so.

9 CHAIRPERSON GRIFFIS: Okay. So we're
10 looking at 20 employees, total bodies, on-site at one
11 time. Is everyone clear on that? We didn't have any
12 coffee this morning, so we'll get rolling a little bit
13 faster as the day goes on, I'm sure. Any other
14 questions then from the Board? Any other
15 clarifications? I think a lot of the questions that
16 we had have been answered. And, Mr. Gell, if you
17 don't mind, let's move on to the Office of Planning.
18 Of course, I'll give you an opportunity to do closing
19 remarks or anything else that you might need.

20 MR. GELL: Thank you very much.

21 CHAIRPERSON GRIFFIS: Thank you. Mr.
22 McGettigan is from the Office of Planning. Why don't
23 we turn it to him?

24 MR. MCGETTIGAN: Thank you, Mr. Chair.
25 For the record, my name is David McGettigan from the

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1 Office of Planning. The Office of Planning report was
2 prepared by John Moore of our office. I'm sitting in
3 for him. And the Office of Planning recommends
4 approval of the project and would like to just stand
5 on the record with the report, unless there is any
6 particular questions.

7 CHAIRPERSON GRIFFIS: Okay. Thank you
8 very much, Mr. McGettigan. There is, and I don't know
9 if you can answer it, and actually why don't we take
10 it to the applicant. Well, first of all, does the
11 applicant have any cross examination of the Office of
12 Planning?

13 MR. GELL: No, we're satisfied.

14 CHAIRPERSON GRIFFIS: Okay. Board
15 Members, any questions of the Office of Planning?

16 VICE CHAIR MILLER: I have a few. With
17 respect to this parking issue, I know we have looked
18 at this in other cases and found that we needed to put
19 a maximum number of employees in the conditions,
20 because it was too vague and difficult to enforce if
21 we didn't have a specific number, that part-time could
22 be divided multiple times. I'm wondering if Office of
23 Planning has an opinion on that in this case?

24 MR. MCGETTIGAN: I don't think that the
25 parking on neighborhood streets would be impacted.

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1 The impact would be within the community itself, given
2 the hours of the day care center. I don't think
3 that's a problem. The only concern I see is drop-off
4 space. As long as there is adequate drop-off space
5 and perhaps some signage that recommended reserve some
6 spaces during the operating hours of the day care
7 center might be appropriate for a few spaces in front.

8 VICE CHAIR MILLER: Well, with respect to
9 conditions, I think that there is a question of number
10 of years that this would be conditioned for. I think
11 I've seen the figures four years and six years, and
12 I'm interested in Office of Planning's view on that.

13 MR. MCGETTIGAN: I would suggest the four
14 years for starters to see how the operation is. If
15 there is any problems that arise, and you can relook
16 at it later after four years of operation, and you
17 should know if there is any problems and then a larger
18 amount of time can be granted after that.

19 VICE CHAIR MILLER: I think there were
20 also two figures with respect to designated parking
21 spaces. I saw a designation of five spaces or 10
22 spaces for the center.

23 CHAIRPERSON GRIFFIS: It's on page 6 under
24 205.4 of the Statement of Office of Planning, "The
25 Child Development Center will employ a maximum of 20

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1 teachers and other support staff and, therefore, are
2 required to provide five on-site. The applicant will
3 provide 10 on-site spaces, which will also include
4 visitor parking." But there was some discrepancy
5 about what the Office of Planning's thought was, is
6 whether that was critical to their recommendation of
7 whether it was five or 10 total.

8 I guess the direct question in my mind,
9 Ms. Miller, if this picks it up is and, Mr.
10 McGettigan, if you can answer this, obviously, it's
11 not your specific report, but was the Office of
12 Planning looking at the fact that those 10 were being
13 utilized by the day care center?

14 MR. MCGETTIGAN: No, I think it was just a
15 note that there were 10 spaces available and it's
16 above the parking requirement, but still five is
17 what's required and recommended.

18 CHAIRPERSON GRIFFIS: I see. Okay.
19 Follow-up, Ms. Miller?

20 VICE CHAIR MILLER: No, I think that's
21 all. Thank you.

22 CHAIRPERSON GRIFFIS: Okay. And, Ms.
23 Miller, quickly where I wanted to go, Mr. Gell, you
24 have reviewed the Office of Planning's report. Is
25 that correct?

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1 MR. GELL: Yes, I did.

2 CHAIRPERSON GRIFFIS: And you have seen
3 the discrepancy of the conditions that are being
4 recommended by Office of Planning and your own
5 applicant?

6 MR. GELL: I had looked at it some time
7 ago. I don't know if I remember all of them.

8 CHAIRPERSON GRIFFIS: Okay.

9 MR. GELL: But we didn't have any really
10 serious problem with any of them at the time.

11 CHAIRPERSON GRIFFIS: Okay. So the time,
12 four years, as recommended by the Office of Planning,
13 does not create a difficulty for you. Is that
14 correct?

15 MR. GELL: We would urge the Board to give
16 us more than four years, simply because we're going to
17 have to get a day care center operator on board. It
18 will take some time for them to get up and running and
19 by the time they have a full compliment of children,
20 if they are permitted up to 60, it may take some time.

21 It would give them perhaps a few years of operation
22 for the Board then to see whether they can handle it.

23 Four years may not be enough time for them to reach
24 that full compliment.

25 CHAIRPERSON GRIFFIS: What is the --

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1 MR. GELL: But it might be in the Board's
2 interest.

3 CHAIRPERSON GRIFFIS: What is the
4 anticipated timing in sending out the RFP and getting
5 a center in there?

6 MR. RIGELSKY: Hopefully, we would have an
7 operator there by the start of the school season in
8 September. I can't guarantee that.

9 CHAIRPERSON GRIFFIS: Okay. All right.
10 Any other follow-ups? And we do have the correct
11 ages. What you're asking to do is change from 2 to 12
12 to 2 to 14 years of age. Is that correct?

13 MR. GELL: Yes, that's exactly correct.

14 CHAIRPERSON GRIFFIS: Do you want to
15 refresh your memory on your application?

16 MR. RIGELSKY: The previous application
17 was 2 to --

18 CHAIRPERSON GRIFFIS: 12.

19 MR. RIGELSKY: 12.

20 CHAIRPERSON GRIFFIS: Right.

21 MR. RIGELSKY: The current application is
22 infant to 14.

23 CHAIRPERSON GRIFFIS: Oh, infant. I'm
24 sorry. You're absolutely right. You can refresh my
25 recollection, my own reading sitting here in front of

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1 me. Okay. And the hours of operation are 7:00 to
2 6:00. Is that correct?

3 MR. RIGELSKY: Yes.

4 CHAIRPERSON GRIFFIS: 7:00 a.m. to 6:00
5 p.m. Okay. Yes?

6 VICE CHAIR MILLER: Yes. I think this is
7 the basic issue and I just want to nail this down with
8 Office of Planning and make sure I understand it in
9 this case. The way I see this is that the application
10 asks for 20 staff, but what they have come here and
11 are saying is no, that doesn't mean 20 maximum. That
12 means 20 at any one time on-site.

13 And from what I understood of you to say,
14 and I want to make sure that this is correct, is that
15 while maybe in other cases that's a problem because of
16 the neighboring streets and difficulty finding parking
17 on neighboring streets, in this particular case it is
18 not a problem if it's 20 at any one time, because
19 there's a lot of spaces for parking around the school,
20 around the center, and not just on-site. Is that
21 correct?

22 MR. MCGETTIGAN: Yes, because this is the
23 gated community and there is lots of parking spaces on
24 the site that will probably be vacant during the time
25 that the demand for this use is there.

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1 VICE CHAIR MILLER: Thank you.

2 CHAIRPERSON GRIFFIS: Anything else for
3 the applicant, Office of Planning? Very well. Mr.
4 Gell, do you have a report from the ANC or is ANC-8B
5 represented today? I'm not noting a representation.

6 MR. GELL: Mr. Chairman, we appeared
7 before ANC-8B and received a unanimous vote in favor
8 of this day care center, but I have not been able to
9 get the ANC to send you a letter. So, unfortunately,
10 the Board may not be able to give great weight to the
11 ANC, but we were there at the meeting and all we can
12 do is report what happened.

13 CHAIRPERSON GRIFFIS: We'll take your word
14 for it. Do you have any other Government reports then
15 to this application, Mr. Gell, that haven't been
16 filed?

17 MR. GELL: I have not seen any.

18 CHAIRPERSON GRIFFIS: Nor have I. Very
19 well then. Is anyone here in regards to Application
20 17103 to give testimony, persons to give testimony
21 either in support or in opposition? Not noting any
22 indication of persons present to give testimony, I
23 believe we can move on, Mr. Gell, to any closing
24 remarks that you might have.

25 MR. GELL: Yes, Mr. Chairman. At the last

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1 hearing, there were people from the community. In
2 fact, one was a member of the ANC, who lives at the
3 community, who urged the Board to meet what is
4 considered to be a really desperate need in that area
5 for an additional day care center. We regret the fact
6 that we're not able to provide the day care center,
7 because there is such a need and we would like to get
8 started as soon as possible to do so.

9 There was testimony at the ANC and so
10 forth that there is a crying need not only within
11 Stanton Glenn, but also in the surrounding homes and
12 it's a growing community. As you know, there is a
13 great deal of building going on in that area of the
14 city, so we think that the success of the day care
15 center is certainly going to be assured, and our job
16 really is to find the very best operator we can, so
17 that those kids will have the best care that's
18 available and the parents can go to work knowing that
19 their kids are well taken care of.

20 So we would just urge the Board to pass
21 this, to give us the special exception and, as I say,
22 to give us as much time as possible before we have to
23 go through the process of coming back to you for an
24 extension. With that, thank you very much.

25 CHAIRPERSON GRIFFIS: Thank you, Mr. Gell.

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1 Clarifications from the Board, any last questions?
2 Very well. Let's move ahead then. I would move
3 approval of Application 17103, Stanton Glenn Limited
4 Partnerships, and that is pursuant for a special
5 exception to allow the Child Development Center for 60
6 children ages infant to 14 and 20 staff under section
7 205. That is for the premises of 3040 Stanton Road,
8 S.E. The motion will, of course, have conditions with
9 it.

10 I would propose the conditions as the
11 following: First, approval shall be for five years.
12 I think it's important to keep the attendant language
13 in the previous condition, that at the three year
14 anniversary the applicant would hold a meeting with
15 the Advisory Neighborhood Commission and the ANC would
16 provide a report to the Board.

17 Again, the number of children, as stated
18 in the application, would be listed as not to exceed
19 60 infant to 14 years of age. The total of teachers
20 and staff shall be 20. Of course, that is attendant
21 to 2118.3, which would mean employed at any one period
22 of the day or night, including persons having full-
23 time and part-time status. Hours of operation would
24 be from 7:00 a.m. on Friday or Monday through Friday,
25 7:00 a.m. to 6:00 p.m. and that five on-site parking

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1 spaces would be provided. And I would ask for a
2 second.

3 BOARD MEMBER MANN: Second.

4 CHAIRPERSON GRIFFIS: Thank you very much,
5 Mr. Mann. I think it's fairly clear, and I will take
6 deliberation on the entire piece, but let me run
7 through, first of all, my view of the compliance to
8 section 205.

9 First of all, looking at it, it is fairly
10 clear that most, if not all, are directly met and I
11 say most in that we have some peculiarities with this
12 in terms of not having an actual operator. I think we
13 can rely heavily on the testimony that we have heard
14 today and the fact that a contract would be awarded
15 for those centers that could be properly licensed and
16 meet building codes and, of course, the building
17 itself would obviously have to accommodate that.

18 The outdoor play space, we have clearly
19 seen the distance from any other adjoining properties,
20 so that there wouldn't be any objectionable impact for
21 outside play or equipment or anything of that nature.

22 205.6 talks about the Board's ability to
23 have design discretion and any sort of screening that
24 would be applicable. I think it's fairly clear in the
25 application the fact that this just went through a

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1 major renovation and, obviously, there was a lot of
2 attention paid to how it was landscaped. The
3 buildings were upgraded, sidewalks, etcetera. I don't
4 see the need for the Board to step into that realm and
5 nor do I see any evidence in the application that
6 would rise to the point where we would need to address
7 those in order to mitigate any sort of impacts.

8 Of course, with day care centers it's
9 always an issue for the Board to fully understand
10 parking, picking up, dropping off for numerous
11 reasons. I think the most important is the safety of
12 the children and, of course, that is everyone's
13 concern in this case. I think 205 is met in that
14 respect specifically, but also I want to state the
15 fact that this is a gated community in which case that
16 it will be fully managed, and if there is a problem it
17 won't be ours first. It will be the management
18 company's and the residents that are there, and so I
19 think the Board can put full faith in the fact that it
20 will be dealt with and accommodated.

21 And so I don't see any need to go beyond
22 looking at the specifics of having five parking spaces
23 provided and as this gets up and running, it will
24 obviously need some flexibility in terms of how
25 students are brought in and not, Mr. Gell, and I

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1 believe the statement of the applicant is that it is a
2 growing community, so you probably will well be
3 drawing from outside of the gated community itself and
4 so that, obviously, will have to be dealt with and I
5 think can be appropriately dealt with with the Castle
6 Management Corp.

7 That being said, I will turn to other
8 Board Members.

9 VICE CHAIR MILLER: I would concur with
10 everything that you said, Mr. Chairman, and I probably
11 alluded to this before, but normally we do put a
12 maximum number on employees, but in this case, giving
13 OP great weight and there seems to be no evidence of
14 any parking problems in general, so there is no need
15 to do that in this case.

16 CHAIRPERSON GRIFFIS: Well, let me get
17 some clarification, because we have put a cap. It's
18 20 faculty and staff at any one period.

19 VICE CHAIR MILLER: At one time. That's
20 true, at one time.

21 CHAIRPERSON GRIFFIS: Right.

22 VICE CHAIR MILLER: But often we give a
23 maximum number of employees period, you know, that
24 can't be broken down into different combinations,
25 part-time employees.

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1 CHAIRPERSON GRIFFIS: Right. Okay.

2 VICE CHAIR MILLER: But in this case I
3 think the case certainly has been made that 2118.3 is
4 appropriately applied.

5 CHAIRPERSON GRIFFIS: Excellent. Anything
6 else then? Very well. We have a motion before us
7 that has been seconded with the conditions. I would
8 ask that all the Board Members in favor signify by
9 saying aye.

10 ALL: Aye.

11 CHAIRPERSON GRIFFIS: And opposed?
12 Abstaining?

13 MR. RIGELSKY: Thank you.

14 MS. BAILEY: The vote is recorded.

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

16 MS. BAILEY: The vote is recorded as 3-0-2
17 to approve the application. Mr. Griffis made the
18 motion, Mr. Mann second, Mrs. Miller is in agreement,
19 Mr. Etherly nor a Zoning Commission member are present
20 today.

21 CHAIRPERSON GRIFFIS: Okay. Thank you,
22 Ms. Bailey. Thank you all very much. Good luck
23 getting someone in over the summer.

24 MR. RIGELSKY: Thank you.

25 CHAIRPERSON GRIFFIS: Very well. If there

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1 is nothing for that application, why don't we call the
2 next case when staff is ready?

3 MS. BAILEY: We did a summary order on
4 that, Mr. Chairman? Mr. Griffis, did we do a summary?

5 CHAIRPERSON GRIFFIS: I was conferring
6 with the Board on their opinion.

7 MS. BAILEY: Sorry.

8 CHAIRPERSON GRIFFIS: That's okay. I
9 think a summary order is perfectly appropriate.

10 MS. BAILEY: The next case, sir,
11 Application No. 17138 of James and Julie Edmonds,
12 pursuant to 11 DCMR section 3103.2, for a variance
13 from the minimum lot area requirements under section
14 401.3, to allow the conversion of an existing flat
15 that is a two-family dwelling to a four unit apartment
16 building in the R-4 District at premises 1325 Fairmont
17 Street, N.W., Square 2860, Lot 819.

18 CHAIRPERSON GRIFFIS: Good morning.

19 MR. GEBREMICHAEL: Good morning. My name
20 is Mesfin Gebremichael. I am here representing the
21 owners.

22 CHAIRPERSON GRIFFIS: And your address?

23 MR. GEBREMICHAEL: 415 Florida Avenue,
24 N.W., Washington, D.C.

25 CHAIRPERSON GRIFFIS: Okay. Let's

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1 proceed. Actually, let me ask a quick question. What
2 is your capacity in terms of the project and
3 representing? I mean, are you an attorney, architect?

4 MR. GEBREMICHAEL: No, I'm not an
5 attorney. I am a real estate agent.

6 CHAIRPERSON GRIFFIS: I see.

7 MR. GEBREMICHAEL: I work with -- James
8 and Julie Edmonds are my clients.

9 CHAIRPERSON GRIFFIS: Okay.

10 MR. GEBREMICHAEL: And I represent them.
11 I am representing them today, because they couldn't be
12 here because of some family issues.

13 CHAIRPERSON GRIFFIS: That's fine. It's
14 not a requirement. I just wanted to know what was
15 happening.

16 MR. GEBREMICHAEL: Okay.

17 CHAIRPERSON GRIFFIS: I would also just
18 welcome Mr. Etherly who is with us. So proceed.

19 MR. GEBREMICHAEL: I intend to stand on
20 the record of the statement of the burden of proof. A
21 little bit of background on how I got to this point.
22 Prior to the purchase of the property, I called the
23 Zoning Office and asked what the requirement was to
24 convert a single-family unit into multi units, and I
25 was told by Mr. Reeves, in the Zoning Office, that the

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1 only requirement was that each unit has 900 square
2 feet.

3 CHAIRPERSON GRIFFIS: Mr. Reeves in the
4 Zoning Office? Is that at DCRA?

5 MR. GEBREMICHAEL: Yes, it's at DCRA.

6 CHAIRPERSON GRIFFIS: So in the Zoning
7 Administrator's Office?

8 MR. GEBREMICHAEL: Yes.

9 CHAIRPERSON GRIFFIS: And what is his
10 title and capacity?

11 MR. GEBREMICHAEL: Well, I found out later
12 that he is not a zoning technician. He is just a
13 zoning assistant and based on the information that he
14 gave me, we went ahead and purchased this property and
15 architectural drawings were made for a four unit
16 building, and we submitted the application for a
17 building permit, and then that's when I was told that
18 this four unit was not -- we will not be able to have
19 four units in that area. We only can have three
20 units. Now, the economic value of the property was
21 determined on four units.

22 CHAIRPERSON GRIFFIS: Do you have an
23 appraisal on that?

24 MR. GEBREMICHAEL: On the property?

25 CHAIRPERSON GRIFFIS: Yes. How was it

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1 determined? What do you mean it was determined by
2 four units?

3 MR. GEBREMICHAEL: Well, basically, when
4 you consider the acquisition costs and the cost of
5 construction, when you add, you know, when you add up
6 the numbers, it doesn't add up to be economically
7 viable.

8 CHAIRPERSON GRIFFIS: But doesn't that
9 speak to the fact that they paid too much?

10 MR. GEBREMICHAEL: No, not really. We
11 paid what the going rate was in the area at the time.

12 CHAIRPERSON GRIFFIS: But then if the
13 going rate is -- then there isn't any economic
14 hardship if that's the going rate. You're saying
15 market rate, that's what the sale was?

16 MR. GEBREMICHAEL: The sale was a correct
17 sale.

18 CHAIRPERSON GRIFFIS: Okay.

19 MR. GEBREMICHAEL: All I'm saying is the
20 sale, the purchase was based on the assumption or the
21 belief that we can have four units on the property.

22 CHAIRPERSON GRIFFIS: I understand that.
23 Who did the drawings for the building?

24 MR. GEBREMICHAEL: An architect by the
25 name of -- with McKissack and McKissack.

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1 CHAIRPERSON GRIFFIS: And were they not
2 asked to do a zoning analysis?

3 MR. GEBREMICHAEL: Well, maybe they were,
4 but I was not aware of it. Maybe they were asked,
5 maybe they were not asked, but they were just asked to
6 do the drawing for the four units.

7 CHAIRPERSON GRIFFIS: Okay. So if I
8 understand you correctly, your clients who you sold
9 the house to relied on your telephone conversation
10 with Mr. Reeves at DCRA?

11 MR. GEBREMICHAEL: Yes.

12 CHAIRPERSON GRIFFIS: And did Mr. Reeves
13 put a statement in the application that's before us
14 that said yes, I told you it was 900 square feet per
15 unit?

16 MR. GEBREMICHAEL: No, he didn't. You
17 see, at the time that he -- I know in retrospect now I
18 should have asked for something in writing, but it
19 would not have been a reasonable request on my part.
20 I mean, if all applicants or everybody that calls into
21 the office requests a written statement from the
22 Zoning Office, you know --

23 CHAIRPERSON GRIFFIS: Many do.

24 MR. GEBREMICHAEL: Well, at that time, it
25 was my first meeting or my first contact with the

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1 Zoning Office asking this kind of information and
2 really, in trying to come to this point, I have done a
3 lot of research. I have gone into cases before you
4 previously presented and, as you can see, I have spent
5 a lot of time on this application. And I know it
6 doesn't -- I mean, it's my word that you're listening
7 to, but this is what happened and that's why I spent
8 so much time in coming here.

9 CHAIRPERSON GRIFFIS: Right.

10 MR. GEBREMICHAEL: And doing all this
11 research to prove that this is what Mr. Reeves
12 actually told me.

13 CHAIRPERSON GRIFFIS: Right.

14 MR. GEBREMICHAEL: And we have gone to
15 great extent to acquire the property and spent a lot
16 of time and energy.

17 CHAIRPERSON GRIFFIS: I understand. Is it
18 conceivable that you misunderstood Mr. Reeves?

19 MR. GEBREMICHAEL: No, I didn't. I don't
20 think I misunderstood it. If he had told me that 900
21 square feet was in relation to the lot area --

22 CHAIRPERSON GRIFFIS: Did he give you a
23 section of the Zoning Regulations?

24 MR. GEBREMICHAEL: No, he didn't.

25 CHAIRPERSON GRIFFIS: Okay. Here's my

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1 difficulty, is I fully understand not knowing all of
2 the ins and outs of zoning and the like. I can fully
3 understand a reliance on what you thought was
4 appropriate. The difficulty that we have for this
5 Board is that it doesn't rise to the level of a
6 variance test and another important aspect that the
7 Board needs to really keep in mind is if we rely on
8 the variance test being met by the fact of you just
9 didn't understand the zoning, how is it that we could
10 deny anybody else meaning, going even further, that
11 we're actually changing the zoning, which we are not
12 allowed to do, because if, based on just your
13 statements, that, you know, we misunderstood that it
14 wasn't allowed, what's to stop the next door neighbors
15 and three doors down and all across the city making
16 the same statement and how can we deny them if we
17 don't deny you?

18 MR. GEBREMICHAEL: Well, looking at, first
19 of all, the property was a shell. It was vacant
20 property.

21 CHAIRPERSON GRIFFIS: Okay.

22 MR. GEBREMICHAEL: Secondly, we have the
23 support of the ANC and the neighborhood for what we're
24 trying to do.

25 CHAIRPERSON GRIFFIS: And that's terrific.

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1 How is this property unique?

2 MR. GEBREMICHAEL: Well, it's unique.
3 It's not unique in the sense that there are, from what
4 I have read in the Zoning Rules, it has any physical
5 deformities or anything like that. It's unique in the
6 sense that this was an abandoned property, vacant, and
7 we are restoring it and we are making it a liveable
8 property.

9 CHAIRPERSON GRIFFIS: Is that unique for
10 the area? Is it unique for the city?

11 MR. GEBREMICHAEL: No.

12 CHAIRPERSON GRIFFIS: Is it unique for
13 that particular block?

14 MR. GEBREMICHAEL: No, it's not.

15 CHAIRPERSON GRIFFIS: Okay. Go ahead.

16 MR. GEBREMICHAEL: I guess, I mean, I
17 guess it would have been, you know, unfeasible for any
18 or any owner, not only us, or for anybody who would
19 have considered purchasing that property. If given
20 the same information that I was given, I think we
21 would have backed out and left.

22 CHAIRPERSON GRIFFIS: Is that so?

23 MR. GEBREMICHAEL: Yes.

24 CHAIRPERSON GRIFFIS: What's the sale
25 price of a single-family home on that block right now,

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1 market value?

2 MR. GEBREMICHAEL: It depends on three
3 bedrooms, two bedrooms, one bedroom.

4 CHAIRPERSON GRIFFIS: Give me comparable
5 to the house that we're talking about here.

6 MR. GEBREMICHAEL: Well, it would be about
7 half a million.

8 CHAIRPERSON GRIFFIS: And you purchased
9 this for \$340,000?

10 MR. GEBREMICHAEL: Yes.

11 CHAIRPERSON GRIFFIS: And what is your
12 estimation it would take to bring it back to a single-
13 family home?

14 MR. GEBREMICHAEL: The way it is now?

15 CHAIRPERSON GRIFFIS: Yes.

16 MR. GEBREMICHAEL: Maybe another \$300,000.

17 CHAIRPERSON GRIFFIS: And you don't think
18 that you could sell? Your economic argument is that
19 you couldn't sell this for \$640,000 at this time?

20 MR. GEBREMICHAEL: It's not that we cannot
21 sell it. Probably somebody willing to pay for it, but
22 what I'm saying is we are not able to get financing
23 for it.

24 CHAIRPERSON GRIFFIS: How do we know that?
25 What do you mean you can't get financing for it?

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1 MR. GEBREMICHAEL: Well, you see, when we
2 went to the bank initially with a four unit plan and
3 submitted the application, we were given the okay.
4 But then when the permit was not presented as a four
5 unit, the bank said, you know, we need to look into
6 this more.

7 CHAIRPERSON GRIFFIS: So you were denied
8 financing? You were denied financing for a three
9 unit, for a flat, for a single-family home?

10 MR. GEBREMICHAEL: Well, from what I know,
11 we are denied financing for four units.

12 CHAIRPERSON GRIFFIS: Well, of course you
13 are.

14 MR. GEBREMICHAEL: Yes.

15 CHAIRPERSON GRIFFIS: Because it's not
16 allowed.

17 MR. GEBREMICHAEL: Yes.

18 CHAIRPERSON GRIFFIS: They can't finance
19 something that's not allowed by zoning.

20 MR. GEBREMICHAEL: But it's not, I mean,
21 feasible for us to even go into it if we're not going
22 to get four units, because it would put us in the red.

23 CHAIRPERSON GRIFFIS: Okay. You indicate
24 that you have looked at the past Certificate of
25 Occupancy. Is that correct?

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1 MR. GEBREMICHAEL: Yes.

2 CHAIRPERSON GRIFFIS: And it was for a
3 rooming, boarding houses?

4 MR. GEBREMICHAEL: Yes.

5 CHAIRPERSON GRIFFIS: And what other uses?
6 Was there anything else? It was just a rooming,
7 boarding house that had a C of O in the past?

8 MR. GEBREMICHAEL: Well, the neighborhood
9 has had, you know, a preponderance.

10 CHAIRPERSON GRIFFIS: No, I don't care
11 about the neighborhood.

12 MR. GEBREMICHAEL: Okay.

13 CHAIRPERSON GRIFFIS: Because we have to
14 focus specifically on this property.

15 MR. GEBREMICHAEL: Yes, it was basically a
16 rooming house, boarding house. And actually, in the
17 public record it states that it's a four unit
18 building.

19 CHAIRPERSON GRIFFIS: What public record?

20 MR. GEBREMICHAEL: The public record that
21 we pulled out on the MRIS system.

22 CHAIRPERSON GRIFFIS: You mean a real
23 estate listing?

24 MR. GEBREMICHAEL: Yes.

25 CHAIRPERSON GRIFFIS: Showed it as a four

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1 unit building?

2 MR. GEBREMICHAEL: Not the listing, the
3 public record. There is a public record that I didn't
4 bring with me, but I will be happy to provide that.

5 CHAIRPERSON GRIFFIS: Right. The MRIS.

6 MR. GEBREMICHAEL: Yes.

7 CHAIRPERSON GRIFFIS: Who creates it?

8 MR. GEBREMICHAEL: I guess MRIS creates
9 it.

10 CHAIRPERSON GRIFFIS: And who are they?

11 MR. GEBREMICHAEL: They are a multiple
12 listing system.

13 CHAIRPERSON GRIFFIS: Are they tied at all
14 directly, indirectly to the Office of Zoning of the
15 District of Columbia?

16 MR. GEBREMICHAEL: I don't think so, but I
17 think the --

18 CHAIRPERSON GRIFFIS: How about DCRA?

19 MR. GEBREMICHAEL: Probably they are and I
20 had a copy of it when I went to the DCRA office to
21 show them that this is actually what it states on the
22 public record, that it's a four unit, and I will be
23 more than happy to provide that.

24 CHAIRPERSON GRIFFIS: Describe to me what
25 your understanding of what the MRIS is.

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1 MR. GEBREMICHAEL: The MRIS system,
2 usually we real estate agents rely on it when we look
3 into the record as to who the owner of the property
4 is, the lot size, the lot and square of the property
5 and who transferred the transfer information and, at
6 the same time, whether it's one unit, two units or
7 three units. But I have come to realize now, having
8 done what I have done so far, that that needs to be
9 verified, that you actually need to call into the
10 Government office and find out.

11 CHAIRPERSON GRIFFIS: Is there a statement
12 to that effect on the MRIS?

13 MR. GEBREMICHAEL: That says that you need
14 to verify?

15 CHAIRPERSON GRIFFIS: Yes.

16 MR. GEBREMICHAEL: No.

17 CHAIRPERSON GRIFFIS: Are you certain?

18 MR. GEBREMICHAEL: Yes.

19 CHAIRPERSON GRIFFIS: Do you have a copy
20 of it in front of you?

21 MR. GEBREMICHAEL: I can provide a copy.

22 CHAIRPERSON GRIFFIS: You don't have it
23 with you?

24 MR. GEBREMICHAEL: Yes, I don't have it
25 with me, but I was looking at it this morning and I

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1 will be more than happy to provide that.

2 CHAIRPERSON GRIFFIS: Okay. Exhibit 8 is
3 a Certificate of Occupancy. So this is your
4 submission. Am I correct?

5 MR. GEBREMICHAEL: Yes.

6 CHAIRPERSON GRIFFIS: What is this
7 property information that's in this stack? It's the
8 fourth sheet in my pile.

9 MR. GEBREMICHAEL: Which one are you
10 looking at?

11 CHAIRPERSON GRIFFIS: It looks like that.

12 MR. GEBREMICHAEL: Yes, yes.

13 CHAIRPERSON GRIFFIS: What is it?

14 MR. GEBREMICHAEL: This is property
15 information.

16 CHAIRPERSON GRIFFIS: Okay. I kind of got
17 that from the heading, property information.

18 MR. GEBREMICHAEL: Yes.

19 CHAIRPERSON GRIFFIS: But why is it
20 important to us? Who made it? What is it telling us?
21 Is it an official document of some sort?

22 MR. GEBREMICHAEL: Well, this was -- I
23 found this in researching the property and, obviously,
24 this says --

25 CHAIRPERSON GRIFFIS: I'm sorry. Maybe

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1 I'm not being direct. I'll try and be direct. Where
2 did you find it? What's the source of this sheet?

3 MR. GEBREMICHAEL: This is not the MRIS
4 system.

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. GEBREMICHAEL: This is from the
7 Government's information.

8 CHAIRPERSON GRIFFIS: The D.C. Government?

9 MR. GEBREMICHAEL: Yes, D.C. Government.

10 CHAIRPERSON GRIFFIS: Tax and Revenue?

11 MR. GEBREMICHAEL: Yes.

12 CHAIRPERSON GRIFFIS: Okay. And what is
13 it showing us, that it's a multi-family dwelling use?

14 MR. GEBREMICHAEL: It says it's a multi-
15 family dwelling, but here at the bottom it says units,
16 one.

17 CHAIRPERSON GRIFFIS: Okay. Why do you
18 want us to note that?

19 MR. GEBREMICHAEL: No, because I'm saying
20 this is what you understand it to be, but this is what
21 I got. This is what I found out after I did my
22 research. What I was looking for --

23 CHAIRPERSON GRIFFIS: Okay. So this
24 Government has in the Tax and Revenue the fact that
25 this is --

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1 MR. GEBREMICHAEL: Contradicts what's in
2 the MRIS system and we relied on --

3 CHAIRPERSON GRIFFIS: And you actually
4 rely on the MRIS?

5 MR. GEBREMICHAEL: Yes.

6 CHAIRPERSON GRIFFIS: And what is your
7 understanding of our jurisdiction to rely on the MRIS?

8 MR. GEBREMICHAEL: Could you say that
9 again?

10 CHAIRPERSON GRIFFIS: Let me make a
11 statement. There is no way that we have a
12 jurisdiction to rely on the MRIS. It actually doesn't
13 inform us from zoning at all. In fact, I think you
14 will find when you review it, and my previous
15 experience when that has been submitted as part of an
16 application, that there is a bold statement at the end
17 of a printout that says all information within needs
18 to be verified.

19 So my point is how can the Board rely and
20 deliberate on information that is provided by the
21 MRIS?

22 MR. GEBREMICHAEL: Well, I am an average
23 joe, you know.

24 CHAIRPERSON GRIFFIS: You're a real estate
25 agent. Is that correct?

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1 MR. GEBREMICHAEL: I'm a real estate
2 agent.

3 CHAIRPERSON GRIFFIS: Are you a broker?

4 MR. GEBREMICHAEL: No, I'm not.

5 CHAIRPERSON GRIFFIS: Okay. You're a
6 licensed real estate agent?

7 MR. GEBREMICHAEL: Yes, I am.

8 CHAIRPERSON GRIFFIS: That's not an
9 average joe then.

10 MR. GEBREMICHAEL: Well, I mean, when it
11 comes to zoning issues it is, because this is the
12 first time I ever come --

13 CHAIRPERSON GRIFFIS: Well, it shouldn't
14 be.

15 MR. GEBREMICHAEL: It shouldn't be. I
16 mean, it's a lesson well learned.

17 CHAIRPERSON GRIFFIS: In your licensing,
18 do you go through any sort of basic zoning analysis?

19 MR. GEBREMICHAEL: No.

20 CHAIRPERSON GRIFFIS: Introduction to
21 zoning?

22 MR. GEBREMICHAEL: No.

23 CHAIRPERSON GRIFFIS: Well, we'll have to
24 take that up with the Licensing Board. Okay.

25 MR. GEBREMICHAEL: I mean, I --

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1 CHAIRPERSON GRIFFIS: Let me be direct. I
2 totally understand. I do not like the fact that you
3 are in this circumstance. And what I'm trying to do
4 is just trying to get you through what we actually
5 have to and are bound by doing. I don't see, at this
6 point, let me open it up, we have the rest of the case
7 going, but I need a lot more to make the test for the
8 variance that we're being asked for. Okay. Any other
9 questions from the Board, at this time? Ms. Miller?

10 VICE CHAIR MILLER: Well, I'm just
11 wondering if you at any time looked at 401.3, that
12 sets forth the requirements for the 900 per apartment
13 or bachelor apartment?

14 CHAIRPERSON GRIFFIS: That's the Zoning
15 Regulation of 11 DCMR.

16 MR. GEBREMICHAEL: Yes, I mean, in
17 preparing this application, I have.

18 VICE CHAIR MILLER: But not before you
19 purchased the property?

20 MR. GEBREMICHAEL: No, no.

21 VICE CHAIR MILLER: And the property
22 information from the Tax and Revenue Office, did you
23 look at that before you purchased the property or
24 after?

25 MR. GEBREMICHAEL: No, no.

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1 VICE CHAIR MILLER: After?

2 MR. GEBREMICHAEL: Yes.

3 VICE CHAIR MILLER: Okay.

4 CHAIRPERSON GRIFFIS: How many four unit
5 buildings, townhouses are on this block?

6 MR. GEBREMICHAEL: Well, I know next to
7 the 1325, there is a 30 unit apartment.

8 CHAIRPERSON GRIFFIS: Is that a similar
9 sized structure as the one that is in this
10 application?

11 MR. GEBREMICHAEL: Well, it is a little
12 bit larger than this.

13 CHAIRPERSON GRIFFIS: A little bit. Could
14 you fit the 30 units in this building?

15 MR. GEBREMICHAEL: No, no.

16 CHAIRPERSON GRIFFIS: Okay. How about a
17 similar size townhouse, how many four units are on
18 this block?

19 MR. GEBREMICHAEL: That I'm not sure.

20 CHAIRPERSON GRIFFIS: Are you aware of
21 any?

22 MR. GEBREMICHAEL: Well, there is one
23 1301, that is being converted into condominiums and I
24 think it is about four or more, that's the only one
25 that I'm aware of, and then the one next door, which

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1 is 30 units.

2 CHAIRPERSON GRIFFIS: You're saying 1301
3 may or may not be converted into four condos?

4 MR. GEBREMICHAEL: Yes.

5 CHAIRPERSON GRIFFIS: Okay. But you are
6 not sure?

7 MR. GEBREMICHAEL: I'm not sure.

8 CHAIRPERSON GRIFFIS: Could it be two?

9 MR. GEBREMICHAEL: I tried to call the
10 owner and talk to him, but he never responded to me.

11 CHAIRPERSON GRIFFIS: Who is the owner?

12 MR. GEBREMICHAEL: A guy with a Spanish
13 name.

14 CHAIRPERSON GRIFFIS: Okay. Anything
15 else? Follow-up? Mr. Spalding, you're here at the
16 table. Did you want to weigh in on this application
17 or do you want to present your letter, at this point?

18 MR. SPALDING: I would just present our
19 letter and I remind the Board that the ANC-1B has
20 opposed similar requests that have come before us. In
21 this case, the Single Member District Commissioner and
22 the Neighborhood Association looked at the situation
23 of the building in the community, the context that it
24 is in, and decided that, you know, the request for a
25 variance is a very small one. By matter-of-right,

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1 they could probably put in three units and they are
2 asking for four.

3 The density in that area is mixed. There
4 are apartment buildings. Yes, in the case of row
5 houses, there may not be those that have been
6 converted to four units, but the density here is a
7 very small request. And the community doesn't seem to
8 feel that there is any difficulty in accommodating
9 that request.

10 CHAIRPERSON GRIFFIS: But you understand
11 our difficulty with that?

12 MR. SPALDING: I do understand your
13 difficulty with the way this has all arisen.

14 CHAIRPERSON GRIFFIS: In fact, in the
15 context of your statement, the ANC has come in in
16 opposition. Could you oppose any others if this was
17 approved?

18 MR. SPALDING: The Commission is
19 responding to a different set of things than the Board
20 is, and the Commission's knowledge of the Zoning Code
21 is not always the ruling situation. What we have is a
22 community that looks at, you know, the fabric of their
23 community. They look at requests that are made to
24 upgrade the housing that is in their community. And
25 in some cases, that is in contradiction to what you do

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1 need to consider.

2 CHAIRPERSON GRIFFIS: Right.

3 MR. SPALDING: But the Commission has to
4 listen to its constituents and report that yes,
5 indeed, you know, this may be a small difficult issue
6 for zoning, and you may not be able to get over that
7 hurdle, but the community can get over that hurdle.
8 We do understand that there will be more density as
9 time goes on and that there will be more conversions
10 as time goes on. Some of them we'll support, some of
11 them we won't.

12 But when we had a request, I think about a
13 year ago, from somebody who wanted to do what was
14 originally a single-family on 8th Street in this
15 Historic District, it was in a context where it was
16 all either flats or single-family still, and the
17 people in that community didn't want further density.

18 In this case, you're talking about a block that is a
19 combination of uses. There are apartment buildings.
20 It is a bit denser and they don't seem to find this a
21 difficulty.

22 So, yes, there are different tests that,
23 you know, you the Board needs to meet and that the ANC
24 needs to meet. In this case, the community has said
25 they are willing to accept a little more density.

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1 CHAIRPERSON GRIFFIS: Good. Thank you
2 very much, and I think that is important. And we do
3 look to the ANC to bring the community's perspective,
4 because it is part of the test that we do look at for
5 the variance once we get through uniqueness and
6 practical difficulty, we then, of course, can go on to
7 would it impair the intent and taking of the Zone Plan
8 and the public good. And certainly the ANC is
9 weighing in very heavily to the fact that this would
10 be for the betterment of the block and therefore the
11 public good of the area.

12 And I think the Board fully appreciates
13 that. Your statement in your letter, I thought, was
14 well put in terms of it is satisfying the community's
15 interest for redevelopment, reinvigoration of blocks
16 and also they are satisfied with the design and the
17 current count. But the important point in my
18 statement is that once we get by the uniqueness and
19 practical difficulty, we get to the third prong of the
20 test. Okay. Any other questions from the Board of
21 the ANC?

22 Then having gone a little bit out of
23 order, let's go to the Office of Planning, who have
24 submitted their report. And, Mr. McGettigan, are you
25 presenting this one also?

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1 MR. MCGETTIGAN: Yes.

2 CHAIRPERSON GRIFFIS: Is this one yours?

3 MR. MCGETTIGAN: Yes, it is.

4 CHAIRPERSON GRIFFIS: How about that.

5 MR. MCGETTIGAN: Thank you, Mr. Chair.

6 The Office of Planning has reviewed the information
7 provided and the Office of Planning does not see that
8 the applicant has met the tests, particularly, the
9 practical difficulty or the uniqueness test for this,
10 and we are recommending denial of the application.
11 And if you have any particular questions, I'll answer
12 them, be happy to answer them.

13 CHAIRPERSON GRIFFIS: Let's first go to
14 the applicant. Do you have any cross examination
15 questions of the Office of Planning?

16 MR. GEBREMICHAEL: Yes.

17 CHAIRPERSON GRIFFIS: Go ahead.

18 MR. GEBREMICHAEL: In the first one, you
19 say that -- do you believe that being provided
20 erroneous information as a basis of acquiring a
21 property to be an exceptional situation?

22 MR. MCGETTIGAN: I think that can go to
23 the situation. However, there is no evidence that
24 that was the case. And the decision of whether the
25 Government erred is really not in the Office of

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1 Planning's purview on the case. So we would not
2 necessarily comment on that.

3 MR. GEBREMICHAEL: If I was going to
4 provide a pro forma showing that the economic
5 viability of a three or a four unit, would you support
6 the application?

7 MR. MCGETTIGAN: No, because it would not
8 meet the uniqueness tests, in my mind, and the current
9 property value assessment on the Tax Rules above what
10 you paid for it. So that's, I believe, over \$400,000.

11 MR. GEBREMICHAEL: What do you mean when
12 you say reasonable use of the property? It's on top
13 of the second page.

14 MR. MCGETTIGAN: Right. I think the
15 property could be used as a flat. It could be used as
16 a three unit structure.

17 MR. GEBREMICHAEL: Not as a four unit?

18 MR. MCGETTIGAN: It could be used as a
19 four unit, but I don't think that that is necessary,
20 based on the evidence provided to have four units.

21 MR. GEBREMICHAEL: What is the difference
22 between an R-4 and an R-5 District when it comes to
23 lot size?

24 MR. MCGETTIGAN: The R-5 is a multi-family
25 zone and the R-4 is not intended to be, that is why

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1 the lot restrictions, area restrictions are in there
2 to prevent over crowding in the R-4 Zone. The minimum
3 lot area in an R-4 Zone for a flat would be 1,800
4 square feet. Therefore, providing 900 square foot of
5 land area per unit and the provisions in 403.2 are
6 intended to protect the R-4 District so it doesn't
7 become an apartment district.

8 MR. GEBREMICHAEL: My understanding of the
9 R-5 District is that there is no relationship to lot
10 area. I mean, in R-4, the lot area needs to be
11 considered. In R-5 Zones, the lot area is not
12 considered, so you can have multi units in R-5 Zones
13 without requiring the lot area to be of a certain
14 size.

15 CHAIRPERSON GRIFFIS: That's a question of
16 Office of Planning?

17 MR. GEBREMICHAEL: Yes.

18 CHAIRPERSON GRIFFIS: Is that your
19 understanding, Mr. McGettigan?

20 MR. MCGETTIGAN: Yes, that's correct.

21 CHAIRPERSON GRIFFIS: Okay. And so,
22 what's the point? This is not in R-5. Is that
23 correct?

24 MR. GEBREMICHAEL: It's not in R-5, but
25 I'm just saying here on the Comprehensive Plan, under

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1 the heading of Comprehensive Plan, and I read "The
2 moderate density of residential designation includes
3 row houses and garden apartments of the predominant
4 uses and may also include as appropriate uses low-
5 density housing." And I just see that there is a
6 contradiction here. If the Comprehensive Plan is
7 saying that we can have a moderate housing with low-
8 density, then this project falls within the
9 Comprehensive Plan.

10 CHAIRPERSON GRIFFIS: What's your
11 understanding of what the Comprehensive Plan is?

12 MR. GEBREMICHAEL: Say that again.

13 CHAIRPERSON GRIFFIS: Is the Comprehensive
14 Plan a prescriptive enforceable document?

15 MR. GEBREMICHAEL: Well, that I don't
16 know, but I'm just saying from what you stated here,
17 you know, I see that there is a contradiction. He is
18 talking about density. The Office of Planning is
19 concerned about density, but in the Comprehensive
20 Plan, it allows for moderate density. And I'm just
21 saying that this is, you know, two different
22 statements.

23 CHAIRPERSON GRIFFIS: Okay. Understood.
24 Mr. McGettigan, clarification of that?

25 MR. MCGETTIGAN: Yes, the Comprehensive

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1 Plan is guidance to the zoning if the Comprehensive
2 Plan indicates a higher density, then it would be
3 appropriate for rezoning. However, we're looking at
4 the existing R-4 Zone, a Comprehensive Plan also
5 requires maintaining, stabilizing neighborhoods. You
6 see that most of the fabric of this and character of
7 this area is row houses and flats, and it is
8 appropriately zoned R-4 and preserving that character
9 is important in the Comprehensive Plan sense of
10 preserving the character of the existing fabric.

11 CHAIRPERSON GRIFFIS: Further questions?

12 MR. GEBREMICHAEL: Yes, what is the
13 parking requirement in R-5 Zones?

14 CHAIRPERSON GRIFFIS: Let me try and
15 understand why you are making such a comparison to R-
16 5.

17 MR. GEBREMICHAEL: Because my
18 understanding is, you know, there is no lot
19 requirement in R-5 Zones.

20 CHAIRPERSON GRIFFIS: Okay.

21 MR. GEBREMICHAEL: I know this is not an
22 R-5 Zone, but he made a statement here about R-5
23 Zones, and I got curious and I looked into what R-5
24 Zones are. And I'm just saying comparing the two, I
25 mean, in terms of density, the issue about density

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1 really doesn't make sense, because on one side, you
2 have the Comprehensive Plan that allows for low-
3 density. We are only asking for an additional
4 variance of about 20 percent. And in R-4 Zones, you
5 are allowed one parking per three units. In R-5
6 Zones, you are allowed one parking per two units. And
7 we are providing three parking units.

8 CHAIRPERSON GRIFFIS: You are proposing to
9 provide three parking spaces?

10 MR. GEBREMICHAEL: Yes.

11 CHAIRPERSON GRIFFIS: What are the size?

12 MR. GEBREMICHAEL: 19. The whole parking
13 size is 19.

14 CHAIRPERSON GRIFFIS: Are they all on the
15 rear of the property?

16 MR. GEBREMICHAEL: Yes.

17 CHAIRPERSON GRIFFIS: How wide is your
18 property?

19 MR. GEBREMICHAEL: It's about 18 feet.

20 CHAIRPERSON GRIFFIS: How do you fit
21 three?

22 MR. GEBREMICHAEL: Well, maybe, let me
23 look at the drawings here.

24 CHAIRPERSON GRIFFIS: All right. Mr.
25 McGettigan, what is the point of your comparison to R-

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1 5, please?

2 MR. MCGETTIGAN: The only mention in our
3 report of R-5 is my quote from the Zoning Ordinance
4 330.3, which says "The R-4 District shall not be an
5 apartment house district, as contemplated under the
6 general residence R-5 District, since the conversion
7 of existing structure shall be controlled by a minimum
8 lot area per family requirement."

9 CHAIRPERSON GRIFFIS: And that's in your
10 concluding paragraph. Is that correct?

11 MR. MCGETTIGAN: Yes.

12 CHAIRPERSON GRIFFIS: On page 5?

13 MR. MCGETTIGAN: Yes.

14 CHAIRPERSON GRIFFIS: Okay.

15 MR. GEBREMICHAEL: Well, the parking space
16 is 20 x 30.

17 CHAIRPERSON GRIFFIS: 20 x 30?

18 MR. GEBREMICHAEL: Yes.

19 CHAIRPERSON GRIFFIS: 20 feet by 30 feet?

20 MR. GEBREMICHAEL: Yes.

21 CHAIRPERSON GRIFFIS: You mean the area
22 for parking?

23 MR. GEBREMICHAEL: The area, yes, the area
24 for parking.

25 CHAIRPERSON GRIFFIS: Okay. You have a 20

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1 foot width in the rear of the property?

2 MR. GEBREMICHAEL: Yes.

3 CHAIRPERSON GRIFFIS: Okay. That would
4 accommodate two parking spaces as prescribed by the
5 Zoning Regulations.

6 MR. GEBREMICHAEL: Okay.

7 CHAIRPERSON GRIFFIS: Okay. Further
8 questions for Office of Planning?

9 MR. GEBREMICHAEL: No.

10 CHAIRPERSON GRIFFIS: Board questions of
11 the Office of Planning? Mr. McGettigan, you were
12 asked by the applicant and we're going to follow-up,
13 in terms of the exceptional situation, I mean, clearly
14 in the applicant's own statement is a fact that there
15 is not uniqueness to the land of which arise a
16 practical difficulty, but there is an exceptional
17 situation, and that is the reliance on this
18 information. And why is it that you don't find that
19 that is a heavy weight to fulfill this test?

20 MR. MCGETTIGAN: There isn't any evidence
21 that that is the case. If it is, I believe, then it
22 would be an estoppel case and not go to necessarily
23 the exceptional situation.

24 CHAIRPERSON GRIFFIS: Okay. Does the
25 reliance on MRIS document rise to the exceptional

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1 situation for the test of a zoning variance?

2 MR. MCGETTIGAN: No, I don't believe so.

3 CHAIRPERSON GRIFFIS: Okay. Follow-up
4 questions from the Board? Anything else? Thank you
5 very much, Mr. McGettigan. I don't have any other
6 Government reports attendant to this, and we have been
7 through the presentation of ANC-1B. Is there anyone
8 else here attendant to 17138 to give testimony either
9 in opposition or in support? Persons to give
10 testimony, they could come forward now. Not seeing
11 anyone come forward, are there other questions from
12 the Board, clarification? Then let's go for any
13 closing remarks you might have.

14 MR. GEBREMICHAEL: Okay. Can I request
15 that I be allowed to submit more information, that the
16 file be open?

17 CHAIRPERSON GRIFFIS: What sort of
18 information would you like to submit?

19 MR. GEBREMICHAEL: Well, the public record
20 we discussed and also I would like to provide a pro
21 forma, you know, showing the economic feasibility of
22 the project.

23 CHAIRPERSON GRIFFIS: Okay. You do know,
24 the courts have upheld the fact that this Board can
25 consider economic arguments in terms of practical

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1 difficulty and certainly hardship. That test, in
2 fact, is fairly high though. Really what you are
3 asking to have a successful economic argument is quite
4 a comprehensive comparative analysis. Is that
5 understood?

6 MR. GEBREMICHAEL: I guess. No, I mean, I
7 just wanted to provide my understanding of why the
8 Office of Planning is opposing this application.

9 CHAIRPERSON GRIFFIS: Okay.

10 MR. GEBREMICHAEL: I'm not a lawyer, you
11 know.

12 CHAIRPERSON GRIFFIS: Neither am I. So
13 we're all right.

14 MR. GEBREMICHAEL: There's so much that I
15 don't understand in this process, even though, you
16 know, I have spent some time trying to prepare this
17 application.

18 CHAIRPERSON GRIFFIS: Right. I'll say it
19 again, this is the worst type of situation this Board
20 can be in, because I cannot imagine people knowing the
21 zoning just by picking it up and we fully understand
22 that. But again, there is only so much we can
23 empathize and then take action on that empathy. Let's
24 do this, let's keep the record open.

25 Ms. Bailey, if you wouldn't mind just

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1 looking for a date on this. And what we're going to
2 do is we'll take in the MRIS, because that's one of
3 the pieces that you did say, and I would imagine that
4 you are going to find a statement that is fairly clear
5 on the MRIS statement that will be close to the fact
6 that all information should be verified and not wholly
7 relied on and it is believed to be accurate.

8 Well, I mean, we will take in a pro forma
9 single-family flat, three unit, four unit, whatever
10 you want to provide. Note the fact that it is not
11 just how much money you can make on it, and there
12 would have to be some comparative analysis of the
13 building adjacent or some similar building in terms of
14 sale, purchase and all of that that would give us some
15 context, because just based on your statement that you
16 couldn't sell a single-family or a flat on this block
17 for \$640,000, doesn't provide us with anything that we
18 can actually rely on. Is that understood?

19 MR. GEBREMICHAEL: Yes.

20 CHAIRPERSON GRIFFIS: Okay. Now, before I
21 make that an official decision, let me hear from the
22 Board to see if they have any objections to proceeding
23 in that fashion.

24 VICE CHAIR MILLER: Mr. Chairman, I don't
25 have an objection per se, but I just would like to

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1 give some more information to the applicant to make
2 sure he wants to go through that effort and just
3 enlighten you a little bit more as to what we're doing
4 here. It's a very stringent test that you have to
5 meet and this Board has to find is met for a variance.

6 And the first test, like even if you put
7 in all that information about your financial hardship,
8 the first prong OP has difficulty with and I have
9 difficulty with and I would gather some of my other
10 Board Members also do is that question of uniqueness,
11 you know, what's so unique about this particular
12 property. With respect to the physical qualities, and
13 if not the physical qualities, then what might be
14 called the zoning history or your reliance, you know,
15 on a zoning official.

16 But it doesn't seem to me that that
17 reaches the level that we need to find uniqueness. So
18 I would suggest that we can leave the record open, but
19 that you need to really carefully evaluate whether you
20 can meet that test as well.

21 CHAIRPERSON GRIFFIS: Good. Thank you. I
22 think it is important to look at the Office of
23 Planning, because they lay out the test very clearly
24 and address some of their issues if you find that
25 appropriate. But Ms. Miller is bringing up the

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1 excellent point, all of the tests have to be met. So
2 with that, and let me also say, I think the Board is
3 very familiar. We have seen, you know, enough
4 applications in this area. We are familiar with the
5 community and their surrounding blocks, and I think
6 the Board would celebrate the fact of this building
7 being done. So it is not as if we're trying to stop
8 something positive from happening, but rather we're
9 doing our best to make sure that something does.

10 Ms. Bailey, when would we have that
11 submitted?

12 MS. BAILEY: Before I answer your
13 question, Mr. Chairman, mistakingly, so the property
14 was posted for five days instead of the 15, so perhaps
15 one of the things if we're going to keep the record
16 open is to have it posted for an additional 10 days or
17 we post it.

18 CHAIRPERSON GRIFFIS: Yes, I'm sorry, and
19 that's my error. That was a preliminary matter that I
20 was aware of and we should conceivably not even have
21 heard the case today. So do you understand what that
22 means?

23 MR. GEBREMICHAEL: Yes.

24 CHAIRPERSON GRIFFIS: Good. We'll keep
25 the placard up on the building. We will have it

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1 submitted, I guess, Ms. Bailey, why don't we set this
2 then for May?

3 MS. BAILEY: May, the May Public Hearing,
4 that's May 4th, Mr. Chairman.

5 CHAIRPERSON GRIFFIS: And submissions
6 would be due?

7 MS. BAILEY: April 20th.

8 CHAIRPERSON GRIFFIS: Is that understood?

9 MR. GEBREMICHAEL: Yes.

10 CHAIRPERSON GRIFFIS: Okay. So the 20th.
11 You will want to have it into the office by 3:00.

12 MR. GEBREMICHAEL: Okay.

13 CHAIRPERSON GRIFFIS: Excellent. Anything
14 further on that, Board Members? I thank the ANC
15 member for being here, Mr. Spalding, and I appreciate
16 you spending the time coming down on this, and we will
17 look for those submissions and hopefully it will all
18 go well.

19 MR. GEBREMICHAEL: Okay.

20 CHAIRPERSON GRIFFIS: That being said,
21 let's call the next case of the morning.

22 MR. GEBREMICHAEL: Thank you.

23 CHAIRPERSON GRIFFIS: Thank you very much.

24 MS. BAILEY: Application No. 17136 of
25 Africare, Inc., pursuant to 11 DCMR 3103.2, for a

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1 variance from the lot occupancy requirements under
2 section 403, and a variance from the rear yard
3 requirements under section 404, to allow an addition
4 to an existing headquarters office of a charitable
5 organization in the R-4 District at premises 440 R
6 Street, N.W., Square 519, Lot 805.

7 CHAIRPERSON GRIFFIS: And if I'm not
8 mistaken, we have a request for party status in this
9 case of Barry Kreiswirth. Is he here? Could you come
10 forward, please? I'm sorry, I didn't pronounce your
11 name correctly. If you wouldn't mind, just state your
12 name and your address for the record, please.

13 MR. KREISWIRTH: My name is Barry
14 Kreiswirth, and my address is 427 Warner Street.

15 CHAIRPERSON GRIFFIS: Excellent. And we
16 do have the submission as Exhibit 27. I have a quick
17 question for you. Well, can you explain a little bit
18 more how your interest would be more significantly,
19 distinctly or uniquely affected?

20 MR. KREISWIRTH: Sure. I mean, I have
21 written testimony also. I don't know.

22 CHAIRPERSON GRIFFIS: I just need to
23 establish whether you are a party or not.

24 MR. KREISWIRTH: Okay.

25 CHAIRPERSON GRIFFIS: And then you will

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1 have an opportunity.

2 MR. KREISWIRTH: I'm directly to the rear
3 of the Africare Building, right across the alley, so
4 noise issues and sort of maintenance issues.

5 CHAIRPERSON GRIFFIS: Okay. And so you're
6 directly to the rear of the building, so that the
7 addition would have direct and unique impact on you?

8 MR. KREISWIRTH: Yes.

9 CHAIRPERSON GRIFFIS: Okay. Board
10 Members, other questions? Could you state your name
11 and address, please?

12 MR. KEYS: Oh, yes, Mr. Chairman, it's
13 George Keys. Law Firm of Jordan and Keys representing
14 Africare. The address is 1400 16th Street, Suite 520,
15 Washington, D.C. 20036.

16 CHAIRPERSON GRIFFIS: Excellent. And do
17 you have any statement on the request for party status
18 just now?

19 MR. KEYS: I do, Mr. Chair, in two
20 respects. I was aware of a party status application
21 being filed. However, I was unaware that there was
22 any written statement submitted.

23 CHAIRPERSON GRIFFIS: Let's deal with the
24 party status first.

25 MR. KEYS: The other point that I would

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1 make is, and I think it would be helpful, if we
2 establish the location of the property in question.
3 And I think if you would look at the applicant's
4 application, there is a plat of the area that is
5 submitted and it is --

6 CHAIRPERSON GRIFFIS: Is it bound? Is it
7 secure?

8 MR. KEYS: Yes, it's a bound section.
9 It's just before the pictures that are in the record.

10 CHAIRPERSON GRIFFIS: Okay.

11 MR. KEYS: And what this shows is it shows
12 the relationship between the lots facing Warner
13 Street, which are at the rear of the subject property
14 and the existing building.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. KEYS: And as I understand it, Mr.
17 Kreiswirth lives at -- is it 427?

18 MR. KREISWIRTH: Yes.

19 MR. KEYS: Yes, and that's Lot 131?

20 MR. KREISWIRTH: I'm not sure what block
21 number it is.

22 MR. KEYS: Oh.

23 CHAIRPERSON GRIFFIS: Why don't you just
24 have him point out where his property is on that
25 sheet?

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1 BOARD MEMBER ETHERLY: Mr. Chair, if we go
2 perhaps by the listing of property owners, which is
3 contained in Exhibit 4, that listing notes Mr.
4 Kreiswirth's property as, I believe that is going to
5 be, Lot 132.

6 MR. KEYS: Yes, I think that is correct.
7 Lot 132. Lot 132 is to the rear of the existing
8 building and there is no proposed change to the
9 existing building. And I'm not sure if Mr. Kreiswirth
10 is even aware of that fact.

11 MR. KREISWIRTH: I am aware of that fact.
12 The rear of my property directly behind the current
13 building, also there will be an impact from the
14 addition, which is just to the side. I mean, it's a
15 matter of a number of feet and I'm not dealing with
16 the issue of air or light, which maybe would be more
17 relevant to that issue, but with noise and open space.

18 CHAIRPERSON GRIFFIS: Okay. And noise,
19 are you talking about when it is actually constructed
20 and the use of it?

21 MR. KREISWIRTH: No, in the -- I'm talking
22 about the noise from the mechanical structures, their
23 air handling units and just sort of general noise from
24 the building itself.

25 CHAIRPERSON GRIFFIS: Okay. Let me step

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1 back just a second. You do understand the higher
2 participatory requirements if granted party status, as
3 opposed to giving testimony as a person? Is that
4 correct?

5 MR. KREISWIRTH: I'm not sure, no.

6 CHAIRPERSON GRIFFIS: Okay. First of all,
7 anyone is welcome in this Public Hearing to give
8 testimony and persons are afforded three minutes and
9 we would hear people in opposition and people in
10 support. So you would be afforded that time. If
11 granted party status, you are a full participant in
12 the hearing process. Meaning, you are granted the
13 ability to cross examine witnesses if the Board
14 requires additional documentation or filings, you are
15 required to also do that. An equal participant in the
16 hearing as opposed to just being a person. Is that
17 what you were anticipating or were you anticipating
18 just presenting testimony?

19 MR. KREISWIRTH: I didn't really have a
20 preference either way, as long as -- I thought that
21 having party status would give the comments greater
22 weight, but that was my main concern.

23 CHAIRPERSON GRIFFIS: Okay. So, at this
24 time, factoring in all that I have said and the
25 opposition to the request, based on the adjacency of

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1 the addition of your property, do you have a firm
2 direction you would like to go?

3 MR. KREISWIRTH: Well, I mean, I guess
4 it's up to the Board. I don't think the argument
5 Africare has presented in any way mitigates the fact
6 that I'm uniquely affected by this program's project.

7 CHAIRPERSON GRIFFIS: Okay. So you
8 maintain the fact that you are still unique and
9 distinctly impacted?

10 MR. KREISWIRTH: Yes.

11 CHAIRPERSON GRIFFIS: Board Members,
12 questions?

13 VICE CHAIR MILLER: No, I just want to
14 explain a little further, since you don't seem to have
15 a familiarity with our process. If you are a party,
16 you will be able to cross examine witnesses. You
17 won't have to though. I mean, things like that or
18 make closing statements, etcetera. It will give you
19 more.

20 MR. KREISWIRTH: Yes, I understood that.
21 I was more concerned when he was talking about
22 additional obligations or responsibilities. But,
23 thanks.

24 CHAIRPERSON GRIFFIS: Well, you are being
25 asked -- you would present a case. You wouldn't

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1 present testimony, you would present a case, however,
2 you want to do that. There is additional
3 responsibilities to it. Okay. Other questions,
4 clarifications?

5 MR. KREISWIRTH: I'm sorry, I guess I do
6 have one question, if that is appropriate. The issue
7 of whether a party has not so much greater rights and
8 obligations, but whether it has greater weight, the
9 arguments that are made?

10 CHAIRPERSON GRIFFIS: No, there is not a
11 direct ruling on the fact of weight that would be
12 afforded. There is a difference in standing before
13 the Board. Certainly, there is a difference in
14 standing as an expert witness and a fact witness. I
15 think all information is taken in. There is a level
16 of which one puts importance or reliability on certain
17 expert witness' statements and that factors into
18 deliberation. But in terms of factoring a greater
19 weight for a party and a person giving testimony, it's
20 not an easy question to answer, but I would say,
21 first, directly, there would be no difference. The
22 Board takes in fact, weighs fact and deliberates on
23 it.

24 Now, being more difficult, in a
25 presentation of a party's case, there is substantially

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1 more information you probably provide. You provide
2 witnesses. You cross examine as opposed to a person
3 giving testimony within three minutes. So those are
4 the two kind of answers to the question, which goes
5 back to the fact of whether you want to rise to the
6 level of the presentation of a case and possibly
7 calling witnesses. You are not required to. I'm just
8 saying this is what the open parameters are or
9 whether, in fact, a statement is really wanting to be
10 given. Believe me, I'm not pushing you one way or the
11 other. I'm just trying to make sure you understand.

12 MR. KREISWIRTH: I guess, at this point,
13 I'll just leave it up to the Board whether it is
14 appropriate to have party status. I have no
15 particular preference, but I prefer being a party if
16 that meets the rules.

17 CHAIRPERSON GRIFFIS: Okay. And there is,
18 you know, the additional -- okay. That being said,
19 let's go to the aspect. Let me hear some deliberation
20 for the Board in helping establish party status. We
21 obviously have the applicant in opposition to it as it
22 is removed from the addition. I think the impact
23 would be fairly unique on this property. The
24 uniqueness standing specifically for party status is
25 not that it is one and only and no other would share,

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1 but rather that it is, in some respects, uniquely
2 represented in the application, which this clearly is.

3 I think the impact would be felt as
4 opposed to somebody across 5th Street or north of R
5 Street or Rhode Island from 427 Warner, and so I do
6 not think it is the absolute strongest party
7 application we have seen, but I do not think it fails
8 in warranting granting. But I would like to hear from
9 other Board Members if they are so inclined. And if
10 not, Ms. Miller?

11 VICE CHAIR MILLER: I would just concur
12 with what you said.

13 CHAIRPERSON GRIFFIS: Okay. Very well.
14 Noting the objection of the applicant, I think the
15 request does rise to the level of granting party
16 status, unless I hear any other objections from the
17 Board, we can take that as a consensus.

18 BOARD MEMBER ETHERLY: Mr. Chair?

19 CHAIRPERSON GRIFFIS: Yes?

20 BOARD MEMBER ETHERLY: Just for the
21 record, I'll vote in opposition to the party status.
22 I concur with you entirely that is a fairly close call
23 here. I'll just leave it at that. I just don't see
24 the interest component rising to the level of
25 uniqueness and particularity that would remove Mr.

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1 Kreiswirth's situation from the status of that of a
2 member of the general public, so I will vote against
3 the party status application.

4 CHAIRPERSON GRIFFIS: Okay. Thank you.
5 Okay. I think we can note that and, if I'm not
6 mistaken, then others if they wouldn't -- why don't we
7 just do a quick voice? Mr. Mann, are you supportive
8 or in opposition to the granting of party status?

9 BOARD MEMBER MANN: Support.

10 CHAIRPERSON GRIFFIS: Ms. Miller?

11 VICE CHAIR MILLER: Support.

12 CHAIRPERSON GRIFFIS: Okay. And I would
13 also support, in which case I believe it would be 3-1
14 that we would grant party status. Just to clarify the
15 Board's position on that, I think that was all well
16 said. That being established, you can have a seat,
17 Mr. Kreiswirth, make yourself comfortable. We'll have
18 the presentation of the case and witnesses and then we
19 will call you forward to conduct cross examination.
20 Yes, question?

21 MR. KEYS: Mr. Chair, I think, Mr.
22 Kreiswirth needs to be sworn in. He was not here when
23 witnesses were previously sworn in.

24 CHAIRPERSON GRIFFIS: Good point. If you
25 wouldn't mind standing and give your attention to Ms.

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1 Bailey, at the far right?

2 (Whereupon, the witness was sworn.)

3 CHAIRPERSON GRIFFIS: Very well. Let's
4 proceed.

5 MR. KEYS: Good morning, Mr. Chairman,
6 Members of the Board. I have already introduced
7 myself, George Keys. I'm here on behalf of Africare,
8 a District of Columbia, non-profit corporation, that
9 owns the subject property at 440 R Street. We are
10 here to request two variances, one, a lot occupancy
11 variance from the 40 percent threshold in the R-4 Zone
12 and also a rear yard variance of 6 feet from the
13 required 20 foot rear yard to enable Africare to build
14 an additional, an annex we call it, structure on the
15 lot that would enable it to continue its mission and
16 its presence in the Shaw neighborhood.

17 I think a relevant background to this is
18 contained in the narrative statement in the
19 application. We attached a copy of two prior Zoning
20 Orders of this Board, and I think both of them are an
21 important context. The first is the 1983 decision to
22 grant a use variance. As you know, use variances are
23 rarely granted in the city. In my experience, I've
24 managed to obtain one. But these use variances, I
25 think, reveals two city goals.

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1 One is to ensure the effective adaptive
2 reuse of an abandoned surplus school building, the
3 Morse School, which at the time of the application had
4 been abandoned for a period of five or more years. It
5 was boarded up. It was an eyesore. It was
6 deteriorating and I think that motivated the Board and
7 motivated the city in looking at the use variance
8 favorably.

9 Secondly, I think that the city also felt
10 that the organization, Africare, belonged in the Shaw
11 neighborhood. And I think as you understand more
12 about Africare's mission and its function and how that
13 mission relates and how it has been adapted to this
14 property, you'll understand another element of the
15 context of our case. And I have Julius Coles, the
16 relatively new president of Africare, here to provide
17 that background.

18 In 1999, there was a subsequent action of
19 this Board, which approved variance relief for,
20 essentially, the same building. At that time, the
21 application was presented as a request for a 6 foot
22 rear yard variance. I've looked at the application
23 again and have taken issue with that particular
24 characterization. But in any event, the Board
25 approved that application and granted the variance to

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1 build the annex that we are proposing today.

2 For reasons which Mr. Coles will refer to,
3 that annex was not built, the order expired of its own
4 terms and we are back again to attempt to reinstate
5 the effect of that relief and are reapplying for
6 variances that we think will allow this site to be
7 developed in a way that ensures Africare's continued
8 viability in this location.

9 Also, as a prelude to this discussion, I
10 think it is important that we reach and resolve one
11 point of law, which struck me as being significant in
12 this instance, and that is how do we characterize a
13 use that has been granted a variance? When I first
14 presented this proposal to the Office of Planning,
15 their assessment was we could not enlarge the use,
16 because it is nonconforming in the R-4 Zone. And that
17 would be a serious, if not fatal, blow to the
18 application.

19 What I went to do is to try to look at the
20 local authorities to determine how you conceptualize
21 and how you think about a use variance. And I think
22 part of the answer to that is in the structure or the
23 definition of nonconforming use.

24 CHAIRPERSON GRIFFIS: Before we get too
25 far into this, as you have stated, this has been

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1 granted a use variance, so the use is found to be
2 conforming, at this point. Are you trying to
3 establish for the Board so that we are not looking at
4 this as a new use variance?

5 MR. KEYS: That's correct.

6 CHAIRPERSON GRIFFIS: Okay. Board
7 Members, I would strongly suggest --

8 MR. KEYS: Oh, and the proposition that a
9 use variance, once granted, creates a conforming use.

10 CHAIRPERSON GRIFFIS: That's correct.

11 MR. KEYS: And nonconforming use standards
12 are not applicable in this application.

13 CHAIRPERSON GRIFFIS: But nonconforming
14 area standards are.

15 MR. KEYS: Absolutely

16 CHAIRPERSON GRIFFIS: Right. I think we
17 can hear more if required and based on the Office of
18 Planning's position, but I'm of firm understanding
19 that that is the case. In fact, in the expansion, I
20 know the Board has seen this in numerous iterations,
21 in the aspect of we have nonconforming, but now
22 conforming, by our own actions, use and now it is
23 growing. Is that an increase of a use? Is it an
24 additional use? Does it need use variance? That's
25 what area covers. It covers the intensity. It covers

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1 the use that is now deemed to be conforming. And so I
2 believe, unless others need further clarification or
3 have statements of opposition, we can have
4 deliberation. I think we can move ahead and look at
5 this straightforward as an area variance. Any
6 questions? Everyone clear? Excellent. Okay.

7 MR. KEYS: Now, the only other issue that
8 I want to bring to the Board's attention is the
9 question that you'll -- if you agree with the relief
10 requested, that you will also have to reach a decision
11 on the parking element associated with an increase
12 addition. And because it is a use variance and
13 because there is no parking standard applicable for
14 such a use in the R-4 Zone, that one of the tasks the
15 Board will have to do is to reach the parking issue.

16 What we have put forward in the narrative
17 statement is simply a framework that we have used in
18 trying to demonstrate that appropriate provision has
19 been made for parking. The Board's previous order
20 required 11 parking spaces for the existing use.

21 CHAIRPERSON GRIFFIS: Do you know what
22 that was based on?

23 MR. KEYS: I do not. The record does not
24 disclose what that calculation was based on or what
25 the thinking of the Board was at the time. And I say

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1 that only from the terms of the order. I have not
2 gone back to, if there is a transcript, understand
3 what that was based on.

4 CHAIRPERSON GRIFFIS: Right.

5 MR. KEYS: What we have done in assessing
6 the site is to consider the first Zoning District, the
7 most restrictive Zoning District which permits a non-
8 profit organization and that is the SP District. And
9 since the SP District functions where it has been
10 mapped as a buffer between commercial and residential
11 uses, it seemed a particularly appropriate criteria to
12 measure marking in this instance. The SP District
13 requires one parking space for each 1,800 square feet
14 with a grace of the first 2,000.

15 And depending upon how you analyze this
16 site, if you analyze the site as a whole, it would
17 require, I believe, 17 parking spaces. If you analyze
18 the site as the previous order of 11 and then the
19 additional area and the proposed addition, you come up
20 with, I believe, 14 spaces. The applicant has decided
21 that we would go beyond that and the current plan
22 proposes 22 parking spaces. It doubles the parking
23 space. It provides more parking per square foot than
24 the current facility now operates. I would just
25 remind the Board of that if we have the occasion to

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1 get to the calculation of parking.

2 CHAIRPERSON GRIFFIS: And you are
3 certainly saying that that is the correct way that the
4 Board should look at it. In fact, maintain the 11 as
5 the existing condition and calculate the parking
6 requirement for that addition as being proposed?

7 MR. KEYS: Correct. I wanted to give the
8 Board the knowledge that either way you go, the
9 parking proposed is in excess of either way of looking
10 at the site.

11 CHAIRPERSON GRIFFIS: Okay.

12 MR. KEYS: And finally, one of our
13 witnesses is Joseph Handwerger, who is the architect
14 for the project. He was also the architect for the
15 original renovation of the Morse School 20 plus years
16 ago. I think he has got some valuable testimony,
17 certainly for our case, I think you will be interested
18 in. And I've got Mr. Handwerger's curriculum vitae,
19 which I would like to submit to the Board, at this
20 time, and ask for their consideration of accepting Mr.
21 Handwerger as an expert in architecture.

22 CHAIRPERSON GRIFFIS: Okay. Can you also
23 give one to the party in opposition?

24 MR. KEYS: Yes, I will.

25 CHAIRPERSON GRIFFIS: Does the party in

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1 opposition have any opposition to establishing Mr.
2 Handwerger as an expert in architecture?

3 MR. KREISWIRTH: No opposition.

4 CHAIRPERSON GRIFFIS: No opposition.
5 Board Members, any opposition? I think it's obvious
6 the experience level, not only overall in
7 architecture, but specifically in this site warrant
8 granting of the expert status. Let's continue. I'm
9 ready.

10 MR. KEYS: Mr. Chairman, I would like to
11 present our first witness, Julius Coles, the president
12 of Africare, who will describe Africare's mission, how
13 it operates, its employee level and then relate the
14 need for this particular facility and the variances
15 that arise from that request.

16 DR. COLES: Thank you very much. Can you
17 hear me?

18 CHAIRPERSON GRIFFIS: Yes.

19 DR. COLES: Fine. Thank you. Good
20 morning, Mr. Chairman, Members of the Board and the
21 Staff of the Board. It is a pleasure and an honor to
22 be before you today and to address you. Just to give
23 you some idea of my background, I have been in and out
24 of the Washington area some 40 years of my life. I
25 was educated in Atlanta and spent my graduate

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1 education in New Jersey at Princeton and then I went
2 into the Foreign Service, so I was a member of the
3 Foreign Service for some 28 years of my life living in
4 and out of the Washington Metropolitan area.

5 I have also served on the administration
6 of Howard University, which is in the Shaw area. I
7 was the director of the Ralph Bunche Center for
8 International Affairs at Howard University and spent
9 some three years working in the Shaw area, so I'm very
10 familiar with the area and have resided there, I mean,
11 in terms of having worked there for some three years.

12 I've returned back to Washington after spending some
13 five years at Morehouse College as director of the
14 Andrew Young Center for International Affairs there.

15 So all of my life has been working on
16 Africa and working on international affairs. It was
17 indeed an honor to be selected to what I consider to
18 be the premier organization from the United States
19 working on Africa. This was an organization that was
20 founded in 1970 by a group of people who were in the
21 Peace Corps in response to the African drought. And
22 in the African drought if you remember from 1970,
23 there were thousands and thousands of people suffering
24 from lack of food and who were really in very bad
25 condition.

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1 And the African head of state from Niger
2 asked a group of Peace Corps staff what are Americans
3 doing to help the people of Africa and why can't you
4 guys do something about that? And so from that
5 question was born Africare. In 1970, it was
6 incorporated in the first instance in Hawaii and then
7 one year later moved to the District of Columbia. And
8 we have been in the District of Columbia since around
9 1971 and have been good neighbors and good citizens in
10 every location that we have been located.

11 Let me say that the organization started
12 off quite simply in the basement of one of our
13 cofounders, C. Payne Lucas, who is a very
14 distinguished African American and citizen of the
15 District of Columbia. The man took the organization
16 from a basement operation without any money to
17 Connecticut Avenue near Dupont Circle where we were
18 located in an office building there, and we outgrew
19 that location and were offered the opportunity by the
20 District of Columbia to move into a deserted school
21 that had been deserted for five years, unoccupied.

22 And then we were lucky enough to get Mr.
23 Handwerker, who is a distinguished architect, as you
24 can see from his qualifications, and he took a
25 building that was deserted, rundown, rat infested,

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1 holes in the walls, everything else that you can
2 imagine and turned it into a marvelous structure. In
3 fact, the design that he did and the work he did on
4 this building was so good that he won an award for
5 that.

6 And the other day there was someone who
7 came in from the District of Columbia and saw the
8 building and commented "This is the kind of building
9 and this is the kind of reuse of a facility that
10 should be a model for the District of Columbia."
11 Because what Mr. Handwerger did was turn an eyesore
12 into a beautiful edifice that is considered to be one
13 of the best structured office buildings in the
14 Washington area. And having worked myself in academia
15 and having worked in the State Department, I can say
16 it's the best office facility that I have ever worked
17 in.

18 It is not only a beautifully, very airy,
19 very attractive building and environment to work in,
20 but it is also a museum. It has art works from all of
21 Africa and I would say the value of these art works
22 alone would be somewhere in the neighborhood of \$4 to
23 \$5 million. And people who come into our building
24 marvel at how beautiful the artworks are and what a
25 contribution it is making to the education of school

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1 children and other people who come into that building
2 to get a feel for what the African Continent is like.

3 But these are only backgrounds. We have
4 grown from an organization that started off probably
5 in the 1970s with five or six people. In 1983, when
6 we moved and designed a new building, we grew to a
7 staff of around 20 and going up to a level of 40 staff
8 members. And today we are an organization of 58 staff
9 members. What do we do and what is our mission?

10 We are an organization that is devoted to
11 helping the people of Africa to help themselves. We
12 work in food security and agriculture. We work in
13 health, HIV/AIDS. We work in education. We work in
14 environmental issues. We work in microcredit. We
15 work in every aspect of dealing with African
16 development and most of all, I think, we have been
17 very successful in what we have tried to do.

18 Since our founding, we have had and
19 provided some \$450 million to help the people of
20 Africa. We have had a total of some 2,500 projects.
21 We have worked in up to 35 to 36 countries in Africa
22 and we are currently working in another 25 countries
23 of Africa at the present time. We are looked upon as
24 a premier American organization working in Africa. As
25 an example of this, each month 54 African diplomats

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1 representing all the countries in Africa come to our
2 building and hold their meeting, their annual
3 diplomatic core meeting in our facilities.

4 And this is really bringing honor to this
5 Shaw community. Can you imagine 54 African
6 ambassadors coming to a District that was considered
7 at one time to be completely rundown and something
8 that people shouldn't even come to? But they feel
9 honored to come to this facility, because it
10 represents what it represents. And they have been
11 doing this for years and continue to do this and this
12 is very important. It also shows the linkage between
13 what we are doing and the community, because we are
14 bringing not only employment opportunity in terms of
15 the work that we are doing, but we are bringing honor
16 to the community. We are bringing in people that
17 would not come into Shaw, that would not visit Shaw
18 normally, into that community.

19 We have also opened our facility to the
20 community. We have let school kids come in. We have
21 let politicians use the facility. We have also let
22 the ANC use the facility any time that they wanted to
23 for their meetings of the Neighborhood Commission. In
24 fact, we went before the ANC and testified and
25 received the vote of their support, so I was very

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1 surprised to see Mr. Kreiswirth this morning coming in
2 to voice his opposition, which he has the right to in
3 this democracy that we live in, to our project,
4 because the ANC itself and the majority of people
5 attending that meeting were very, very favorably posed
6 and highly complimentary of what we had done to the
7 community and for the community.

8 CHAIRPERSON GRIFFIS: Mr. Keys, do we have
9 that letter? I don't show in the record that ANC-2C
10 has submitted a letter.

11 MR. KEYS: Unfortunately, we've appeared
12 before the ANC on two occasions. First, to introduce
13 the subject and that was in July of 2003.

14 CHAIRPERSON GRIFFIS: Okay.

15 MR. KEYS: And we appeared again before
16 the ANC, I believe it was, last month.

17 CHAIRPERSON GRIFFIS: That's all right. I
18 just wanted to know if we had the letter.

19 MR. KEYS: And they voted to approve, but
20 there is no evidence that they have submitted a
21 resolution.

22 CHAIRPERSON GRIFFIS: Okay. Okay. I'm
23 sorry to interrupt, I just didn't want to lose that
24 fact. Well, why don't you continue?

25 DR. COLES: Okay. Let's move on to why we

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1 didn't move ahead with the renovation that we had
2 asked for in 1999.

3 CHAIRPERSON GRIFFIS: Actually, I'm going
4 to do this.

5 DR. COLES: Okay.

6 CHAIRPERSON GRIFFIS: I don't think we
7 really need to know that.

8 DR. COLES: Okay.

9 CHAIRPERSON GRIFFIS: I think in the
10 written submission, it is very clear.

11 DR. COLES: Okay. Fine.

12 CHAIRPERSON GRIFFIS: And rather than take
13 up your time --

14 DR. COLES: Right.

15 CHAIRPERSON GRIFFIS: We might as well
16 just move on. I think what is particularly of
17 interest to the Board, at this point, is what is
18 motivating the expansion?

19 DR. COLES: Yes.

20 CHAIRPERSON GRIFFIS: And I thought you
21 were trying to or were starting to get to that.

22 DR. COLES: Yes.

23 CHAIRPERSON GRIFFIS: In terms of the
24 staffing.

25 DR. COLES: Right.

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1 CHAIRPERSON GRIFFIS: And the
2 responsibilities.

3 DR. COLES: Right.

4 CHAIRPERSON GRIFFIS: And stuff.

5 DR. COLES: Well, let me say there are
6 different functions that we are not able to have now,
7 because we don't have the space to be able to do it.
8 As I have indicated, we grew from an organization of
9 five or six people up to 20, up to 40, now, we're up
10 to 58 and we need additional facilities for another 20
11 staff members or so. And what we'll be able to do
12 with additional 20 staff members. We need to improve
13 and enlarge our auditing function. We do not have an
14 audit section. Because of the complications of the
15 type of work that we are carrying out, we need to have
16 an audit staff and management of that staff.

17 One of our two sectors of NL strategy is
18 to help to promote food security and to alleviate
19 hunger in Africa. We have no one on our Washington
20 staff at the present time in the agriculture area. We
21 have people in the field, but we don't have
22 headquarters backstopping. And we don't have the room
23 and space within the current structure that we have to
24 be able to have people on our staff in that area.
25 Also, we need to enlarge and improve upon our

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1 financial management. Right now, offices are very
2 crowded and people are using just about every space
3 that they can and there is not any room for expansion.

4 In addition, the meeting of 54 diplomats
5 into a small, relatively small conference room, which
6 is the largest conference room we have, is somewhat
7 overcrowded. And we would like to periodically bring
8 in lecturers on Africa to the community and to have a
9 small auditorium as we are proposing in the
10 neighborhood of 100 people that would fit into that
11 space. 80 to 100 people comfortably. It is something
12 that I think would make an excellent contribution to
13 the community and provide a forum where distinguished
14 people can be brought into Africare.

15 Just alone in the past year, we have had
16 two head of states to come and visit our facility.
17 The president of Uganda and also the president's wife
18 of Liberia, and there are a number of people who are
19 requesting when they come to Washington that Africare
20 is one of the sites that many of the distinguished
21 visitors who come from Africa come to visit, because
22 of its importance and what it has done for the African
23 Continent.

24 We also have a great deal of African art
25 and this art is now stuffed into a closet. We have no

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1 place to display it. And we feel that the building
2 that we are proposing and additional office space it
3 is really essential. The only alternative, from our
4 perspective, would be to move to another location or
5 to get another office facility or acquire additional
6 space elsewhere and that would make for a difficult
7 logistical arrangements for us to use and work. It
8 would be much better to have offices colocated.

9 And with that in mind, we've hired what I
10 consider one of Washington's most distinguished
11 architects to come in to do for us what he did for us
12 the last time and that is to design a wonderful
13 building that makes excellent utilization of the space
14 available to us, and I'm sure, as we have presented
15 our plans to the ANC, that they felt that it is a
16 beautiful addition. It does add to the community and
17 it provides value to the community. So I'm asking
18 that this Board give triple consideration to the two
19 variances that we are asking. Thank you very much.

20 CHAIRPERSON GRIFFIS: Good. Thank you
21 very much, Mr. Coles. Did you have follow-up?

22 MR. KEYS: Yes. Dr. Coles, I would like
23 to ask you just to amplify a couple of your comments.

24 First, how many employees does Africare have
25 worldwide?

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1 DR. COLES: On a worldwide basis, we have
2 1,200 employees. Our headquarters operation is quite
3 small compared to that number of employees.

4 MR. KEYS: And, Dr. Coles, you have
5 mentioned the periodic meetings of the African
6 diplomatic community that take place at Africare's
7 facility. I would like you to describe where those
8 meetings are currently held and I would like you to
9 relate that periodic gathering to Africare's mission
10 of actually delivering services to individual African
11 countries.

12 DR. COLES: It is important that we
13 maintain contact with the African Diplomatic Corps,
14 because these people communicate back to their
15 governments and they also identify with what we're
16 trying to do for their continent. So they want to
17 show strong support for our mission and our role in
18 what we're doing and come to Shaw to demonstrate that
19 support.

20 And right now it's very crowded where they
21 meet. They are meeting in a conference room where the
22 chairs are just spaced all over the place in two or
23 three rows where it's difficult for them to meet, but
24 they still come and meet there, because they feel it's
25 important to demonstrate their support to our

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1 organization.

2 MR. KEYS: I think the only other thing
3 that I would like you to address that you have not
4 covered today is the employee count, and are you
5 speaking of an immediate expansion of employment? Is
6 this a gradual? If you could explain your plans, how
7 you envision the current employment base of 58 to
8 change.

9 DR. COLES: Our estimation, expectation,
10 is that it will be a gradual growth. It will be not
11 something that we would move up to a number of 20
12 early on. It will take time, probably in the next
13 five to 10 years, to reach that level of growth and
14 activity. I would say that, from my perspective, the
15 maximum number of people that we would have working in
16 the building, not part-time but full-time, the maximum
17 from this point on would be about 85 people all
18 together, total.

19 CHAIRPERSON GRIFFIS: Anything else?
20 Excellent. Thank you again, Dr. Coles. We do
21 appreciate the testimony. What I would like to do is
22 just take some quick Board questions and then we'll
23 have you undergo cross examination questions if there
24 are any. If I understand you correctly, of note,
25 Africare started in the early 1970s and, interestingly

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1 enough, I was actually myself living in Nigeria at
2 that time when it started here.

3 But my understanding is that you have 54
4 diplomats on an annual meeting. You have 58 staff
5 current. You obviously are looking to grow as all
6 businesses do in their successes, and looking to
7 include the audit functions, some sort of agricultural
8 staff. I noted in the written submission that that
9 was a substantial area of interest and, in your own
10 statement now, the financial management and art
11 display.

12 When you talked about the art display,
13 first of all, how does that fit into the actual
14 function and purpose program of Africare and secondly,
15 what is the availability for community access to such
16 a collection?

17 DR. COLES: Thank you. The collection of
18 art is displayed throughout the building. It's a part
19 of the interior design of the building. The art does
20 not relate to our function in terms of what we do or
21 what we carry out, but represents gifts that have been
22 given to us by African governments to express
23 appreciation for the work that we have done in their
24 countries or from former American diplomats who have
25 donated art to us because of the beauty of the

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1 building and its interior.

2 CHAIRPERSON GRIFFIS: Yes.

3 DR. COLES: Groups only have to ask if
4 they can bring students in and they do bring them in
5 and they come in from time to time, and we also host
6 public meetings in the facility, not in large numbers,
7 but periodically we are -- we don't want a lot of
8 people coming in and out. We are not a meeting place.

9 CHAIRPERSON GRIFFIS: Right.

10 DR. COLES: But we do allow certain people
11 and certain groups to come in and to use our
12 facilities, but everyone who comes in marvels at the
13 beauty of the facility.

14 CHAIRPERSON GRIFFIS: Indeed. I can
15 imagine. Okay. And you're anticipating, of course,
16 as you have stated, that the possibility of growing by
17 20 or so in the future.

18 DR. COLES: Right.

19 CHAIRPERSON GRIFFIS: Other questions from
20 the Board?

21 BOARD MEMBER MANN: I have a question.

22 CHAIRPERSON GRIFFIS: Yes, Mr. Mann?

23 BOARD MEMBER MANN: Do you currently
24 occupy any other facilities in the Washington, D.C.
25 area besides the R Street facility?

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1 DR. COLES: No, we do not.

2 BOARD MEMBER MANN: So all 58 employees
3 are currently working in the R Street facility?

4 DR. COLES: That is correct.

5 CHAIRPERSON GRIFFIS: Ms. Miller?

6 VICE CHAIR MILLER: I just want to get a
7 better feel for how crowded things are right now with
8 respect to, you know, what's dictating the expansion.
9 How much is it, how crowded it is now and how much is
10 it your desire to grow?

11 DR. COLES: Let me give you an example of
12 that. Probably in around 1983 when we started off, we
13 were probably an organization providing some \$5
14 million annually in aid to Africa. Currently, we are
15 providing somewhere in the neighborhood of around \$45
16 to \$50 million in economic assistance to Africa with a
17 headquarter staff of only 58 people, with a field
18 staff of some 1,100 people working in some 26
19 countries in Africa. I mean, that's to give you some
20 -- and what is driving the growth? It's the growth of
21 program. It's the need in Africa for development
22 assistance.

23 Right now, the only real staff that we
24 have of some quality and size to rise to the occasion
25 is our health HIV/AIDS staff, which is about eight to

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1 nine people in that area. Whereas, in agriculture we
2 have no one in headquarters and that's one of our
3 major focuses, so we need to really expand that area,
4 our work force in that area.

5 Also, we don't have an audit group and we
6 need an audit group. There has been a lot of problems
7 in terms of malfeasance and fraud and we need to
8 expand in that area to have an audit capability and
9 also to improve our financial management.

10 The other area that I would think of, and
11 one of the other requirements, is that we are not able
12 to store our records on-site and we have to store off-
13 site. So there is no office facility. There is no
14 place other than storage facilities, because all of
15 our records have to be stored off-site, because there
16 is no storage facility for our records in the building
17 itself.

18 If you were to come to our building, I
19 think that you would find that people are very cramped
20 into cubicles that are probably around the normal size
21 of a cubicle in terms of what office space is allowed,
22 but very crowded, you know, because of the need to put
23 that many people into the structure that we have. And
24 so we need to expand to allow for more room and a more
25 orderly presence of what we have to be able to

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1 maintain it.

2 CHAIRPERSON GRIFFIS: Good. Thank you.

3 DR. COLES: Thank you.

4 CHAIRPERSON GRIFFIS: Follow-up, any other
5 questions from the Board? Very well. Cross
6 examination?

7 MR. KREISWIRTH: No questions.

8 CHAIRPERSON GRIFFIS: No cross? Okay.

9 MR. KEYS: Dr. Coles, I would like to just
10 ask you what is your relationship to the United States
11 Government in international organizations, and what
12 has been the change in their budgetary allocations to
13 Africa and how has that rippled down to you?

14 DR. COLES: Okay. Let me say that most of
15 our money comes from the Federal Government. In fact,
16 some 65 to 70 percent of it comes from the U.S.
17 Government. Other funds come from private
18 foundations, such as the Gates Foundation, the Donner
19 Foundation, the Ford Foundation. We get money from
20 international financial institutions like the World
21 Bank, the International Fund for Agricultural
22 Development. We have gotten money from the European
23 Union. We have gotten money from the Japanese. We
24 have gotten money from the Netherlands. We have
25 gotten money from the British. We have gotten some

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1 money from the U.N., the World Food Program.

2 So we get money from a variety of sources,
3 but the major source of our funding is the Federal
4 Government at the present time. And we also get money
5 from small donors, from churches, from sororities and
6 from people who just want to contribute to Africare.

7 BOARD MEMBER ETHERLY: Mr. Chair, if I
8 could, just a very quick question perhaps either for
9 Mr. Keys or for Dr. Coles. It wasn't referenced in
10 any of the prehearing submissions, but I'm just
11 curious as to whether or not there are any security
12 related considerations concerning the configuration of
13 the proposed annex space or even with respect to your
14 existing building that you also have to deal with
15 given, you know, of course, some of the diplomatic
16 traffic that you may have coming through the facility,
17 as well as other important visitors or guests?

18 DR. COLES: Thank you. We have not had
19 any security concerns. We have an electronic
20 surveillance system within the building. We have an
21 alarm system that has worked very effectively, and we
22 have not had, to my knowledge, at least in my -- I
23 have been on the board for five years and have also
24 been in contact with Africare over a period of time, I
25 have never heard of a burglary.

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1 BOARD MEMBER ETHERLY: Okay.

2 DR. COLES: And so I think we have been
3 very lucky. Either people don't realize what's in
4 there or they like what we're doing, but we have been
5 very fortunate in that regard. The one time I think I
6 did hear a story that somebody came into one of the
7 windows and stole computers, but they didn't mess with
8 anything else.

9 BOARD MEMBER ETHERLY: Okay.

10 DR. COLES: Because all that they took was
11 -- I think that's the only incident. One burglary, is
12 that --

13 MR. KING: And that computer happened to
14 be sitting right beside the window.

15 DR. COLES: Yes, that's the only instance
16 that we have had.

17 BOARD MEMBER ETHERLY: Okay.

18 DR. COLES: One time.

19 BOARD MEMBER ETHERLY: But from the
20 instance within the context of design and planning for
21 the new building, and then perhaps I will leave it
22 just as a flag, when the architect comes forward to
23 the extent there might have been any considerations
24 that you have to --

25 DR. COLES: Right.

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1 BOARD MEMBER ETHERLY: -- take account of
2 in looking at the new building and its design, that
3 might be helpful to speak to. And I can completely
4 understand, of course, if there weren't any severe
5 needs.

6 DR. COLES: Right.

7 BOARD MEMBER ETHERLY: I mean, clearly,
8 we're not talking about an embassy type structure,
9 but, you know, once again, I understand completely the
10 needs around the art storage and the additional
11 conference and meeting space and office space, but I
12 was just curious as to whether there might be any
13 security needs that also drove some of the design
14 questions that you had to deal with.

15 DR. COLES: Let me just say that from our
16 point of view, when we first moved into Shaw in 1983,
17 nobody wanted to go there and now Shaw is looked upon
18 as being one of the up and coming communities, fast
19 growing, economically improved communities and I'm
20 proud to say that Africare is a part of that beauty
21 and that growth, and I think that people in general in
22 the community really appreciate what we have done for
23 the community and what we have brought to this
24 community.

25 BOARD MEMBER ETHERLY: Right.

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1 DR. COLES: But we're not particularly
2 concerned about it. I don't think the architects have
3 made any special features for security.

4 BOARD MEMBER ETHERLY: Okay.

5 DR. COLES: Because we haven't had those
6 problems.

7 BOARD MEMBER ETHERLY: Okay.

8 DR. COLES: We have been very lucky.

9 BOARD MEMBER ETHERLY: Okay. Excellent.
10 Thank you.

11 DR. COLES: Thank you.

12 BOARD MEMBER ETHERLY: Thank you, Mr.
13 Chair.

14 CHAIRPERSON GRIFFIS: Certainly.

15 BOARD MEMBER MANN: Mr. Chairman?

16 CHAIRPERSON GRIFFIS: Yes, Mr. Mann?

17 BOARD MEMBER MANN: Does the U.S.
18 Department of State recognize Africare as an
19 international organization?

20 DR. COLES: Yes, it's the Agency for
21 International Development, which is a part of the
22 Department of State. We are a registered private
23 voluntary agency with the Federal Government, yes. We
24 are registered as a registered NGO. That means we are
25 eligible to receive U.S. Government funds and that we

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1 are members of the private voluntary agencies that
2 meet periodically with the head of the Agency of
3 International Development, but we are recognized by
4 the State Department, by the White House and by the
5 Agency for International Development, but our primary
6 contact in the American Government is the Agency for
7 International Development.

8 CHAIRPERSON GRIFFIS: Excellent. Thank
9 you.

10 DR. COLES: Thank you.

11 CHAIRPERSON GRIFFIS: What other
12 reoccurring events do you have and requirements for
13 on-site?

14 DR. COLES: When you say reoccurring
15 events --

16 CHAIRPERSON GRIFFIS: You said annually,
17 you have 54 diplomats come in. Is there anything else
18 that occurs on that type of schedule?

19 DR. COLES: No, they come in once a month.

20 CHAIRPERSON GRIFFIS: Once a month?

21 DR. COLES: They meet once a month at
22 Africare, not annually. They meet once a month there.

23 CHAIRPERSON GRIFFIS: 54 diplomats come
24 once a month?

25 DR. COLES: Yes.

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1 CHAIRPERSON GRIFFIS: You said an annual
2 meeting. I'm sorry.

3 DR. COLES: Well, I made a mistake if I
4 said that.

5 CHAIRPERSON GRIFFIS: Once a month?

6 DR. COLES: Yes, they come monthly.

7 CHAIRPERSON GRIFFIS: Wow.

8 DR. COLES: Yes.

9 CHAIRPERSON GRIFFIS: Okay. What other
10 sort of reoccurring?

11 DR. COLES: Other reoccurring meetings are
12 just periodically we would have people invited in,
13 small meetings, maybe 15 or 20 people, something like
14 that.

15 CHAIRPERSON GRIFFIS: Okay. Nothing on
16 that kind of perpetual schedule though that you're
17 aware of?

18 DR. COLES: No, no.

19 CHAIRPERSON GRIFFIS: Okay. And Africare
20 itself has a board and it has staff. The board is how
21 large?

22 DR. COLES: The board is about 30 people.

23 CHAIRPERSON GRIFFIS: And how often does
24 it meet?

25 DR. COLES: The board, the main body of

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1 the board meets twice a year and the Executive
2 Committee meets four times a year, so there are six
3 meetings of the board during the year, because the
4 Executive Board is only quite small. It's less than
5 eight to 10 people.

6 CHAIRPERSON GRIFFIS: Right. Okay. And
7 that is perfectly understandable. Okay. And then you
8 made the comment of 1,200 worldwide employees. Do
9 they utilize the D.C. site at all? Is there a
10 rotation? Is there a significance to that number?

11 DR. COLES: Most of our employees overseas
12 are Africans, and there are, approximately, probably
13 something like 30 to 40 Americans. We did not have
14 enough positions in headquarters to have sort of a
15 rotation back to Washington.

16 CHAIRPERSON GRIFFIS: Right.

17 DR. COLES: So these people spend most of
18 their lives overseas and move from one area of work to
19 another. Their only contact with headquarters would
20 be coming back in on home leave or passing through for
21 short periods of time.

22 CHAIRPERSON GRIFFIS: Okay. Okay. Good.

23 Thank you.

24 DR. COLES: Thank you very much.

25 CHAIRPERSON GRIFFIS: Anything else?

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1 VICE CHAIR MILLER: Well, just with
2 respect to the 54 diplomats that come and meet
3 monthly.

4 DR. COLES: Yes.

5 VICE CHAIR MILLER: What room do they meet
6 in? Do they meet in this conference room?

7 DR. COLES: They meet in a large
8 conference room.

9 VICE CHAIR MILLER: Your large conference
10 room?

11 DR. COLES: Yes, it's very crowded.

12 VICE CHAIR MILLER: What is the capacity
13 of that room?

14 MR. KING: 50, 54 chairs.

15 VICE CHAIR MILLER: Oh, okay.

16 MR. KING: They sit around the wall.

17 VICE CHAIR MILLER: So they just sit?

18 DR. COLES: But they are crowded. When
19 you think about a meeting place, to see a meeting
20 center table in the center and then chairs in three to
21 four rows.

22 MR. KING: Yes.

23 DR. COLES: Basically, I think that if the
24 Fire Department came in, they would probably give us a
25 violation in terms of that overcapacity for that

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1 particular room, because it's just not designed for
2 that kind of --

3 CHAIRPERSON GRIFFIS: Of course, you just
4 said that on the record.

5 DR. COLES: Well --

6 CHAIRPERSON GRIFFIS: Okay. I think
7 that's understood. Anything else? Again, thank you
8 very much. We appreciate you being here. Why don't
9 we move on?

10 MR. KEYS: Our next witness is Elton F.
11 King who is the director of Management Services for
12 Africare.

13 CHAIRPERSON GRIFFIS: You just have the
14 three witnesses?

15 MR. KEYS: Yes.

16 CHAIRPERSON GRIFFIS: Okay.

17 MR. KEYS: And I have asked Mr. King to
18 relate the employment data to what he has determined
19 about the mode of transportation for employees to
20 understand and what the local parking situation is, so
21 that we can begin to extrapolate and understand what
22 parking impacts might be from an expansion.

23 CHAIRPERSON GRIFFIS: Let me understand.
24 Why would you be able to tell us about the parking
25 requirements based on the management?

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1 MR. KEYS: Not on the parking
2 requirements, but what is the parking situation.

3 CHAIRPERSON GRIFFIS: Or the parking
4 impact, the demand.

5 MR. KEYS: And he has conducted a survey
6 of employees.

7 CHAIRPERSON GRIFFIS: I see.

8 MR. KEYS: To determine the modes of
9 coming to and from work.

10 CHAIRPERSON GRIFFIS: Oh, I see. Okay.
11 And is that going to be submitted or are you just
12 going to give that orally?

13 MR. KEYS: I think he can summarize orally
14 the results of his interactions with employees, and
15 what he can tell you about the R Street and the
16 immediate neighborhood in terms of parking.

17 CHAIRPERSON GRIFFIS: Okay.

18 MR. KING: Good afternoon to the Board and
19 to the Chair and all the Members. When we took a
20 survey of the number of people that work for Africare,
21 we found out that there were 35 percent of our
22 employees that use Metro to get to Africare. They use
23 the line and the closest line to us is the Green Line,
24 which is about two blocks from us.

25 65 percent of them drive, which is about,

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1 we say, 42 based on the maximum of maybe 65 people in
2 the building, because we have some people coming in to
3 terminate and may be in the building at the time when
4 new ones are coming in, going overseas. So with an
5 overlap of people, a maximum of 65 people at one time.

6 We were saying that that's 42 people that
7 would probably drive, and if they do drive we found
8 that on the R Street side, on the south side of R
9 Street in the block between New Jersey and 5th is where
10 our building is located, that whole side of the street
11 is nonrestrictive for neighborhood parking and that
12 itself holds 11 to 12 cars on that one side of the
13 street. The next block between 5th and 6th Street on
14 the south side also will house, it can hold around 10
15 cars and that is nonrestrictive up until 4:00 p.m. in
16 the evening when it becomes 4:00 to 6:30 traffic zone.

17 In addition, on the other side of New
18 Jersey Avenue between 4th and New Jersey, on both sides
19 of the streets, none of those are restricted for
20 residential, as well, which both with hold 11 to 12
21 people on each side. So when you really take a total,
22 there is really space available for 61 people at any
23 one time between Monday and Friday.

24 CHAIRPERSON GRIFFIS: On the street?

25 MR. KING: Excuse me?

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1 CHAIRPERSON GRIFFIS: On the street you're
2 saying?

3 MR. KING: On the street, on the street
4 parking, nonrestrictive, not in restrictive
5 neighborhood zones.

6 CHAIRPERSON GRIFFIS: Right.

7 MR. KING: So we virtually have no
8 problems with people coming to work and being able to
9 find a parking space.

10 CHAIRPERSON GRIFFIS: Of course, those
11 aren't all for you, right?

12 MR. KING: No, they are for --

13 CHAIRPERSON GRIFFIS: So what you're
14 saying, your point is that if 42 people drive, there
15 are 61 out there, there is plenty of parking to go
16 around?

17 MR. KING: There's plenty of parking
18 space.

19 CHAIRPERSON GRIFFIS: Gotcha.

20 MR. KING: And not using any residential
21 area zone at all.

22 CHAIRPERSON GRIFFIS: Right.

23 MR. KING: Yes, sir.

24 MR. KEYS: Thank you, Mr. Chair.

25 CHAIRPERSON GRIFFIS: That's the kind of

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1 traffic engineering study I like. I mean, it's not
2 traffic engineering, but, you know, a quick summary,
3 give us the numbers. That's understandable. Okay.
4 Any questions from the Board? Hold on.
5 Clarifications? Okay.

6 The party in opposition, I know you didn't
7 hear that last part. I can summarize any cross
8 examination. The parking count, on-site,
9 unrestricted. They have indicated that it's a
10 possibility of 61 available in the immediate adjacent
11 neighborhood that would be unrestricted street
12 parking. Okay.

13 MR. KEYS: I think our task now is to
14 relate Dr. Coles' program requirements and the
15 situation of the organization to the site and to the
16 potential for the building, and I'm going to ask Mr.
17 Handwerger to acquaint the Board with the
18 circumstances that compel us to come before you
19 seeking the variances. And, Joe, would you? I'll
20 give him a hand with the easels.

21 UNIDENTIFIED SPEAKER: I can help.

22 MR. KEYS: Are you live, Joe, with that?

23 MR. HANDWERGER: Yes.

24 MR. KEYS: Okay.

25 MR. HANDWERGER: Can you see this spot?

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1 Do I need this? My name is Joseph Handwerger. I
2 reside at 3743 Upton Street, N.W. in the District of
3 Columbia. I have been a registered architect in the
4 District of Columbia since 1963. I was an assistant
5 to L'Enfant at the time.

6 I enjoyed bringing this particular board,
7 because it's the exhibit board that we used for the
8 original presentation for the first granting of the
9 variance. Just to clear up some of the questions that
10 have been asked, first of all, north is at the bottom
11 and this is R Street. This is 5th Street. New Jersey
12 Avenue is not here. That's the alley, but just over
13 from there, and the alley continues around back here.

14 This is the boardroom that has been
15 discussed and it's interesting to look at this
16 original layout. There are twice as many people in
17 that area as was in the beginning. This small
18 conference room has become an office. There are other
19 functions that have changed since 20 years ago. There
20 is a substantial computer room. There was on this
21 corner a structure that had been used for file storage
22 that we looked at to improve, but it was so decrepid
23 that it was demolished and the files have gone
24 somewhere else, to an undisclosed location somewhere.

25 I will point out some of the uniqueness of

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1 this structure, unique in that it is not like a modern
2 office structure and, therefore, very flexible. The
3 way this is structured is you can probably see what
4 was going on here originally. There was a classroom,
5 classroom, classroom and classroom with these, what
6 used to be cloakrooms between the classrooms.

7 But the point is that this is structured
8 with bearing walls. You can see these walls going
9 through. These are bearing walls. The stairs are
10 enclosed in bearing walls. The entire structure is
11 structured with masonry bearing walls of a certain
12 age. This was built at the turn of the century, and
13 so it's very difficult to just remove walls and expand
14 or move things about. We did a bit of that to enlarge
15 the atrium here and it's very dicey business. The
16 masonry is ancient and so it's not the best thing to
17 do to this little building.

18 It has served Africare very well over the
19 years, but it is very difficult to change it in any
20 significant way. Another change recently is a
21 conversion of what was the library and language lab to
22 office space, to staff space for the AIDS group who
23 were scattered around, but as a way to assemble them
24 in one place that was accomplished.

25 We considered how we might expand this in

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1 order to make a large conference room that has been
2 talked about. This is a boardroom and the only
3 opportunity would be to remove these bearing walls and
4 expand this way to remove the director, the president
5 to another location, and it really is barely feasible.

6 So it served Africare very well up until now, but
7 their new needs are different and so we have tried to
8 accommodate them.

9 CHAIRPERSON GRIFFIS: Do you have any
10 availability of adding on to the top of this building?

11 MR. HANDWERGER: I suppose we would exceed
12 the 40 foot height.

13 CHAIRPERSON GRIFFIS: Right. It's not a
14 matter-of-right to add on top of this building. Is
15 that correct?

16 MR. HANDWERGER: That's right.

17 CHAIRPERSON GRIFFIS: Even if we assume
18 that you could gut this building, it seems to me I
19 recall in your submission that you have large floor to
20 floor heights. Is that correct?

21 MR. HANDWERGER: Yes.

22 CHAIRPERSON GRIFFIS: Okay. And so you're
23 not gaining a lot of volume, if I'm understanding your
24 testimony, now in the original structure by just
25 removing the bearing walls and restructuring this

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1 whole thing, because you have utilized all those
2 spaces. Is that correct?

3 MR. HANDWERGER: That's correct.

4 CHAIRPERSON GRIFFIS: So if I understand
5 you correctly, the testimony that you're bringing is
6 that there is nowhere else to expand within the
7 existing envelope?

8 MR. HANDWERGER: That's correct.

9 CHAIRPERSON GRIFFIS: Okay. Let's go to
10 the addition then, and let's talk specifically about
11 the relief areas that are before us. The rear yard
12 would be good if you could just point out graphically
13 where the impact area is and also, I think it's fully
14 understood, the lot occupancy, but we may want to go
15 through. No, I don't think we do.

16 MR. HANDWERGER: So the solution
17 proposed --

18 CHAIRPERSON GRIFFIS: I'm sorry, but you
19 have to speak into the microphone, not for us to hear,
20 but for you to be on the record.

21 MR. HANDWERGER: Did I turn it off?

22 CHAIRPERSON GRIFFIS: I don't know.

23 MR. KEYS: Yes, it's on.

24 CHAIRPERSON GRIFFIS: Have it close to
25 your mouth and it will be great.

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1 MR. HANDWERGER: Right. Our solution to
2 these requirements is to propose a structure on the
3 west side of three stories with two basements. We
4 have lifted up the courtyard to the level of the
5 existing building, which permits a short ramp to get
6 down under this ground floor to the parking garage.
7 Below that is a floor of storage for files and art
8 work. These are the three townhouses that are
9 adjoining. I didn't expect that one, but --

10 MR. KEYS: Joe, could you point out or
11 trace the outlines of those townhomes?

12 MR. HANDWERGER: That's one. There's one,
13 two, three townhouses. I should have pointed out that
14 what exists now at the boundaries of the parking lot
15 is the side yard of this townhouse, which is a blank
16 brick wall, and the rest of the enclosure is a chain
17 link fence.

18 So our charge in addition to developing
19 the spaces was to preserve as much open space as we
20 could and to have the least impact on the
21 neighborhood. So one of the things that we did was to
22 put the short end of this structure onto R Street with
23 some of it at the far end to have the least impact,
24 and let me put another exhibit up.

25 Before I do, I will speak to what this

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1 exhibit shows. I have highlighted the service areas,
2 that is stair, toilets, storage elevator and another
3 stair highlighted in this reddish color as it is here.

4 And the point here is that this is a rather
5 inefficient building in that so much service area is
6 provided for a relatively small amount of space, but
7 that's required to make it work and to meet the codes,
8 have two stairs. So this service area here is roughly
9 one third of the floor area, which is a very low
10 efficiency.

11 CHAIRPERSON GRIFFIS: But let me just
12 follow that line of thought. First of all, you have
13 to add two additional stairs into the addition,
14 although you have connected with a covered walkway.
15 So was there any indication or why couldn't you add
16 onto the existing building directly and then share the
17 stairs for egress?

18 MR. HANDWERGER: Well, it would, for
19 instance, cover existing space and make it less
20 usable. Some of it would come completely interior.
21 And in connecting it, you would have to drive a
22 corridor through those spaces since this is the core
23 of the circulation in the building.

24 CHAIRPERSON GRIFFIS: Okay. So based on
25 the fact of the bearing walls, which you talked about,

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1 and the existing structure is a schoolhouse, which is
2 a four room schoolhouse on every floor, in order to
3 accommodate an actual circulation to share those
4 stairs would remove so much of the interior of the
5 existing that the balance of square footage is better
6 off putting in an addition. Is that my understanding?

7 MR. HANDWERGER: Very well said.

8 CHAIRPERSON GRIFFIS: I see. Okay. And
9 the bathroom counts, the fixture counts, that's
10 accommodated in the expansion in the addition or the
11 entire facility?

12 MR. HANDWERGER: Well, this additional
13 bathroom is only for this annex.

14 CHAIRPERSON GRIFFIS: Is that right?

15 MR. HANDWERGER: Yes, well, this --

16 CHAIRPERSON GRIFFIS: Do you have the
17 correct count?

18 MR. HANDWERGER: Pardon?

19 CHAIRPERSON GRIFFIS: Do you have the
20 correct count then in the existing building?

21 MR. HANDWERGER: To accommodate this?

22 CHAIRPERSON GRIFFIS: Yes.

23 MR. HANDWERGER: Yes, we have --

24 CHAIRPERSON GRIFFIS: Okay.

25 MR. HANDWERGER: We have toilets here,

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1 here on each floor.

2 CHAIRPERSON GRIFFIS: I see. Okay. Okay.

3 MR. HANDWERGER: All right. Let's do that
4 one.

5 UNIDENTIFIED SPEAKER: This one?

6 MR. HANDWERGER: Yes. This is to
7 illustrate how we have attempted to break up the mass.
8 This looks like a larger structure than it really is,
9 because these pieces that are actually set far back on
10 the site, this piece is this L part here, makes it
11 look like more building to R Street than would
12 actually appear. If you imagine this and this as the
13 R Street frontage, I think it does have a modest
14 impact on the street.

15 When we visited Office of Planning, they
16 made some useful suggestions about relating this
17 building to the adjoining townhouses. Originally,
18 this wall came directly out to the street frontage.
19 Now, we have pushed that back and enclosed the stair
20 in this structure, which is more in scale with the
21 adjacent townhouses, and we have tried to recall
22 elements in the design of the original building as a
23 way of integrating it.

24 CHAIRPERSON GRIFFIS: I understand the
25 kind of stepping scale to go to the two story

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1 townhouses that are adjacent. You have a portion of
2 your addition that shows as with a pitch roof on, the
3 black roof portion right there. Exactly. Can you
4 show me where that is on the plan?

5 MR. HANDWERGER: That's here. This stair
6 is --

7 CHAIRPERSON GRIFFIS: Oh, so actually that
8 shadow is probably not well represented. That only
9 bumps out about 4 feet?

10 MR. HANDWERGER: 5 feet.

11 CHAIRPERSON GRIFFIS: 5 feet? I see.

12 MR. HANDWERGER: So the shadow is a little
13 heavy maybe.

14 CHAIRPERSON GRIFFIS: I see, yes. I
15 thought it was a nice, big carriage house there. All
16 right. Okay.

17 MR. HANDWERGER: And in addition, the
18 setting back of this facade accomplishes something
19 else. We have introduced a decorative iron fence
20 along here with the overhead door to the garage being
21 back of that.

22 CHAIRPERSON GRIFFIS: Okay.

23 MR. HANDWERGER: And less visible.

24 CHAIRPERSON GRIFFIS: Last thing, I'm
25 sorry if I missed it. Graphically on the plan, where

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1 is your rear yard?

2 MR. HANDWERGER: This is the alley. This
3 is the property line. This is the 14 feet existing
4 rear yard. We have aligned this with the existing
5 rear yard. This is the condition for which we're
6 asking for the 6 feet rear yard variance. Just to
7 refer back to the efficiency question, if we honored
8 the 6 foot rear yard, it would squeeze this space even
9 further or make it bulge into the courtyard more to
10 pick up that space.

11 CHAIRPERSON GRIFFIS: Okay. Are you
12 familiar with the Office of Planning's report that
13 they submitted?

14 MR. HANDWERGER: Yes.

15 CHAIRPERSON GRIFFIS: Okay. I'm going to
16 just jump into it, because I want to really kind of
17 get through this, so that the Board can at least eat
18 lunch before we start our afternoon session, but we
19 need to spend the appropriate time on this.

20 They make a comment and that is that,
21 based on the submitted drawings, there is open area to
22 the west of the existing building to design an annex,
23 approximately, 4,000 square feet comparable to the
24 features of the main building, that it would meet the
25 rear setback.

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1 Is that what you're saying, if you pull it
2 down at that portion, that you would fill the open
3 court?

4 MR. HANDWERGER: If you pulled this down--

5 CHAIRPERSON GRIFFIS: Right.

6 MR. HANDWERGER: And tried to make up for
7 the space lost here, you would have to bulge this wall
8 out into the courtyard and that's what I'm saying.

9 CHAIRPERSON GRIFFIS: Okay. And so what
10 grade problem does that cause?

11 MR. HANDWERGER: The grade problem?

12 CHAIRPERSON GRIFFIS: Yes. Why wouldn't
13 you do that?

14 MR. HANDWERGER: Well, this shape of the--
15 bulging it out would make this space that's here less
16 functional. I mean, the shape of this lecture room
17 would be almost square and that's not the best shape
18 for a lecture, a movie or other functions.

19 MR. KEYS: Joe, what's the impact on the
20 courtyard and why is the courtyard important as a
21 design element in your solution to this site?

22 MR. HANDWERGER: Well, I think the
23 courtyard is an important contribution to the
24 neighborhood visually, and it also can be used by the
25 occupants of the building. We wanted to get as much

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1 light into the courtyard as we could. We wanted to
2 preserve site lines to the existing building, and for
3 those reasons we wanted to retain as much of the
4 courtyard as possible.

5 BOARD MEMBER ETHERLY: If I could, as a
6 follow-up to that question, there was comment in the
7 prehearing submissions also about the interplay
8 between the two buildings, between the Morse School
9 building and the annex.

10 Does biting into that courtyard a little
11 bit in your opinion, Mr. Handwerger, further upset or
12 threaten to, shall we say, overrun the profile and
13 point of reference as far as the Morse School building
14 is concerned?

15 MR. HANDWERGER: Well, the further you
16 push it over, the more it begins to crowd this
17 building. This projection begins to be pressed a bit
18 more against the building. It doesn't disturb
19 anything functionally.

20 BOARD MEMBER ETHERLY: Yes.

21 MR. HANDWERGER: But why don't I go on to
22 the other plans?

23 UNIDENTIFIED SPEAKER: This one?

24 MR. HANDWERGER: Yes. Let's see. Let me
25 point out a couple of things here. In order to --

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1 just one second. Let me go back to this one. We have
2 provided an arcade connection, I don't know if this
3 dotted line is visible, that allows circulation at the
4 plaza level between the two buildings. There is also
5 a connection at the basement level between the two
6 buildings.

7 CHAIRPERSON GRIFFIS: Okay. I'm going to
8 do this. I think the Board is fully understanding
9 what we're looking at here.

10 MR. HANDWERGER: All right.

11 CHAIRPERSON GRIFFIS: If there is one
12 question from the Board, they will go into the
13 elevation and you pointed out the glass portion that
14 projects out from the existing structure.

15 MR. HANDWERGER: Glass portion?

16 CHAIRPERSON GRIFFIS: Yes, the glass at
17 the rear.

18 MR. HANDWERGER: Back here?

19 CHAIRPERSON GRIFFIS: No, on the left
20 side.

21 MR. HANDWERGER: Oh, this?

22 CHAIRPERSON GRIFFIS: Yes.

23 MR. HANDWERGER: Oh, well, you'll have to
24 refer to your photograph of this building.

25 CHAIRPERSON GRIFFIS: Right. She didn't

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1 know.

2 MR. HANDWERGER: It's the only addition to
3 this structure when it was remodelled, so that's an
4 existing --

5 CHAIRPERSON GRIFFIS: And what it is, in
6 plan, it is just that width and depth. It's a fairly
7 shallow rectangle that projects up through the
8 building. Is that correct?

9 MR. HANDWERGER: That's right, this,
10 right. This goes up to a skylight.

11 CHAIRPERSON GRIFFIS: Yes.

12 MR. KEYS: I think photograph 6 in the
13 package.

14 CHAIRPERSON GRIFFIS: I think it's number
15 3 in the package, because they are beautifully --
16 okay. Anything else from the Board then, question,
17 clarifications? Then last in his reading elevation,
18 which is a very nice elevation, but the portion under
19 the flags, which is reading as a projection out,
20 white, more white, is that the atrium in the back of
21 the courtyard or not the atrium?

22 MR. HANDWERGER: That's the arcade.

23 CHAIRPERSON GRIFFIS: I'm sorry, the
24 arcade.

25 MR. HANDWERGER: Heavily drawn, yes,

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1 that's the connection.

2 CHAIRPERSON GRIFFIS: Right. Okay. So in
3 fact, that would fade substantially away?

4 MR. HANDWERGER: Yes.

5 CHAIRPERSON GRIFFIS: In a realistic view?

6 MR. HANDWERGER: Right.

7 CHAIRPERSON GRIFFIS: Okay.

8 MR. HANDWERGER: That, like this piece,
9 this piece is far back from R Street.

10 CHAIRPERSON GRIFFIS: Understood. Okay.
11 I think it would be more expeditious for us to go to
12 Office of Planning.

13 VICE CHAIR MILLER: I have a question.

14 CHAIRPERSON GRIFFIS: Right, after these
15 questions. I just want to clarify, because they have
16 an awful lot that deals with this. But, Ms. Miller, a
17 question of the architect?

18 VICE CHAIR MILLER: Mr. Handwerger, just
19 for clarification of my understanding of the history
20 here, I know you presented this case for a variance in
21 1999 and I'm just wondering, other than the changes
22 that you made in response to Office of Planning, is
23 this the same plan that was presented? And when I
24 look at the transcript, it looks like all that was
25 sought was the variance from the rear yard and why is

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1 that? Is the lot occupancy the same now?

2 MR. HANDWERGER: Yes.

3 VICE CHAIR MILLER: As what was presented
4 then?

5 MR. HANDWERGER: This proposal, this
6 footprint, is precisely the one that was presented
7 previously.

8 MR. KEYS: Ms. Miller, I would just offer
9 a slight qualification. We have added the arcade,
10 which adds 450 square feet to the plan that was
11 presented in 1999. That arcade, though it's open,
12 does count as lot occupancy.

13 CHAIRPERSON GRIFFIS: And makes it one
14 existing structure.

15 VICE CHAIR MILLER: Thank you.

16 CHAIRPERSON GRIFFIS: Or one structure.
17 Okay.

18 MR. HANDWERGER: All right.

19 CHAIRPERSON GRIFFIS: Anything else,
20 further questions from the Board? Very well. Is
21 there any cross examination from the party in
22 opposition of the architect? You have copies of this,
23 the plans and all?

24 MR. KREISWIRTH: I have seen them. I
25 don't have copies.

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1 CHAIRPERSON GRIFFIS: Okay. We will make
2 sure, if you would like, then to pick one up today
3 before you go or you can get one from the applicant or
4 the office. Okay. If there's nothing else, let's
5 move on. Yes?

6 MR. KEYS: Mr. Chair, I think having read
7 the statement of the party in opposition, I think it
8 would be important if he is not going to ask the
9 question, that the Board be acquainted with -- Mr.
10 Handwerger, where are the mechanical systems for the
11 proposed annex?

12 CHAIRPERSON GRIFFIS: Oh, I'm sorry.

13 MR. HANDWERGER: This is not totally
14 designed, but they are conceived to be on the rooftop,
15 so the contribution of the noise from there is not any
16 different from what happens on many townhouses.

17 CHAIRPERSON GRIFFIS: Do you have a roof
18 plan?

19 MR. HANDWERGER: No.

20 CHAIRPERSON GRIFFIS: Okay. Let's go then
21 to the third floor plan. From my understanding,
22 you're saying it's going to be on the addition. Where
23 are the mechanical units now that service the existing
24 building?

25 MR. HANDWERGER: This?

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1 CHAIRPERSON GRIFFIS: Are they on grade?

2 MR. HANDWERGER: They are compressors,
3 yes, on grade here. There are compressors in the back
4 there.

5 CHAIRPERSON GRIFFIS: I see.

6 MR. HANDWERGER: And at the rear.

7 CHAIRPERSON GRIFFIS: And are those going
8 to stay in those locations?

9 MR. HANDWERGER: They will stay, yes.

10 CHAIRPERSON GRIFFIS: Okay. And so any
11 additional mechanical, are you using compressors also
12 or is there chiller --

13 MR. HANDWERGER: I would expect there to
14 be chillers on the roof.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. KEYS: Mr. Handwerger, were the
17 compressors that are being utilized with the Morse
18 School today, the ones that are at grade, were they
19 present when the renovation was done in 1983?

20 MR. HANDWERGER: Yes, they are original.

21 MR. KEYS: Thank you.

22 CHAIRPERSON GRIFFIS: Original to the
23 school?

24 MR. HANDWERGER: No, original to the first
25 renovation.

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1 CHAIRPERSON GRIFFIS: I was going to say
2 that would have been monumental for a public school to
3 be air conditioned and even cool. No wonder it's so
4 spectacular. Okay.

5 In all seriousness though, you are drawing
6 penthouses on the addition. Help us understand where
7 they are actually located.

8 MR. HANDWERGER: Well, as conceived now,
9 there would be a long enclosure, which is narrow, but
10 long.

11 CHAIRPERSON GRIFFIS: Right.

12 MR. HANDWERGER: And feed directly down
13 with duct work.

14 CHAIRPERSON GRIFFIS: How tall is that?
15 Do you have an elevator in this?

16 MR. HANDWERGER: Yes, this is the
17 elevator.

18 CHAIRPERSON GRIFFIS: Oh, my. Do you have
19 an overrun on that elevator?

20 MR. HANDWERGER: Well, I would expect it
21 to be hydraulic.

22 CHAIRPERSON GRIFFIS: Okay.

23 MR. HANDWERGER: And the machine would be
24 in the basement.

25 CHAIRPERSON GRIFFIS: Okay. But does the

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1 enclosure that you're proposing attach to that
2 elevator?

3 MR. HANDWERGER: The enclosure for the air
4 handlers?

5 CHAIRPERSON GRIFFIS: Yes, the single
6 enclosure.

7 MR. HANDWERGER: No.

8 CHAIRPERSON GRIFFIS: It doesn't?

9 MR. HANDWERGER: At this point, no.

10 CHAIRPERSON GRIFFIS: Fascinating. Okay.
11 So this would be an enclosure and it would run north
12 and south along the building. Is that my
13 understanding?

14 MR. HANDWERGER: Yes.

15 CHAIRPERSON GRIFFIS: Okay. And you're
16 not exactly sure where it's going to be located or how
17 high it is?

18 MR. HANDWERGER: Not exactly.

19 CHAIRPERSON GRIFFIS: What is your
20 estimation of how tall it might be?

21 MR. HANDWERGER: 6 feet.

22 CHAIRPERSON GRIFFIS: So it would be 6
23 feet back from the edge of the building?

24 MR. HANDWERGER: Yes.

25 CHAIRPERSON GRIFFIS: That's a good

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1 answer. Okay. Ms. Miller, follow-up?

2 VICE CHAIR MILLER: Yes, I was just
3 noticing. How close is the townhouse to the addition
4 that's next door to it? The red, is that a townhouse,
5 that red building?

6 MR. HANDWERGER: It abuts.

7 VICE CHAIR MILLER: It abuts it?

8 MR. HANDWERGER: Yes.

9 VICE CHAIR MILLER: And have those
10 neighbors weighed in on their feeling about the
11 expansion?

12 MR. HANDWERGER: Not to my knowledge.

13 VICE CHAIR MILLER: Have you talked with
14 them?

15 MR. KEYS: I think that Mr. King may have
16 had conversations with some of the owners.

17 MR. KING: Yes, I did have a conversation
18 with two of the young folks that bought the building
19 at the beginning, and I haven't had any contact with
20 them since.

21 VICE CHAIR MILLER: Since when? When was
22 that?

23 MR. KING: Oh, this was I guess maybe six
24 months or a year ago now.

25 CHAIRPERSON GRIFFIS: So you had

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1 conversations about this plan with them when they
2 purchased their property?

3 MR. KING: Well, when they were doing the
4 construction there. Yes, when they just bought it.

5 MR. KEYS: Mr. King, what building are we
6 talking about?

7 MR. KING: The building that we are in
8 now.

9 MR. KEYS: I'm sorry, which townhome of
10 the three?

11 MR. KING: The first one right next to the
12 fence.

13 MR. KEYS: Thank you.

14 MR. KING: The red one.

15 VICE CHAIR MILLER: Did you show them the
16 plans?

17 MR. KING: No, no, I did not.

18 VICE CHAIR MILLER: Okay. Thank you.

19 MR. KING: But the owner in the middle,
20 the owner of the property in the middle did see the
21 plans quite awhile ago.

22 CHAIRPERSON GRIFFIS: Let's clarify.

23 MR. KING: The policeman that owns the
24 middle piece. I don't know his name.

25 CHAIRPERSON GRIFFIS: What is your

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1 perspective of quite awhile ago?

2 MR. KING: Well, at one point, we had
3 considered trying to purchase some of that property
4 and the owner came to us to tell us he was interested
5 in selling it.

6 CHAIRPERSON GRIFFIS: Okay. 10 years ago,
7 50 years ago, last year?

8 MR. KING: Oh, no, no, this was maybe two
9 years ago or more.

10 CHAIRPERSON GRIFFIS: Okay. All right.
11 Anything else, follow-up? Any cross examination
12 questions pop in? Okay. Let's move on then to the
13 Office of Planning.

14 MS. THOMAS: Good afternoon, Mr. Chairman,
15 Members of the Board. I am Karen Thomas presenting
16 OP's report on Africare's application for variances
17 from the lot occupancy and rear yard requirements.
18 The applicant's proposal is to expand the existing
19 building area to construct an annex to connect with
20 their main building by a covered portico, and this
21 would allow the proposed structure to comply with the
22 requirement that only one principal structure occupy a
23 single lot of record.

24 We reviewed the application in terms of
25 the property zoning and the standards for variance

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1 relief, and I will briefly highlight some elements of
2 our report. With respect to the rear yard request, we
3 noted that the proposed annex would extend the
4 existing 14 foot rear yard by an additional 81 feet to
5 accommodate the applicant's design.

6 The applicant states that a 20 foot rear
7 yard would reduce the footprint of the annex and cause
8 realignment of the below grade connection of the two
9 buildings. We contend that the below grade alignment
10 could be satisfied while meeting the rear yard
11 requirement since the underground excavation within
12 property limits do not have to meet above grade
13 setback requirements.

14 We believe that a rectilinear design,
15 which may result in less courtyard space could satisfy
16 the proposed use and, therefore, OP believes that a
17 reduction of the footprint by 6 feet to accommodate
18 the space requirements is a function of design and not
19 due to any unique feature of the property.

20 With respect to lot occupancy, the
21 applicant claims that an increase in space is an
22 institutional necessity. A test cannot be met on the
23 basis that an applicant wants more space. OP believes
24 that the proposed design would create a structure that
25 is out of character with this residentially zoned

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1 District.

2 We do not believe that there was
3 sufficient justification for the lot occupancy to go
4 from 30.56 percent to 56 percent, which is a
5 difference of 26 percent or 17 percent above the 40
6 percent permitted for the R-4 Zone District. Since no
7 exceptional condition of the property has been
8 established, we do not find that a strict application
9 of the regulations will result in an exceptional
10 practical difficulty upon the owner of the property.

11 We are concerned about the proposed
12 intensity of use of the building. OP understands that
13 institutional imperatives may necessitate expansion
14 and observe, from submitted plans and true
15 conversations with the applicant, that space is
16 desired to host functions for dignitaries and similar
17 events. No information was provided in the
18 application for the projected number or type of events
19 per year or the number of visitors who typically are
20 expected to attend these events.

21 While current and projected number of
22 parking spaces is adequate, any large event may
23 increase demand for off-site parking in the immediate
24 neighborhood and we're concerned that since the Shaw
25 neighborhood is experiencing revitalization, it would

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1 require more consideration be given to the potential
2 increase in traffic and on-street parking concerns of
3 the community.

4 In addition, there has been an expansion
5 of its staff over the past 20 years from a total of 40
6 employees anticipated at the time of this opening in
7 1983. Currently, there are 58 employees and according
8 to the application, the proposed expansion may
9 accommodate up to 20 more for a projected 78
10 employees.

11 The applicant claims that a former school
12 building is relatively inefficient as offices since
13 there are large interior areas devoted to stairwells
14 and a central hall. However, the applicant has not
15 demonstrated whether or not the existing structure may
16 satisfy the ground floor and conference room
17 requirements of their proposed plans and whether or
18 not a smaller structure to the west of the building
19 may meet some of their office space requirements.

20 The proposed intensity of use would be
21 detrimental to the public good, will impair the
22 intent, purpose and integrity of the Zone Plan and be
23 especially contrary to the R-4 Zone and the standard
24 for variances. The intent of rear yard and lot
25 occupancy requirements is to control siting and

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1 massing.

2 The proposed annex is shown with a height
3 of 40 feet, which is permitted in the R-4 Zone.
4 However, extending this southern wall 6 feet into the
5 required rear yard has a somewhat cavernous effect on
6 the adjoining residential lot where the Zoning
7 Regulations anticipate 20 feet. The required 20 foot
8 rear yard is maintained by the three adjoining row
9 houses to the west.

10 We are aware of the nonprofit's
11 participation in the community and other important
12 services it provides and do recognize that the
13 existing structure, as renovated, is quite admirable
14 in the neighborhood. However, we are concerned about
15 the demands currently being placed on the R-4 Zone
16 District to include uses typically not assigned by
17 Zoning Regulations and the impact of the expansion on
18 the immediate neighborhoods.

19 The applicant has not provided sufficient
20 justification for the necessity to construct a
21 building in excess of the R-4 development standards.
22 OP believes that, in this instance, no situation
23 exists where the submitted design cannot be made to
24 accommodate the property in a manner consistent with
25 the Zoning Regulations and for these reasons, we

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1 recommend the Board deny the request for the variance
2 from the rear yard and lot occupancy requirements.
3 Thank you.

4 CHAIRPERSON GRIFFIS: Thank you very much.

5 Board questions? Ms. Miller?

6 VICE CHAIR MILLER: Yes. Could you
7 perhaps elaborate on how the proposed intensity of use
8 would be detrimental to the public good and will
9 impair the intent, purpose and integrity of the Zone
10 Plan? You state that on page 4 of your report.

11 MS. THOMAS: Well, we looked at what is
12 the intent of the R-4 Zone District. The R-4 Zone
13 District is designed to include those areas now
14 primarily developed with row dwellings and very little
15 vacant land shall be included within the R-4 District
16 since its primary purpose is for the stabilization of
17 one-family dwellings.

18 The size of this structure, and while we
19 could claim that the use may be less intense than
20 other permitted uses, the expansion on this site seems
21 an over-build for this site and we are concerned about
22 that in this District, in the R-4 Zone District in
23 general, and particularly with this site.

24 VICE CHAIR MILLER: But, I mean, are you
25 talking about the structure here or are you talking

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1 about the increase in staff?

2 MS. THOMAS: As well, all those go to the
3 intensity of use of the site, the increase in the
4 staff, the parking requirements, the projected parking
5 requirements, the number of events that we have no
6 idea about, as well as I just heard today that 54
7 diplomats come meet is it once per month? You know,
8 we don't have any information about the times of these
9 types of events.

10 VICE CHAIR MILLER: I guess my question
11 for you, building on that, is if you had more
12 information, then you might be able to come to a more
13 informed opinion. I mean, is it that you don't have
14 information about it and it's speculative and it's
15 just increasing that's a concern?

16 MS. THOMAS: We are concerned about the
17 increase in use of the site and, as well as we don't
18 have. We didn't have that information, as well, but
19 we are concerned that it is an increase, an intensive
20 use of the site, an increase in the use of the site.

21 VICE CHAIR MILLER: Well, do you have an
22 opinion with respect to the testimony we heard about
23 parking, that there was sufficient parking to meet
24 their needs?

25 MS. THOMAS: I would have to have that in

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1 writing.

2 VICE CHAIR MILLER: It seems to me that
3 with respect to the rear yard setback, that they are
4 making a tradeoff in open space between their rear
5 yard and the courtyard. Is that something that OP
6 considered and decided that the rear yard space was
7 more important than the courtyard space?

8 MS. THOMAS: Yes, we would like them to
9 respect the Zone Regulations for the rear yard. We
10 see no reason why they can't lose some of that
11 courtyard space to accommodate their space needs.

12 CHAIRPERSON GRIFFIS: Mr. Etherly?

13 BOARD MEMBER ETHERLY: Thank you very
14 much, Mr. Chair. Two fairly quick questions for
15 Office of Planning. I just wanted to clarify. With
16 respect to page 3 of the Office of Planning's report,
17 which was very detailed in terms of the rationale and
18 thinking behind its opposition to the application, I
19 wanted to be sure that I understood correctly.

20 Is the Office of Planning's belief that as
21 far as the below grade alignment issue, the applicant,
22 if compelled to comply with the rear yard setback
23 requirement, could still maintain a below grade
24 alignment, i.e., they could still build below grade
25 past that point?

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1 MS. THOMAS: That's correct, yes. We see
2 no reason why. This has been done before, that you
3 could dig below. You can still -- within your lot and
4 you can go and dig and excavate.

5 BOARD MEMBER ETHERLY: Okay.

6 MS. THOMAS: And have your parking area.

7 BOARD MEMBER ETHERLY: Okay.

8 MS. THOMAS: But you can still meet.
9 Their argument was that they would lose the
10 connection.

11 BOARD MEMBER ETHERLY: On-street parking
12 spaces.

13 MS. THOMAS: Or lose connection between
14 the buildings.

15 BOARD MEMBER ETHERLY: Okay.

16 MS. THOMAS: So we're saying that you
17 didn't need the rear yard to do that.

18 BOARD MEMBER ETHERLY: Okay. Okay.

19 CHAIRPERSON GRIFFIS: It would be
20 fascinating if we started to review below grade
21 tunnels. Think of all the security passages we would
22 be looking at. Okay.

23 BOARD MEMBER ETHERLY: My final question
24 for the Office of Planning is with respect to the
25 issue of the rear yard setback in the application

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1 submissions, there is a statement to the effect from
2 the applicant that when you look at the Warner Street
3 residences, because of the setback at the rear of the
4 subject property, you are not going to see the same
5 type of impact with regard to, that is not necessarily
6 explicitly part of the test, but with regard to
7 looking for my relevant reference, light and air
8 impacts on those properties that are on Warner Street,
9 and I know that we'll hear from Mr. Kreiswirth at the
10 appropriate time regarding some of the Warner Street
11 residences.

12 But did the Office of Planning take a look
13 at the potential impact of the annex on those
14 properties, those Warner Street properties?

15 MS. THOMAS: We were more concerned about
16 the abutting residences.

17 BOARD MEMBER ETHERLY: Okay. So that
18 would be the three townhouse units that we have
19 referenced?

20 MS. THOMAS: Yes, that's correct.

21 BOARD MEMBER ETHERLY: Okay. Okay. Thank
22 you.

23 CHAIRPERSON GRIFFIS: Anything else from
24 the Board?

25 BOARD MEMBER ETHERLY: Thank you, Mr.

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1 Chair.

2 CHAIRPERSON GRIFFIS: Very well. Does the
3 applicant have cross examination of the Office of
4 Planning?

5 MR. KEYS: Briefly, Mr. Chair.

6 CHAIRPERSON GRIFFIS: Yes.

7 MR. KEYS: Ms. Thomas, let me ask you a
8 question. Your conclusion is that it's an
9 inappropriate structure for the site?

10 MS. THOMAS: Our conclusion is basically
11 saying that it's an over-build of the site.

12 MR. KEYS: It's an over-build of the site?

13 MS. THOMAS: Yes.

14 MR. KEYS: Can I ask you then why the
15 Office of Planning assisted us in designing and
16 articulating the front of the building?

17 MS. THOMAS: We may have articulated the
18 front of the building, but we didn't expect that you
19 are going to lose the rear yard.

20 MR. KEYS: Okay.

21 MS. THOMAS: And affect the lot occupancy.

22 MR. KEYS: All right. Now, you have
23 opposed both variances. Is that correct?

24 MS. THOMAS: Yes.

25 MR. KEYS: What could the applicant build

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1 inside the 40 percent lot occupancy given this site?

2 MS. THOMAS: Well, I looked at what was
3 there before. If you look at -- actually, four
4 townhouses could fit on that site.

5 MR. KEYS: No, no, I'm asking a question.
6 What could we build in this site by way of an
7 addition that would be matter-of-right, because you
8 are opposing both variances.

9 MS. THOMAS: You should build a smaller
10 structure.

11 MR. KEYS: Do you know how small?

12 MS. THOMAS: I have no idea as to how
13 small you can build it.

14 MR. KEYS: Okay.

15 MS. THOMAS: But you could build a smaller
16 structure.

17 MR. KEYS: Do you have any evidence of any
18 complaint from the community regarding the use of the
19 existing site?

20 MS. THOMAS: No, we don't.

21 MR. KEYS: On what do you base the
22 conclusion that the intensity of use would be
23 detrimental to the community?

24 MS. THOMAS: From a planning standpoint,
25 we look at the Zone Regulations.

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1 MR. KEYS: But no direct evidence from the
2 community itself?

3 MS. THOMAS: We have no evidence from the
4 community. No one has called us to complain.

5 MR. KEYS: Did you make any examination of
6 the parking situation around the neighborhood during
7 the working day hours?

8 MS. THOMAS: Yes, we did. I walked the
9 site. I looked at the site.

10 MR. KEYS: Do you offer any information in
11 your report regarding the parking?

12 MS. THOMAS: No, I did not offer
13 information on that.

14 MR. KEYS: Okay. Now, you have said that
15 -- well, what is the height limit for a matter-of-
16 right structure in the R-4 Zone?

17 MS. THOMAS: 40 feet.

18 MR. KEYS: If this were in a different
19 ownership, couldn't the entire open space that now
20 exists be built to a 40 foot height limit?

21 MS. THOMAS: That's correct.

22 MR. KEYS: In other words, there could be
23 more massing on this site than we're proposing?

24 CHAIRPERSON GRIFFIS: Let's not talk too
25 much about hypotheticals, because it's going to matter

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1 about use and then your lot occupancy. I think the
2 Board gets your point.

3 MR. KEYS: Thank you.

4 CHAIRPERSON GRIFFIS: Anything further?

5 MR. KEYS: No further questions.

6 CHAIRPERSON GRIFFIS: You don't have
7 anything further on cross examination, do you? Very
8 well. Does the party in opposition have any? Okay.
9 Good. Thank you very much.

10 MR. KEYS: Oh, Mr. Chairman?

11 CHAIRPERSON GRIFFIS: Yes?

12 MR. KEYS: I would like to recall Mr.
13 Handwerger, because I think that there were a couple
14 of omissions.

15 CHAIRPERSON GRIFFIS: In conclusion and
16 rebuttals.

17 MR. KEYS: Okay.

18 CHAIRPERSON GRIFFIS: We still have got
19 some ways to go here. ANC, as I had mentioned, we did
20 not have anything on file. Is anyone here
21 representing ANC-2C? No? Okay. Then it does bring
22 us to the party in opposition case presentation, and
23 what I'm going to do, I want to take three minutes,
24 because actually we have been here since, well, early
25 this morning with a short break.

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1 So let's take five minutes. The Board is
2 going to break. We're going to come back to you, sir,
3 to present your case, and then what I ask as you
4 formulate all that stuff, you're going to have an
5 opening, a body and a conclusion. The applicant is
6 afforded a conclusion in rebuttal testimonies, and
7 then you can certainly cross examine, but you won't
8 get an additional time to that.

9 So we'll be very brief, but five minutes.

10 Those folks showing up for our 1:00 session, of
11 course, we're finishing up our morning and we will be
12 taking a lunch. Otherwise, you won't get much worth
13 out of us. I would anticipate not opening the
14 afternoon session until at least 1:45. We will be
15 back in five.

16 (Whereupon, at 12:53 p.m. a recess until
17 1:04 p.m.)

18 CHAIRPERSON GRIFFIS: Let's resume.
19 Ready?

20 MR. KREISWIRTH: Good afternoon, Chairman
21 Griffis and Members of the Board of Zoning Adjustment.

22 I appreciate the opportunity to testify at this
23 hearing. My name is Barry Kreiswirth. I live on 427
24 Warner Street, N.W. The row house I live in and own
25 is across the rear alley from the Africare property,

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1 which is the subject of this hearing.

2 As you are aware, Africare has applied to
3 the Board for two variances, one from the lot
4 occupancy limit and one from the rear yard setback
5 requirement. I'm here to testify today in opposition
6 to both variances. I do not believe that either
7 variance should be granted unless the Board places
8 appropriate conditions on those grants.

9 I will focus my testimony today on the
10 final condition for granting a variance, that the
11 variance may only be granted where it can be granted
12 "without substantial detriment to the public good and
13 without substantially impairing the intent, purpose
14 and integrity of the Zone Plan." Without the
15 conditions I propose, this final condition will not be
16 met and the variances should not be granted.

17 First, I would like to speak to the issue
18 of the rear yard setback. I am opposed to the grant
19 of this variance without a requirement that Africare
20 take significant steps to shield the noise coming from
21 its mechanical equipment and other activities.
22 Setbacks are meant to protect not merely the light and
23 air of nearby properties, as the applicant has
24 suggested, but also to protect nearby properties from
25 the noise from neighboring uses.

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1 Because of the loud drone of Africare's
2 current mechanical equipment, particularly it seems
3 the air handling unit, I am unable to fully enjoy my
4 backyard in the spring and summer months. This noise
5 problem will only increase with the proposed project.

6 Either Africare will install additional equipment to
7 cool and ventilate the building addition or the
8 current equipment will be upgraded or operate at a
9 higher level.

10 I guess I will get into the end. There
11 are some issues on the maps, putting parking there and
12 also it looks like a service entry, which also
13 increases the noise issue there.

14 CHAIRPERSON GRIFFIS: Off the rear? Off
15 the rear of the property? Is that what you're
16 speaking to?

17 MR. KREISWIRTH: Yes, yes, in the setback
18 area. It looks like they are putting four parking
19 spaces. I'm not sure how those are intended to be
20 accessed since there is a fence there, a chain link
21 fence with wood slats. So I guess they have to
22 somehow move the fence, but, again, that is going to
23 increase the noise issue, both the cars there and
24 removing the fence.

25 And also, in the drawing I'm looking at,

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1 let me see which one this is, the ground floor plan,
2 there seems to be some service entry from the alley.
3 I'm not really sure what that indicates. And on the
4 garage level plan they indicate the mechanical
5 equipment is going to be located at that rear point.

6 CHAIRPERSON GRIFFIS: Okay.

7 MR. KREISWIRTH: If the Board chooses to
8 grant the rear setback variance, the variance should
9 be conditioned on Africare's agreement to place
10 significant sound shielding around its mechanical
11 equipment and other operations.

12 CHAIRPERSON GRIFFIS: And that would be
13 the new proposed and the existing?

14 MR. KREISWIRTH: Yes. I mean, I guess it
15 depends on how they are using it. I don't know if
16 they are going to -- again, it looks like they are
17 adding a mechanical room that sort of is where the
18 current plant is, and I don't know how that would
19 work, but all the new uses and preferably the existing
20 uses, especially if they are going to increase those
21 uses because of the addition, but it seems with the
22 parking and the mechanical and maybe a service entry
23 in the rear.

24 CHAIRPERSON GRIFFIS: Okay.

25 MR. KREISWIRTH: The second variance

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1 Africare is seeking is relief from the limit on lot
2 occupancy. The lot occupancy requirements protect
3 both open space and the character of the Zoning
4 District. Africare seeks to occupy a greater area of
5 the lot than is allowed under the Zoning Regulations.

6 This variance would create a significant detriment to
7 the public good and the intent of the Zoning
8 Regulations due to the loss of currently well kept
9 open space.

10 In order to mitigate this detriment, the
11 variance, if issued, should be conditioned under a
12 requirement that Africare better maintain the
13 landscape of the vacant parcel to the east of the
14 current building. They are choosing to build on the
15 property to the west of the current building. They
16 also own property across the alley that is to the east
17 of their current building. It has chosen to leave
18 this property vacant with no landscape and surrounded
19 by a chain link fence.

20 Again, Africare seeks to eliminate a large
21 amount of the well kept open space to the west of the
22 current building, which is a portion that's the same
23 lot as the current building and that is space, which
24 is required to be open under the Zoning Regulations.

25 An appropriate condition to protect the

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1 damage to the public good and the intent of the Zoning
2 Regulations that a variance would create would be for
3 Africare to be required to landscape the vacant parcel
4 to the east of the current building, trees, plants,
5 other hardscaping and hardscaping and to replace the
6 chain link fence.

7 In conclusion, I request that the Board
8 grant the variances Africare has requested only if the
9 conditions I have set forth above are incorporated
10 into the Board's order. It is only with the
11 conditions above that these variances can be granted
12 without substantial detriment to the public good and
13 without substantially impairing the intent, purpose
14 and integrity of the Zone Plan. Thank you for your
15 time and your attention to my testimony.

16 CHAIRPERSON GRIFFIS: Thank you very much.

17 Cross?

18 MR. KEYS: Mr. Kreiswirth, one question.
19 When did you buy the property at 427 Warner Street?

20 MR. KREISWIRTH: August.

21 CHAIRPERSON GRIFFIS: Wait a second. Why
22 is that prevalent?

23 MR. KEYS: Why is that?

24 CHAIRPERSON GRIFFIS: Why is that --

25 MR. KEYS: Relevant?

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1 CHAIRPERSON GRIFFIS: Relevant, prevalent,
2 of interest to us?

3 MR. KEYS: Well, I think it's a question
4 of whether the condition he complains of existed.

5 CHAIRPERSON GRIFFIS: Is something he
6 bought into?

7 MR. KEYS: Exactly.

8 CHAIRPERSON GRIFFIS: Oh, man. When did
9 you buy the property?

10 MR. KREISWIRTH: I bought the property in
11 August 2002 and to direct my answer to the underlying
12 question is the increased intensity of uses and the
13 new noise creating uses are what my testimony is
14 directed at. I also did indicate that I would prefer
15 the current noise creating uses to be shielded and
16 think it should be required if those uses are changed
17 because of this new project.

18 CHAIRPERSON GRIFFIS: Okay. Anything
19 else? Further questions, Mr. Keys?

20 MR. KEYS: No, Mr. Chair.

21 CHAIRPERSON GRIFFIS: Okay. Questions
22 from the Board? Is there nothing? Thank you very
23 much. Let me give you one, if you ever happen to have
24 to go through this again and are a party in the case,
25 all the pieces that you brought up were perfect cross

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1 examination questions. And what I'm going to do now
2 is recall the architect to get the answers to that, so
3 if you want to stand by very briefly.

4 But can we have the architect up and just
5 explain a little bit about what the treatment of the
6 rear yard and the alley is going to be attendant to
7 the four parking spaces? Also, there are great
8 changes that are indicated by stairs on that portion.

9 Where are they going and what are they doing? Is
10 there service off of that area and the existing
11 mechanical units that were testified to being on
12 grade, are they going to be shielded at all? I will
13 repeat that if you need. You might want to pull up
14 your ground floor plan first.

15 While they are getting ready for that, Mr.
16 Kreiswirth, are you familiar with the condition of a
17 penthouse at 40 feet on top of a building in terms of
18 the noise that it would create or any sort of adverse
19 impact?

20 MR. KREISWIRTH: Well, no, this is the
21 first time that I have become aware of how they
22 intended to treat the new property. I mean, it wasn't
23 in the plans.

24 CHAIRPERSON GRIFFIS: I see.

25 MR. KREISWIRTH: So I'm not sure.

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1 CHAIRPERSON GRIFFIS: Does it change your
2 opinion noting that they will be on top of the
3 building and surrounding?

4 MR. KREISWIRTH: Oh, no, not in that
5 sense. I mean, not the fact that they are on top of
6 the building. If they are surrounded and if that were
7 a requirement, that would make sense.

8 CHAIRPERSON GRIFFIS: But at 40 feet above
9 the roof they are going to be required to be put in a
10 penthouse. Now, that penthouse could have louvers,
11 but it will have one wall that will enclose the entire
12 area. Oftentimes, penthouses are required for several
13 reasons. One, a visual screening, but I think the --
14 well, I need lunch if I'm going to speak further.

15 However, one of the impacts of doing an
16 enclosure is that it does move the sound and air and
17 the ventilating that it needs up and not out. I mean,
18 I think there would be a different impact on a
19 mechanical unit 40 feet above grade as to one that is
20 just directly on grade. Is that your understanding?

21 MR. KREISWIRTH: Well, given the proximity
22 of the building to the rear yards --

23 CHAIRPERSON GRIFFIS: Yes.

24 MR. KREISWIRTH: I mean, I'm concerned
25 that even above the building, that that noise is going

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1 to just add on to all the current activity. I mean, I
2 don't really have any direct experience with how much
3 noise that would be.

4 CHAIRPERSON GRIFFIS: Okay.

5 MR. KREISWIRTH: You can see the ones that
6 are.

7 CHAIRPERSON GRIFFIS: Okay. I just want
8 to make sure we both have the same understanding.
9 Okay. Let's go to the garage level plan we're looking
10 at.

11 MR. HANDWERGER: Yes, that's this plan.

12 UNIDENTIFIED SPEAKER: Is this working?

13 MR. HANDWERGER: Yes.

14 CHAIRPERSON GRIFFIS: So the garage level
15 as you pull in is on grade, essentially?

16 MR. HANDWERGER: Here?

17 CHAIRPERSON GRIFFIS: Yes.

18 MR. HANDWERGER: It's ramped down. You
19 can see it from this section here.

20 CHAIRPERSON GRIFFIS: Okay.

21 MR. HANDWERGER: The dotted line
22 represents the --

23 CHAIRPERSON GRIFFIS: Okay.

24 MR. HANDWERGER: Because the building, as
25 I said before, has been lifted.

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1 CHAIRPERSON GRIFFIS: Exactly.

2 MR. HANDWERGER: Above the street grade.

3 CHAIRPERSON GRIFFIS: Okay.

4 MR. HANDWERGER: So that you ramp down a
5 level.

6 CHAIRPERSON GRIFFIS: So the stairs on
7 that level on that garage level plan are actually
8 accessing the garage level, so they are going down a
9 half level?

10 MR. HANDWERGER: These? These stairs?

11 MR. KEYS: Oh, here, Joe.

12 CHAIRPERSON GRIFFIS: I guess so. You
13 tell me.

14 MR. HANDWERGER: These stairs?

15 CHAIRPERSON GRIFFIS: On the south side of
16 the building.

17 MR. HANDWERGER: These stairs go down as
18 you can see in the section, go down to this garage
19 level.

20 CHAIRPERSON GRIFFIS: What's the platform?
21 Stay with me on those stairs. What's the platform to
22 the left?

23 MR. HANDWERGER: It's an indication of
24 perhaps a dumpster. It's an enclosure for trash
25 perhaps.

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1 CHAIRPERSON GRIFFIS: You're going to put
2 the enclosure right on the property line?

3 MR. HANDWERGER: It's only enclosed on the
4 side.

5 CHAIRPERSON GRIFFIS: Just on the side,
6 it's open to the alley?

7 MR. HANDWERGER: This side is open to the
8 alley.

9 CHAIRPERSON GRIFFIS: Okay. And there has
10 now been testimony that there is an existing fence on
11 the property line at the alley. Is that correct?

12 MR. HANDWERGER: At present there is a
13 fence at that point.

14 CHAIRPERSON GRIFFIS: And what's the
15 treatment that is proposed?

16 MR. HANDWERGER: There will be no fence.

17 CHAIRPERSON GRIFFIS: And so that is
18 parallel parking off the alley?

19 MR. HANDWERGER: Yes.

20 CHAIRPERSON GRIFFIS: And going to the
21 left then, which isn't showing on your garage level
22 plan, there are two other stairs indicated on the
23 ground floor?

24 MR. HANDWERGER: Here, yes.

25 CHAIRPERSON GRIFFIS: Those are going

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1 where, up or down?

2 MR. HANDWERGER: They go down into the
3 basement level and down to the alley.

4 CHAIRPERSON GRIFFIS: Is there any
5 enclosure on the alley at all proposed?

6 MR. HANDWERGER: For the mechanical units?

7 CHAIRPERSON GRIFFIS: Well, no, for
8 anything, fencing? We'll start big.

9 MR. HANDWERGER: No.

10 CHAIRPERSON GRIFFIS: Okay. Now, it's not
11 graphically shown, but where are the existing
12 mechanical units?

13 MR. HANDWERGER: Here, here, there and
14 there is actually one here.

15 CHAIRPERSON GRIFFIS: Are the two first
16 sets you pointed out going to have to change with the
17 retreatment of the rear yard and the stairs or are
18 those existing stairs going to service the existing
19 building?

20 MR. HANDWERGER: Those are existing.

21 CHAIRPERSON GRIFFIS: So somehow they can
22 figure around in that area around the stairs and they
23 are not being --

24 MR. HANDWERGER: They exist now. There is
25 actually no proposal for any alteration on this side.

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1 CHAIRPERSON GRIFFIS: I see.

2 MR. KREISWIRTH: Can I ask something? I
3 mean, I don't think there is any access from the alley
4 to the building at that point. If you are saying
5 those stairs are in the back and there are openings
6 now, I think the entire length is raised a little bit
7 and then shielded by a fence. And if you are
8 proposing that now access goes to the alley, I don't
9 think that exists now.

10 MR. HANDWERGER: There is no access to the
11 alley now.

12 MR. KREISWIRTH: I thought you were
13 representing --

14 MR. HANDWERGER: From here, we're talking
15 about the existing building?

16 MR. KREISWIRTH: Yes, but in the new plan
17 I thought you were representing that those two exists
18 would now go to the alley and also afford access to
19 the basement.

20 MR. HANDWERGER: No, there is no
21 alteration to what's happening here.

22 MR. KREISWIRTH: Okay.

23 MR. HANDWERGER: Now, I would also point
24 out that there has been a statement that this parking
25 level could still be setback only 14 feet, since it

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1 would be below the ground level. But, in fact, it
2 wouldn't.

3 CHAIRPERSON GRIFFIS: How far to the
4 ground does it come?

5 MR. HANDWERGER: How far from the?

6 CHAIRPERSON GRIFFIS: Above the grade?

7 MR. HANDWERGER: About 4 feet.

8 CHAIRPERSON GRIFFIS: Less than 4 feet?

9 MR. HANDWERGER: No, not less.

10 CHAIRPERSON GRIFFIS: So it's about, but
11 more than 4 feet?

12 MR. HANDWERGER: Yes, although it would be
13 in the footprint.

14 CHAIRPERSON GRIFFIS: So you would be able
15 to travel. Okay. Understood. Further clarification,
16 questions?

17 MR. HANDWERGER: I have another comment
18 about the cavernous comment, and that is that to
19 remind that this is north and that is south, and the
20 sun makes that movement. So there is no casting of
21 shadows on this side. Most of the shadow --
22 predominately, the shadow is cast in our own
23 courtyard. Now, at some time of the day, there is
24 some shadow into this yard, but at 40 feet, I think, a
25 6 foot difference at 40 feet level is not a

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1 significant addition to the cavernous aspect of that
2 yard.

3 CHAIRPERSON GRIFFIS: Your statement is
4 that at some point in the day it would cast a shadow.

5 At a majority of the day, that building would cast a
6 shadow into that rear yard. Is that correct?

7 MR. HANDWERGER: No, no, it would not. In
8 the early morning when the sun is here, it could cast
9 a shadow.

10 CHAIRPERSON GRIFFIS: Right.

11 MR. HANDWERGER: It would cast a shadow
12 there, but for the most of the day, at noon, there is
13 no shadow here whatever.

14 CHAIRPERSON GRIFFIS: You're saying that
15 that building wouldn't cast a shadow at noon into the
16 adjacent yard?

17 MR. HANDWERGER: No, this is south.

18 CHAIRPERSON GRIFFIS: A 40 foot high next
19 to that adjacent wouldn't cast a shadow?

20 MR. HANDWERGER: The sun is coming from
21 this direction. How would it cast a shadow?

22 CHAIRPERSON GRIFFIS: Okay. All right.

23 MR. KEYS: Mr. Handwerger, I have one more
24 question for you. The Office of Planning has
25 suggested that we build matter-of-right. Have you

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1 calculated what we could build and stay within the 40
2 percent lot occupancy?

3 MR. HANDWERGER: You could build 1,546
4 square feet. This shaded service area, we're calling
5 service area, is about 1,200 square feet. So we could
6 build perhaps that, that much. So this would all be
7 impossible. And, in fact, you would not build a
8 building three floors in that shape and size. You
9 couldn't get the stairs and the mechanical and the
10 toilets. It would be a mechanical high-rise.

11 MR. KEYS: Thank you, Mr. Handwerger.

12 CHAIRPERSON GRIFFIS: Okay. Any other
13 questions from the Board, clarifications?

14 VICE CHAIR MILLER: Just following up on
15 that point, I saw what you could build matter-of-right
16 and OP says you are 26 percent over. Could you build
17 something smaller to meet your needs or is that
18 impossible as well?

19 MR. KEYS: I think what Mr. Handwerger has
20 represented is that this is what meets the program
21 requirements. And as it is, it is a very inefficient
22 building, compared to the building you would like to
23 be able to build.

24 CHAIRPERSON GRIFFIS: Architects would
25 always like to build certain things. Okay. Anything

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1 further from the Board? Questions, clarifications?
2 Mr. Keys, it's over to you for brief rebuttal and
3 closing remarks, please.

4 MR. KEYS: Thank you, Mr. Chair. What I'm
5 going to emphasize is what I think has been obscured
6 somewhat by some of the comments and the OP report and
7 that is the basis for the variance relief, for the FAR
8 variance. The reality on this site is that you can
9 build nothing that is useable, that is functional
10 within the lot occupancy limitations. This Board 20
11 years ago, 21 years ago made an affirmative decision
12 that it wanted to locate this institution in the Shaw
13 community, and I don't think that the intent, at that
14 time, was to hamstring that organization and prevent
15 any possibility of future growth.

16 To strictly interpret the regulations and
17 not to recognize that the peculiar characteristics of
18 the Morse School, its age, its functional adaptation
19 to an office use means that it has limited possibility
20 of being enlarged upon, improved upon. What the
21 applicant has done is to try to use the balance of the
22 site in an effective and rational way to get around
23 that one major architectural limitation of the site.

24 Now, the rear yard variance relates to
25 this in the following way. Our desire is to retain

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1 the Morse School as a significant community landmark
2 and Mr. Handwerger's judgment was that that's best
3 maintained by getting the most width in that courtyard
4 as possible. The narrower that courtyard becomes, the
5 more the existing building, which I think if you look
6 at the pictures, it's a magnificent structure, it's a
7 landmark for the community, we want to respect that,
8 that way he has tried to utilize the site in a way
9 that keeps the R Street facade narrow, pushes the
10 mechanical and functional requirements, which can be
11 linearly arranged to the rear of the site.

12 There is a certain framing effect created
13 by holding that courtyard and holding that rear line
14 and that is the architectural solution that brings
15 together the constraints of this site. It is a
16 compromise. There are effects, but I think the
17 effects on other properties are truly de minimis when
18 we look at a 6 foot variation in the rear yard. The
19 project offers a significant increase in the parking
20 of the site. I think it represents the maximum build
21 that is possible. If Africare grows further, it will
22 have to find somewhere else to go.

23 But I think, as Dr. Coles testified, that
24 this is a renovation which would allow them to expand,
25 to operate in a way that is efficient that is

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1 effective for them for the next 10 years. If there is
2 a concern about the existing sound levels, because of
3 existing mechanicals, I mean, I would recommend that
4 the party opposing this application check with the
5 environmental people and they can check noise levels.

6 If there is a violation of the noise limits
7 associated with Africare's compressors, they will be
8 required to build containment structures to baffle
9 that noise, if those exceed existing noise limits.

10 I think that will conclude my statement.

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

13 MR. KEYS: Oh, I would also ask you to
14 recall there is a C-2-A area directly across the
15 street from this lot, and I think that that changes
16 how you view the function of this lot, because of the
17 potential for uses that could occur directly across
18 the street. Like it or not, the south side of R
19 Street is a transitional buffer between the
20 residential community and a commercial area.

21 CHAIRPERSON GRIFFIS: Interesting point
22 that may have prevalence for our afternoon. A
23 commercial zone abutting an R-4, fascinating. Now,
24 there was quick testimony. I have a question. There
25 was a statement about an adjacent across the alley

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1 property that is similarly owned. Is that correct?

2 MR. KEYS: That's correct.

3 CHAIRPERSON GRIFFIS: Okay. Looking at
4 the diagram that is on the board now, it's to my left?

5 MR. KEYS: Looking at the diagram, you'll
6 see to the left of the existing Morse School an alley.

7 CHAIRPERSON GRIFFIS: Right.

8 MR. KEYS: Across that alley there are
9 three irregularly shaped parcels along R Street that
10 go to New Jersey Avenue.

11 CHAIRPERSON GRIFFIS: And there is nothing
12 on those?

13 MR. KEYS: There is nothing on those.
14 Africare owns those three parcels and you can see
15 their configuration.

16 CHAIRPERSON GRIFFIS: Yes, that doesn't
17 matter. I wanted just to make note of that and
18 appreciate that coming into the evidence in part of
19 the testimony. Of course, we regulate only that which
20 is bounded by a property line, which is in the
21 application, so it actually has no bearing, and we
22 actually have no jurisdiction to the condition use of
23 anything across the alley, even though it is similarly
24 owned. But it is an interesting aspect to understand
25 in holistically looking at the application the use or

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1 the treatment of the adjacent properties.

2 Also, what else was I going to ask, well,
3 I don't know. Okay. Anything further? Oh, yes, Ms.
4 Miller?

5 VICE CHAIR MILLER: Mr. Keys, you just
6 made a statement that you anticipated that this
7 expansion would meet the needs of Africare for the
8 next 10 years, and my question is do you anticipate
9 that they will outgrow the building in 10 years as
10 expanded and move?

11 MR. KEYS: I can't answer that. I think
12 what I indicated was Dr. Coles' testimony was that the
13 growth to fill that 20 employee increase that he saw
14 could take place over the next five to 10 years. Now,
15 whether Africare grows beyond that or whether this
16 addition creates the core that they can move on to the
17 next century with, I don't know, and I don't think Dr.
18 Coles does, but I would be happy to call him back if
19 you would like to ask that question of him.

20 VICE CHAIR MILLER: I just wanted
21 clarification. Thank you.

22 CHAIRPERSON GRIFFIS: Last thing, Mr.
23 Keys, don't you think the first step if an adjacent
24 neighbor has difficulty with the sound is to actually
25 communicate with the owner and user, rather than going

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1 to some sort of environmental sound review?

2 MR. KEYS: I would hope that would be the
3 case, but, practically speaking, if there is a remedy
4 to be obtained --

5 CHAIRPERSON GRIFFIS: But do I take from
6 your statement that you are representing the applicant
7 won't change anything if it isn't in violation of some
8 ordinance or code in the District?

9 MR. KEYS: I'm not representing that at
10 all.

11 CHAIRPERSON GRIFFIS: Okay. Good. In
12 which case, if there is nothing further from the
13 Board, anything else? Well, let's set this for a
14 decision making. What I would like to have put into
15 the file for consideration, first of all, Mr.
16 Kreiswirth, if you could put your statement in writing
17 into the record? Has that already come in?

18 MR. KREISWIRTH: I did give copies to your
19 staff.

20 CHAIRPERSON GRIFFIS: Excellent. And then
21 we also have the applicant, do they have a copy? So
22 that has all been done. Very well. I would also like
23 to have submitted a roof plan and mechanical layout.
24 That would also illustrate what type of enclosure that
25 the penthouse enclosing walls would be made of. And

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1 I'm going to leave the record open to take in any sort
2 of proposed screening that might be available for the
3 existing mechanical units as part of the overall
4 construction process and possibly below grade issues,
5 whether it be impacted or not.

6 And, frankly, just to address the existing
7 conditions if, in fact, it became, and I don't know,
8 it's conceivably a possibility as moving along --
9 well, let me tell you my assumption. My assumption is
10 not having a roof mechanical plan laid out, you
11 probably haven't gone fully through the design of the
12 mechanical system. Therefore, there may still be
13 opportunity to look at doing one efficient system
14 through the building or a location. However, that
15 there may be a possibility that some of those existing
16 units might move.

17 I'll leave the record open if there is any
18 sort of information regarding that. And that's all I
19 have attendant to further submissions, unless, Ms.
20 Bailey, you are aware of any others that were
21 mentioned?

22 MS. BAILEY: No, Mr. Chairman.

23 CHAIRPERSON GRIFFIS: Very well.

24 BOARD MEMBER ETHERLY: Mr. Chair?

25 CHAIRPERSON GRIFFIS: Mr. Etherly?

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1 BOARD MEMBER ETHERLY: If I might, I won't
2 specifically request this, but to the extent that Mr.
3 Kreiswirth might be able to provide any type of
4 photographic, I don't want to say evidence but,
5 illustrations of what that perspective looks like from
6 the rear property looking towards the current building
7 and the parcel where the annex would be located, that
8 would be helpful. You don't have to do it, but to the
9 extent you might be able to provide some additional
10 photographic illustrations, that would be helpful.

11 MR. KREISWIRTH: Okay. I'll definitely
12 try to provide that.

13 BOARD MEMBER ETHERLY: Terrific. That
14 would be very helpful.

15 CHAIRPERSON GRIFFIS: And do you have the
16 submissions from the applicant, the prehearing
17 statement?

18 MR. KREISWIRTH: No. I have --

19 CHAIRPERSON GRIFFIS: Okay. Before we
20 leave the record, we will go back out to the Office of
21 Zoning, it's a public record, you should look through
22 it and make any copies of information that you might
23 need, because here is what we're going to finally do.
24 Last question and then we'll go to final submissions.
25 Mr. Keys, you cited Droud in your submission.

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1 MR. KEYS: Yes.

2 CHAIRPERSON GRIFFIS: Is that correct?

3 MR. KEYS: That's correct.

4 CHAIRPERSON GRIFFIS: Droud also, I don't
5 know what the legal term is and being so hungry I
6 couldn't come up with it, at any rate, but it also
7 cites Monaco. Is that your understanding?

8 MR. KEYS: I couldn't tell you that off
9 the top of my head.

10 CHAIRPERSON GRIFFIS: Do you know the case
11 Monaco, which I speak? Yes or no?

12 MR. KEYS: I have used Monaco before.

13 CHAIRPERSON GRIFFIS: Okay.

14 MR. KEYS: But I do not recall its
15 holding.

16 CHAIRPERSON GRIFFIS: Very well. I think
17 the Board is going to find that Monaco has some
18 relevancy to this. I'm not sure we need additional
19 submission of that, but I'll put it on the record.
20 There, Ms. Bailey, do you mind running the schedule?

21 MS. BAILEY: What is the date for the
22 decision, Mr. Chairman?

23 CHAIRPERSON GRIFFIS: The next meeting.

24 MS. BAILEY: That's May 4th?

25 CHAIRPERSON GRIFFIS: Yes.

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1 MS. BAILEY: Well, the next meeting is --

2 CHAIRPERSON GRIFFIS: I'm sorry, the next
3 available meeting.

4 MS. BAILEY: Okay. Right. Let's see,
5 April 20th for the submissions and the gentleman in
6 opposition would have until the 27th to respond, if he
7 needs to. Mr. Keys, does that sound agreeable, sir?
8 So the 20th of April and submissions the -- the
9 responses, excuse me, on the 27th, and May 4th is the
10 decision.

11 MR. KEYS: I'm sorry, Ms. Bailey, I was
12 nodding for myself, and the reality is the Chairman
13 has asked for some architectural information, and I
14 need to ask Mr. Handwerger if that's a reasonable
15 schedule.

16 CHAIRPERSON GRIFFIS: Okay. Let's do
17 that, because I'm going to explain to the party in
18 opposition all the other things that are going to come
19 in. I'm leaving the record open also for the
20 applicant. You get his schedule, Mr. Keys, because
21 you know this. We're leaving the record open for
22 findings of fact, conclusions of law, that means it is
23 essentially how you package this how thing. It could
24 conceivably be used as an order if it was adopted.
25 You're not required to do that, but it is certainly

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1 your opportunity to do that.

2 I think it would be more prevalent --
3 well, there it is. Timing, the 20th. We're okay.
4 Excellent. Ms. Bailey, are we all clear?

5 MS. BAILEY: Yes, sir.

6 CHAIRPERSON GRIFFIS: Okay. Everyone
7 understand dates?

8 VICE CHAIR MILLER: Mr. Chairman?

9 CHAIRPERSON GRIFFIS: Yes?

10 VICE CHAIR MILLER: I have just one more.

11 CHAIRPERSON GRIFFIS: Are you submitting?

12 VICE CHAIR MILLER: No, I'm wondering if
13 the record is open for an ANC report if it might come
14 in? We don't have that in our record.

15 CHAIRPERSON GRIFFIS: Okay. I don't see
16 any difficulty with that. Okay. Obviously, any
17 question of any participants that you have in terms of
18 procedure or dates, I can answer immediately now if
19 you have them. If not, you can certainly call the
20 Office of Zoning and they will be able to assist you
21 in quickly answering procedural or schedule questions.

22 You will be served and before you leave, you should
23 let the applicant know how you want to be served and
24 you should get their information on how they are to be
25 served.

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1 Anything you put into the record needs to
2 go to them and to us and vice versa. So you'll see
3 everything that is submitted and then, as Ms. Bailey
4 has laid out, you have time to address those in your
5 submissions. Very well. All set. Thank you all very
6 much. Sorry it was such a long and painful morning.
7 I don't know if it was painful. If there is nothing
8 further for our morning session, Ms. Bailey, anything
9 further?

10 MS. BAILEY: No, Mr. Chairman.

11 CHAIRPERSON GRIFFIS: Very well. We're
12 going to adjourn the Morning Session of the 30th of
13 March. For the Afternoon Session, we're just going to
14 grab a quick bite. We do actually have a working
15 lunch. We're going to try and expedite it. I am
16 anticipating trying to get out by 2:05 and we will
17 proceed with the afternoon schedule.

18 (Whereupon, the Morning Session Public
19 Hearing was adjourned at 1:35 p.m.)
20
21
22
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24

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

2:25 p.m.

CHAIRPERSON GRIFFIS: Good afternoon, ladies and gentlemen. This is the 30th of March 2004 Board of Zoning Adjustment of the District of Columbia. My name is Geoff Griffis, I am Chairperson.

Joining me today is the Vice Chair, Ms. Miller, and our esteemed Member, Mr. Etherly. Representing on this case from the National Capital Planning Commission is Mr. Zaidain. He is unable to be with us this afternoon, but will be reading the entire transcript and record in order to stay current on this case.

Copies of today's hearing agenda are available to you, if you need it. Well, then I would question whether you are here on the right day. That, of course, is a little bit of a joke, because we have one case this afternoon. Am I correct? Again, as this is a continuation, there are obviously requirements that I need to enumerate in my opening statement, and I will go fairly quickly so we can make up some time. But all proceedings before the Board of Zoning Adjustment are recorded. They are recorded in two fashions.

One is the recorder sitting to my right.

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1 That person will be creating the transcript.
2 Secondly, we are being broadcast live on the Office of
3 Zoning's website. Attendant to that, first of all,
4 when coming forward if you have not addressed the
5 Board prior, you will need to fill out two witness
6 cards. Witness cards are available where you entered
7 into and also on the table where you will give
8 testimony in front of us. Two witness cards go to the
9 recorder prior to coming forward to speak to the
10 Board.

11 When speaking to the Board initially
12 today, I would ask that you provide your name and your
13 address for the record, so that we can, in fact, give
14 you credit for specifically what you have said. Also,
15 I would ask that people turn off cell phones and
16 beepers, at this time, so we don't have any further
17 disruption. Anything, of course, that will be needed
18 to be in the record and will be deliberated by the
19 Board must be either submitted in writing or should be
20 said in the record. That means the microphone should
21 be on and the Board should be addressed appropriately.

22 The order of procedure, I'm going to skip
23 through, as it is specific to the case in which we
24 will call, and I will go through that order. Also, of
25 course, pursuant to our Regulation 3117, we are able

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1 to limit times of presentations. I will run through
2 as there seems to be some concern about how much time
3 is afforded for the presentation of cases.

4 Cross examination of witnesses, of course,
5 is permitted by the applicant and parties and
6 participants in a case. The ANC within which the
7 property is located is automatically a party and
8 participant in the case and therefore is afforded
9 cross examination privileges. Nothing prohibits this
10 Board, of course, from giving direction, limiting
11 cross examination, either in time, in scope or in
12 questions, and I will be fairly direct if I believe
13 that the questions are running off or are not directly
14 on point for the appeal that we will be hearing this
15 afternoon.

16 The record will be closed at the
17 conclusion of the hearing of each case, and this
18 specifically, except for any material that is
19 enumerated by the Board and is specifically outlined.

20 We will be very specific on what is to be submitted
21 and when it is to be submitted into the Office of
22 Zoning. After the conclusion of all the hearings and
23 that information is received, it should be known that
24 the record would then be closed and no other
25 information would be accepted into it.

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1 The Sunshine Act requires that this Board
2 hold its proceedings in the open and before the
3 public. This Board may, however, consistent with its
4 Rules of Procedure and the Sunshine Act, enter into
5 Executive Session. Executive Session is used by this
6 Board for the purposes of reviewing records and
7 deliberating on a case.

8 The decision of this Board in contested
9 cases must be based exclusively on the record, which
10 is why it is so important to establish the record
11 anything that you want us to review, and that is
12 relevant to the case, should be either stated today or
13 submitted in writing. We do ask that people present
14 today not engage Board Members in conversation, so
15 that we do not give the appearance of receiving
16 information outside of the record that is now being
17 created.

18 My favorite paragraph for the openings of
19 the Afternoon Session is that we will conclude our
20 Afternoon Session at 6:00, but we're going to need to
21 assess that depending on how far we go. I am hoping
22 that we get through a majority if not all of the case
23 today. I will assess the time and obviously we will
24 take a breaking point if needed, but let's get into
25 this and then I can address that.

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1 At this time, I think, that the Board is
2 ready to hear any preliminary matters. Preliminary
3 matters are those which relate to whether a case will
4 or should be heard today or any particular specifics
5 in the case. I believe if you have a preliminary
6 matter, I'm going to ask that you come forward to the
7 table and have a seat. I'm going to call the case,
8 because it's my understanding preliminary matters are
9 attendant to this case, specific this afternoon, so we
10 might as well get into it, unless the staff is aware
11 of any other preliminary matters that we need to clear
12 up.

13 If there anyone here that has not been
14 sworn in before, I would ask that you -- if you're
15 thinking about being a participant in this case being
16 called as a witness, if you would, please, stand at
17 this time and give your attention to Ms. Bailey on my
18 far right, and I would say a very good afternoon to
19 Ms. Bailey and also Mr. Moy who is with us today, and
20 Ms. Glazer is present as Corporation Counsel.

21 MS. BAILEY: Anyone else to be sworn in?
22 Anyone else testifying today?

23 (Whereupon, the witness was sworn.)

24 MS. BAILEY: This is an appeal. The
25 number is 17092 of Stephanie Mencimer and others,

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1 pursuant to 11 DCMR 3100 and 3101, from the
2 administrative decision of Denzil Noble, acting Zoning
3 Administrator, Department of Consumer and Regulatory
4 Affairs, from the issuance of Certificate of Occupancy
5 No. CO57903, dated July 23, 2003, to WagTime LLC, a
6 24-hour dog boarding and grooming with accessory
7 retail sales of pet supplies. Appellant alleges that
8 the aforementioned use is not permitted in the Arts/C-
9 3-A District. The property is located at 1412 Q
10 Street, N.W., Square 209, Lot 878.

11 BOARD MEMBER ETHERLY: Mr. Chair, I'll
12 also note for the record, of course, that I was
13 scheduled with an absence for the day that we first
14 heard this case. I have read the record with dogged
15 determination and would be prepared to move forward
16 and participate in the case today.

17 CHAIRPERSON GRIFFIS: Thank you very much,
18 Mr. Etherly.

19 BOARD MEMBER ETHERLY: I couldn't resist,
20 Mr. Chair.

21 CHAIRPERSON GRIFFIS: Okay. We are
22 probably not going to be -- I want to get through
23 these fairly quickly, but you're going to have to bear
24 with us as a lot of the motions that have come in have
25 actually been handed to us today and may well have

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1 come in, in fact, I know of one, if not more that came
2 in, today. So that being said, let's take, first of
3 all, we have an Exhibit 74, if my notes are correct.
4 No, that's not going to be correct. It can't be.

5 We have a motion to amend the application,
6 which would take in the second C of O. We have a
7 motion to dismiss and we have -- how do we want to
8 enumerate this? I think I'm going to take it up as an
9 issue to briefly be addressed, and that is the filing,
10 Exhibit 69, the Clean Hands Act. So if we could put
11 these in some semblance of order. After dispensing
12 through this, of course, we will go to the Zoning
13 Administrator's case.

14 MS. FERSTER: Mr. Chairman?

15 CHAIRPERSON GRIFFIS: Yes?

16 MS. FERSTER: Andrea Ferster for
17 intervenor, Mid-City. We filed a motion to strike as
18 well.

19 CHAIRPERSON GRIFFIS: Exhibit 73, motion
20 to strike. Gotcha. Clean Hands, so we have one.
21 Let's bring up Exhibit 74, which is a request to amend
22 the appeal. The purpose of the request is to amend
23 this appeal to add the Certificate of Occupancy 69395
24 to the appeal. Let's take a quick Board discussion on
25 this issue. My understanding of this in looking at

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1 the filings attendant to this motion, I do not believe
2 it would prejudice anybody in this case to amend the
3 appeal to include both Certificate of Occupancies.

4 What is at point here is the similar issue
5 that flows through the Certificate of Occupancies and
6 therefore having one in or one not. Actually, they
7 are tied and linked, based on the issue at appeal, and
8 that is whether this is a matter-of-right use or not.

9 I'll open it up to others if they have any other
10 comments.

11 VICE CHAIR MILLER: Mr. Chairman, I would
12 concur and say further that this is the Certificate of
13 Occupancy that now is at issue, because the previous
14 one has expired, so this is the certificate that we
15 should be looking at. And it would be timely to
16 appeal the certificate, in that it was issued less
17 than 60 days prior to this amendment. So it would be
18 timely as an appeal and since we have already started
19 the case, it's an efficient way to just take it into
20 this case.

21 CHAIRPERSON GRIFFIS: Okay.

22 BOARD MEMBER ETHERLY: I concur, Mr.
23 Chair.

24 MR. DONOHUE: Mr. Chairman?

25 CHAIRPERSON GRIFFIS: Yes.

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1 MR. DONOHUE: Very briefly, because we did
2 submit our response to the motion to amend, and I
3 won't add to that except to -- I would ask whether the
4 ANC was, in fact, provided copies of the motion or
5 request to amend? It's not clear to me that they were
6 served a copy.

7 CHAIRPERSON GRIFFIS: I just put mine
8 away. Who is speaking on behalf of the appellant?

9 MR. DONOHUE: I beg your pardon, Ed
10 Donohue on behalf of WagTime, for not introducing
11 myself, sorry.

12 CHAIRPERSON GRIFFIS: That's fine.

13 MS. DOUGHTY: Andrea Doughty on behalf of
14 the appellants.

15 CHAIRPERSON GRIFFIS: Would you mind
16 moving your microphone a little bit closer?

17 MS. DOUGHTY: The ANC was informed about
18 our request to amend the appeal.

19 CHAIRPERSON GRIFFIS: How were they
20 informed?

21 MS. DOUGHTY: I spoke to ANC Commission
22 Chairman Cary Silverman. He also had received a copy
23 of the second Certificate of Occupancy, so he was
24 aware of the issue.

25 CHAIRPERSON GRIFFIS: I see. Is there

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1 anyone representing the ANC here today?

2 MS. DOUGHTY: No, there is not, Mr.
3 Chairman. I checked that with --

4 CHAIRPERSON GRIFFIS: Well, it would be a
5 surprise if someone stood up behind you, wouldn't it?

6 MS. DOUGHTY: It would be.

7 CHAIRPERSON GRIFFIS: Okay.

8 MS. DOUGHTY: Yes, and I did ask. I
9 specifically asked that if the Chairman asked whether
10 or not there was somebody here today to speak for the
11 ANC, should I inform the Chairman whether there will
12 be or won't be, and he said there will not be. They
13 have entered their letter, their views on this matter
14 in a written letter to the Board dated December the
15 16th.

16 CHAIRPERSON GRIFFIS: Okay.

17 MR. DONOHUE: Mr. Chairman, they are a
18 party to the case, and apparently have not provided
19 copies of the motion, I'll just note my objection.

20 CHAIRPERSON GRIFFIS: Okay. There seems
21 to be a procedural objection now, but I understand.
22 In the future, for everyone, obviously, any party or
23 participant in this case needs to be served on any
24 sort of filing, so it's important to note. Okay.
25 Anything else on that? In which case, then we can

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1 take it as a consensus of the Board to amend the
2 appeal.

3 Let's go to second. Okay. We're going to
4 take up the issue that was submitted. It's Exhibit
5 77, which is a motion to dismiss. It was filed March
6 29. The motion to dismiss goes to the fact that it
7 would not be -- first, they did address the fact of
8 trying to amend the appeal as improper. If that was
9 not actually amended by the Board, then one could move
10 on to dismiss, based on mootness with regard to the
11 Certificate of Occupancy was no longer enforced.

12 I believe in my brief statement on the 1st
13 in amending the appeal, it is important to note that,
14 first of all, each of the C of Os, the permanent flow
15 is essentially from the temporary. The issue is the
16 same. The decision is the same and really at the crux
17 of it and what we're looking at here is whether it is,
18 as according to the Zoning Administrator, whether the
19 permitted use, according to the Zoning Administrator,
20 is allowable or not. That may not be the best way to
21 put it, but that's kind of how it works in my mind.

22 That being said, I believe we can move to
23 dismiss the motion to dismiss and I take a second to
24 that. We can have brief deliberation on it.

25 VICE CHAIR MILLER: Second.

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1 CHAIRPERSON GRIFFIS: Thank you.
2 Comments?

3 VICE CHAIR MILLER: I would concur with
4 what you said. I think we addressed this issue
5 basically in the motion to amend the appeal. The
6 issue is still very much alive. The issue is not moot
7 and the amendment is timely and proper for the same
8 reasons we enunciated in granting the motion to amend.

9 CHAIRPERSON GRIFFIS: Thank you. Let's
10 take up the next which is a motion to strike.

11 VICE CHAIR MILLER: Do we need a vote from
12 the Board?

13 CHAIRPERSON GRIFFIS: Pardon me? Oh, yes,
14 we do have a motion, seconded. Let me ask for all
15 those in favor signify by saying aye.

16 ALL: Aye.

17 CHAIRPERSON GRIFFIS: Aye. And opposed?
18 Very well. Let's move on to the motion to strike. It
19 is Exhibit 72, am I right?

20 MR. DONOHUE: Mr. Chairman?

21 CHAIRPERSON GRIFFIS: Yes?

22 MR. DONOHUE: Can we be provided an
23 exhibit list, so we can follow along? It's getting a
24 little confusing. Does the staff possibly got a list?

25 CHAIRPERSON GRIFFIS: All right. I wish

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1 we got one. Why should you get one? Let me just say,
2 how updated is our exhibit list, at this point? It's
3 probably sitting in front of me.

4 VICE CHAIR MILLER: Actually, it's not
5 bad.

6 CHAIRPERSON GRIFFIS: You got it? All
7 right. Why don't we do that. Let's make copies of
8 that. We're going to make copies and get it provided,
9 which actually buys me a minute or so also. Let me
10 just note, obviously, we can handle it, but it is very
11 difficult for the Board to get submissions the day of
12 or the day before. I'm sure most of you are well-
13 aware, but we are all volunteers and go to work the
14 rest of the week. Our packages are delivered to us on
15 a Thursday, prior to the Tuesday, meaning it ought to
16 be in the Wednesday, prior to the Thursday, prior to
17 the Tuesday or a week ahead of time and that way we
18 can be issued it and you will be guaranteed a much
19 more -- well, let's just say, a much more relaxing
20 time on my Sunday afternoons when I sit in a
21 comfortable chair and read all these, as opposed to us
22 working through lunch reading everything in the
23 morning in the Morning Session and going through what
24 you are seeing here now.

25 So we will delay a little bit so you have

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1 the exhibit list so you can follow along what I am
2 referencing and to make sure that I do reference
3 correctly, and then we will take up the motion to
4 strike. And it is the letters that were submitted.
5 Let me address this, because in terms of the motion to
6 strike, there have been a substantial amount of
7 letters that have been submitted in, either in support
8 or in opposition to the appeal or to anything else
9 that people felt like writing a letter to us about.

10 That being said, there is a difference
11 between the public hearing in terms of a variance or a
12 special exception hearing and an appeal. An appeal is
13 a much more strict, stringent, limited participation.

14 I believe it is the Board's past procedure to strike,
15 rather not even accept letters into the record during
16 appeals, that aren't attendant to a party, intervenor
17 or participant in this case.

18 And the issue is this, if you look at it
19 in terms of procedural matters, what is the procedure
20 for a person to give testimony in an appeal? And
21 there is not a public time period, a public
22 participation as in an area variance or a special
23 exception where I call anyone in the room in
24 opposition or in support would be afforded the time to
25 come forward and speak. Therefore, looking at the

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1 first step, on face, I look at these letters and I say
2 how is it that we can actually bring these into the
3 record, and there is no vehicle for our process.

4 Second, though, and I think in following
5 the Board's procedure that they have been submitted.
6 It is more difficult for us to strike and for us
7 actually to spend the time to go through to see if
8 letters were submitted under a party, by a party, what
9 is in and what is out. What I'm going to do, at this
10 point, is ask that all the participants in this case
11 go through the record and find those that they will
12 adopt as their submissions. Any of those that aren't
13 enumerated by any participant in this will be stricken
14 from the record. The Board will not deliberate on
15 those.

16 I find that also a lot of the letters are
17 -- well, I'll leave it to you. So rather than us
18 work, you guys can. It is not that difficult. There
19 is a list of all the submissions. They are all
20 exhibited, so it should be fairly quick. In fact, Ms.
21 Bailey does a fantastic job of knowing exactly which
22 side each are on or what issue is addressed, and so
23 I'm sure she will be of great resource in pulling that
24 together. That being said, for clarity, I would
25 suggest that the Board proceed in that fashion that no

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1 individual testimony letters would be accepted into
2 the record, but rather we will afford the opportunity
3 for those participants to adopt as their submissions
4 letters that are in the record and proceed in that
5 fashion, unless we have any difficulty or different
6 opinions.

7 Is everyone okay with that one? Okay.

8 VICE CHAIR MILLER: So, Mr. Chairman, in
9 this particular case that is the subject of this
10 motion, my understanding is that these letters have
11 come in through a party, so that we would not be
12 granting the motion to strike, at this point, with
13 respect to this particular motion.

14 CHAIRPERSON GRIFFIS: That's correct.

15 MS. FERSTER: May I be heard or do you
16 want to hear any discussion on that point?

17 CHAIRPERSON GRIFFIS: Not really. You
18 submitted the issuance on that. Is there something in
19 addition to what you submitted in writing?

20 MS. FERSTER: Well, I just wanted to point
21 out that while the letters were submitted by a party
22 and that they were appended to the party's motion or
23 letter, I guess it would be, that, in fact, the
24 letters were not from a party. The letters were from
25 clients of the owner. So to my mind, those letters

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1 are identical to essentially opening this case up to
2 testimony from the public, because these people are
3 the public. They are not a party.

4 CHAIRPERSON GRIFFIS: Yes, but there would
5 be no difference in the way we are treating the letter
6 as actually paper witnesses. There would be no
7 difference if a participant in this called 50
8 witnesses. It would eat up their time and they
9 probably wouldn't be able to get through them, but
10 that, in my mind, is the way we're treating the
11 letters.

12 MS. FERSTER: Well, and we would object to
13 their calling those witnesses on germaneness grounds
14 as well, because we believe not only do our persons in
15 opposition to the appeal not permitted to testify
16 either in person or by letter, but, in fact, the
17 content of what is in those letters relates to the
18 fact that the owner believes that its facility is
19 clean and friendly.

20 CHAIRPERSON GRIFFIS: Right.

21 MS. FERSTER: And we don't think that
22 those issues are relevant in this, you know.

23 CHAIRPERSON GRIFFIS: Right. And it's so
24 noted. And if we put it into that context as they
25 were witnesses and you objected, we might uphold it or

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1 we might just move on. It seems to be a small issue
2 and actually, I think, the way that we're dealing with
3 this, at this point, is the most expeditious. I think
4 the Board has sensibility enough to note what is going
5 directly to the appeal and what is on point with the
6 appeal and what is not.

7 MR. RUSHKOFF: Mr. Chair, just to clarify.

8 CHAIRPERSON GRIFFIS: Yes.

9 MR. RUSHKOFF: Would we be going through
10 the letters after the hearing today and then
11 submitting a letter just stating which letters we're
12 adopting as part of our submission?

13 CHAIRPERSON GRIFFIS: I think that would
14 be the most prudent, yes.

15 MR. RUSHKOFF: Okay. Like together with
16 any subsequent submission like proposed findings or
17 whatever?

18 CHAIRPERSON GRIFFIS: Right.

19 MR. RUSHKOFF: Okay. Thank you.

20 MS. FERSTER: Can we just clarify if we
21 are adopting anything in a letter as part of our
22 submission, that means that we are required to produce
23 a person who will testify to that fact?

24 CHAIRPERSON GRIFFIS: No.

25 MS. FERSTER: Then I would renew my

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1 objection and want it noted for the record.

2 CHAIRPERSON GRIFFIS: Your objection to
3 not accepting the letters, based on the fact that you
4 can't call witnesses?

5 MS. FERSTER: Well, to the extent that the
6 owner comes back and indicates that the owner adopts
7 the testimony that is stated in the letters of its
8 clientele that the owner's facility is clean and well
9 run. Again, we don't believe that those issues are
10 germane to this appeal and we would object to their
11 being as part of the record.

12 CHAIRPERSON GRIFFIS: But aren't we the
13 last arbitrator to say whether they are germane or
14 not?

15 MS. FERSTER: You certainly are, but I
16 would like my objection noted for the record.

17 CHAIRPERSON GRIFFIS: I understand. I
18 understand.

19 MS. FERSTER: That my client, Mid-City,
20 does not believe that they are germane.

21 CHAIRPERSON GRIFFIS: Indeed. Okay.
22 Anything further on that then? Ms. Miller?

23 VICE CHAIR MILLER: Well, I would just
24 note for the record that we have a lot of letters on
25 both sides, and the Board would have to go through

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1 them right now and start striking and we don't think
2 that is very efficient and that we're talking about
3 the process, at this point. They can come in through
4 a party and at a later date the Board will evaluate
5 the relevance.

6 CHAIRPERSON GRIFFIS: Not that we haven't
7 spent five hours going through a record and striking
8 information, but that's not this case. All right.
9 The last thing I have to look at is the Clean Hands
10 Act submission that we had. What else do we have?

11 MS. FERSTER: The testimony.

12 CHAIRPERSON GRIFFIS: I'm sorry, what?

13 MS. FERSTER: The testimony.

14 CHAIRPERSON GRIFFIS: Oh, come on.

15 UNIDENTIFIED SPEAKER: This is something
16 they submitted, or I don't know, arguing that they
17 weren't --

18 CHAIRPERSON GRIFFIS: Okay. We have a
19 submission 69 which is an Clean Hands Act, WagTime
20 LLC. I believe it is the Mid-City. Ms. Ferster, you
21 submitted it. My reading of this and tell me Board
22 Members if you see differently and we obviously can
23 have comment if I'm so off base here, but it seems to
24 me that this is talking about, first of all,
25 requesting action by this Board that is well beyond

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1 our own jurisdiction.

2 Second of all, it looks as though it's
3 talking about action that should be taken by DCRA.
4 That being said, it's almost more appropriate that
5 this be given to DCRA. It is in the record as it has
6 been exhibited. I just don't know what we could
7 actually do with it. We do not have the ability to
8 levy fines. We do not have the ability to force DCRA
9 to initiate investigations. And we don't have the
10 ability on our own motion to require DCRA to revoke
11 Certificate of Occupancies, but rather through an
12 appeal process of which an outcome would or may or may
13 not have that outcome, of which case we would find the
14 Certificate of Occupancy not valid, and again it would
15 be DCRA's purview to revoke that.

16 MS. FERSTER: Let me just clarify.

17 CHAIRPERSON GRIFFIS: Okay.

18 MS. FERSTER: Because, of course, as you
19 know, the letter is to DCRA. Simply a copy was
20 provided to the Board.

21 CHAIRPERSON GRIFFIS: Oh, I'm sorry. See
22 that, that's the great clarity that I need. That's
23 the problem when you put it in here, I read it and
24 take it as action. Well, there it is then. That
25 being noted, it's certainly appropriately addressed.

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1 MR. DONOHUE: Mr. Chairman?

2 CHAIRPERSON GRIFFIS: Yes?

3 MR. DONOHUE: I beg your pardon, but
4 Corporation Counsel shared with me a copy of the
5 document that you are referring to. We didn't respond
6 to it. It wasn't -- I wasn't provided a copy of the
7 document, and I would just like to reserve a chance to
8 take a look at it and perhaps at the close of this
9 respond to the extent that it is in your record.
10 Sorry to muddy the waters.

11 CHAIRPERSON GRIFFIS: No, it's all right.

12 I guess, yes, we're going to have to keep the record
13 open for a response to it. Okay. Then last, there is
14 a lot of buried issues in motions and all of this
15 stuff. Find me the exhibit number of the last piece I
16 need. It's going to be --

17 MS. BAILEY: Mr. Chairman?

18 CHAIRPERSON GRIFFIS: Okay. Everyone have
19 their scorecard? Exhibit 71 is what I'm looking at.
20 And we just want to address the fact that there is
21 opposition to the appearance of an expert witness and
22 also speaking of how much time the intervening party
23 would be afforded. I think to address this, first of
24 all, we can take up the issue when our witness is
25 called as an expert and given expert status or not, of

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1 course, it would be first. Secondly, whether we could
2 or would preclude calling a witness. I think it would
3 have to be decided at the time where we look at the
4 relevancy to the case.

5 Noting just Mr. Lourenco has participation
6 before this Board, but I don't know that we could
7 render a judgment, at this point, whether we would
8 preclude him from, but I cannot imagine that we would.

9 In terms of the time, the intervenor is afforded the
10 time equal to the other participants in the case in
11 order to put on their case. And so we can address
12 that when we also get through to the rest of the
13 schedule. Is that, Board Members', understanding
14 also?

15 VICE CHAIR MILLER: Yes.

16 CHAIRPERSON GRIFFIS: Okay. Anything else
17 I should note in that if I haven't taken it up all
18 directly? Comments? Okay. That being said, and that
19 I did indicate was Exhibit 71. Is that correct?
20 Okay. Then are there any other preliminary matters,
21 Board Members, you are aware of, staff is aware of?
22 Is anyone else, participants, aware of any other
23 preliminary matters that we haven't addressed? Whew.

24 In that case then, let us move to the administrative
25 officer's case if you're ready to move ahead.

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1 MR. RUSHKOFF: I'm sorry, I was confused.
2 I thought that we were going to have the intervenor
3 go next, but that's not the case? Because I thought
4 the intervenor was, in effect, putting on -- was going
5 to try to put on more of a case in support of
6 appellant's position and that we would get that
7 finished and then we would see what we needed to do.

8 CHAIRPERSON GRIFFIS: Is that what was
9 decided in the last hearing?

10 MR. RUSHKOFF: Actually, I honestly don't
11 remember, but I thought that that seemed more logical
12 to get that whole case out and then we would respond
13 and WagTime would respond.

14 MS. BAILEY: That's not the way it is
15 outlined in the Zoning Regulations, Mr. Chairman.

16 MR. RUSHKOFF: Okay. So we've got to
17 follow the Regulations.

18 CHAIRPERSON GRIFFIS: Yes.

19 MR. RUSHKOFF: Okay.

20 CHAIRPERSON GRIFFIS: We've got to follow
21 something. Yes, I don't recall even that discussion.

22 I don't have that in any of my notes here, so the
23 order of procedure would be the appellants of which we
24 have heard, DCRA will have a case for the owner, we'll
25 have the ANC, we'll have the intervenors and then it

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1 is rebuttal and closing by the appellant. Is everyone
2 clear on that? Is that everyone's understanding?
3 Okay. Let's go then. Yes?

4 MR. RUSHKOFF: Yes, this is Bennett
5 Rushkoff on behalf of DCRA. I thought I would just
6 make a brief opening remark before beginning to
7 question the witness.

8 CHAIRPERSON GRIFFIS: Okay. Do you need
9 more table or are you ready for them to pounce on you?
10 Are you comfortable?

11 MR. RUSHKOFF: Yes.

12 CHAIRPERSON GRIFFIS: Okay.

13 MR. RUSHKOFF: No pouncing, Mr. Chair. My
14 name is Bennett Rushkoff. I represent DCRA in the
15 case. We will be calling one witness, Faye Ogunneye.
16 She is the individual at DCRA who is most personally
17 directly involved in the decision to find that the
18 facility at issue here is a matter-of-right use in a
19 C-2 or C-3 Zone. In terms of DCRA's legal position,
20 it is partly covered by the testimony you are about to
21 hear in terms of what actually went into the decision.
22 There are other factors that the Board should
23 consider which are set forth in, I believe the memo is
24 marked as, Exhibit 70 by the BZA's Office. That sets
25 forth additional legal argument, and essentially what

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1 DCRA--

2 CHAIRPERSON GRIFFIS: That's your filing
3 you're talking about. Is that correct?

4 MR. RUSHKOFF: Yes, the filing, Exhibit
5 70.

6 CHAIRPERSON GRIFFIS: Okay.

7 MR. RUSHKOFF: Yes. We're not
8 representing to the Board that everything that is
9 contained in that memo was, in fact, considered by the
10 administrator. We just see it as additional legal
11 argument in support of the decision that was reached.

12 What Ms. Ogunneye will be testifying to is the actual
13 thought process that she went through in determining
14 that it is a matter-of-right use.

15 I guess the point that I would just ask
16 the Board to keep in mind as we go forward is that
17 there has already been a fair amount of testimony as
18 to what dog kennels or dog boarding facilities are
19 like, either in suburban or rural areas. And in
20 deciding to make a dog boarding facility a matter-of-
21 right use, DCRA is not giving these facilities free
22 reign to operate in any manner. The Board is entitled
23 to presume that these facilities will be operated in
24 accordance with District Law.

25 And in our memo we outlined some of the

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1 applicable laws, such as the Noise Control
2 Regulations, the Animal Control Regulations, and
3 clearly some of the rural facilities that we have
4 heard about simply could not be operated anywhere in
5 the District and comply with District Law. So that
6 being said, I think I'll proceed now with the witness.

7 Please, state your name for the record.

8 MS. OGUNNEYE: Faye Ogunneye.

9 MR. RUSHKOFF: And are you employed by the
10 District of Columbia Government?

11 MS. OGUNNEYE: Yes.

12 MR. RUSHKOFF: And, please, state your
13 agency and your title.

14 MS. OGUNNEYE: Department of Consumer
15 Regulatory Affairs and I work in the Zoning Section.
16 I am the chief of the Zoning Review Branch.

17 MR. RUSHKOFF: And how long have you held
18 this position?

19 MS. OGUNNEYE: It's going on two years.

20 MR. RUSHKOFF: Okay. And to whom do you
21 report?

22 MS. OGUNNEYE: To Denzil Noble.

23 MR. RUSHKOFF: And what is his position?

24 MS. OGUNNEYE: He is the Acting Zoning
25 Administrator.

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1 MR. RUSHKOFF: Okay. Now, as part of your
2 job, do you work on zoning issues that relate to
3 Certificate of Occupancy applications?

4 MS. OGUNNEYE: Yes, I do.

5 MR. RUSHKOFF: And could you describe the
6 circumstances where you would get involved on a
7 particular Certificate of Occupancy application?

8 MS. OGUNNEYE: Yes, if a use is not
9 expressly noted in the regulations, then I would do
10 additional research to determine if that use is
11 similar or, I'm sorry, if the use is similar or a
12 matter-of-right use.

13 MR. RUSHKOFF: Okay. Now, are you
14 familiar with DCRA's decision to issue a Certificate
15 of Occupancy for WagTime at 1412 Q Street, N.W.?

16 MS. OGUNNEYE: Yes, I am.

17 MR. RUSHKOFF: And were you personally
18 involved in that decision?

19 MS. OGUNNEYE: Yes, I was.

20 MR. RUSHKOFF: And could you describe,
21 without getting into the decision making process
22 itself, could you just describe what your role was?

23 MS. OGUNNEYE: My role was to research and
24 determine if the use was, in fact, allowable at the
25 address in question.

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1 MR. RUSHKOFF: Okay. And did your role
2 begin, to the best of your recollection, before or
3 after a Certificate of Occupancy application was
4 received at DCRA?

5 MS. OGUNNEYE: It actually was before the
6 Certificate of Occupancy was issued.

7 MR. RUSHKOFF: And do you recall what
8 prompted your involvement before an application was
9 received?

10 MS. OGUNNEYE: I believe there were some
11 phone conversations that was requesting information on
12 the location of a pet spa.

13 MR. RUSHKOFF: When you say phone
14 conversations, were these with people at DCRA or
15 people outside DCRA?

16 MS. OGUNNEYE: No, this was with the
17 public.

18 MR. RUSHKOFF: With the public? And did
19 you ever learn or did you have any understanding as to
20 whom you were talking?

21 MS. OGUNNEYE: I believe I spoke with a
22 Paul Huffheiser.

23 MR. RUSHKOFF: And did you have any idea,
24 I mean, who he was connected with?

25 MS. OGUNNEYE: With Stephanie Mencimer.

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1 MR. RUSHKOFF: Okay. Did you have an idea
2 as to whether you were dealing with people who were
3 connected in any way with WagTime?

4 MS. OGUNNEYE: No, not at that time.

5 MR. RUSHKOFF: Okay. Did you have any
6 idea whether you were talking to people who were
7 connected to a proposed facility?

8 MS. OGUNNEYE: No. Again, it was just a
9 general phone inquiry.

10 MR. RUSHKOFF: Yes.

11 MS. OGUNNEYE: We do get a lot of that,
12 people want to provide a particular service and want
13 to know where they can have that service.

14 MR. RUSHKOFF: Okay. Now, in the record
15 as Exhibit 36, DCRA submitted some documents from its
16 administrative file. It was marked as Exhibit 36 at
17 the BZA Office. I brought additional copies if anyone
18 needs them here. I assume the Board has Exhibit 36 up
19 there. It's a letter dated January 16th and there are
20 various attachments from DCRA's files that we thought
21 we needed to submit to the Board, so that it would
22 have the background for the decision. Okay.

23 On the attachments, the first page, at the
24 top it says Certificate of Occupancy and it's dated
25 July 23, 2003. Okay. Have you turned to that page?

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1 MS. OGUNNEYE: Yes, I have.

2 MR. RUSHKOFF: Okay. Can you identify
3 this document?

4 MS. OGUNNEYE: It's a Certificate of
5 Occupancy issued to WagTime and the address is 1412 Q
6 Street, N.W.

7 MR. RUSHKOFF: Is this the -- strike that.
8 At the top of the Certificate of Occupancy, in the
9 upper right, it identifies the Zone as CM-3. Do you
10 know whether or not that's correct?

11 MS. OGUNNEYE: It's not correct.

12 MR. RUSHKOFF: And what should it be?

13 MS. OGUNNEYE: It should be C-3-A Arts.

14 MR. RUSHKOFF: And how do you know that it
15 should be C-3 rather than CM-3?

16 MS. OGUNNEYE: Because the zoning
17 technician that reviewed the application noted it on
18 the back of the application form itself.

19 MR. RUSHKOFF: Could you identify where in
20 the exhibit the Board would find that?

21 MS. OGUNNEYE: It's on -- it would be page
22 3 and the boss noted the zoning division. It has the
23 zone as C-3-A Arts.

24 MR. RUSHKOFF: Okay. Now, going back to
25 the Certificate of Occupancy, there is a statement in

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1 parentheses under description of use. It says "C of O
2 to expire 1-31-04." Can you explain what is supposed
3 to happen then? Is the facility supposed to be shut
4 down or can you explain what that means?

5 MS. OGUNNEYE: At the point that this
6 Certificate of Occupancy was issued, there was a
7 condition attached to it and that condition was self
8 imposed by the applicant, a letter of which I believe
9 is within the package as well.

10 MR. RUSHKOFF: And then I guess going back
11 to that date, what happens on that date or what is
12 supposed to happen on that date?

13 MS. OGUNNEYE: The applicant is supposed
14 to come back into DCRA and reapply for a new
15 Certificate of Occupancy.

16 MR. RUSHKOFF: Okay. Now, I have also
17 brought with me copies of a document that is marked in
18 the record as Exhibit 5 for anyone who needs a copy.
19 Okay. I'm showing you an email. At the top it shows
20 that it's from Ogunneye, Faye, DCRA. It shows a copy
21 to Stephanie Mencimer, the appellant in the case. Can
22 you identify this email?

23 MS. OGUNNEYE: Yes, it's an email that I
24 did to Paul Huffheiser in which Stephanie Mencimer was
25 copied and, basically, it just gave an overview of our

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1 phone conversation expressing to him where he could
2 have the pet spa, which was pretty much the
3 information he required.

4 MR. RUSHKOFF: Did you personally prepare
5 this email?

6 MS. OGUNNEYE: Yes, I did.

7 MR. RUSHKOFF: And was this email based on
8 your own analysis?

9 MS. OGUNNEYE: It was based on both mine
10 and the Acting Zoning Administrator's input.

11 MR. RUSHKOFF: And that was Denzil Noble?

12 MS. OGUNNEYE: Correct.

13 MR. RUSHKOFF: Okay. Now, in the email
14 there is a reference on the subject line to pet spa.
15 Can you explain what your understanding was of what
16 was meant by pet spa?

17 MS. OGUNNEYE: At the time, the inquiry
18 was as to whether a pet spa could be located in the C-
19 3-A Zone, and my understanding being that a pet spa is
20 a place where pets are cared for, where they can get
21 groomed, they get exercise and possibly stay
22 overnight, I went into the regs and pretty much tried
23 to determine the areas that such an activity could
24 take place.

25 MR. RUSHKOFF: Okay. Now, can you explain

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1 the apparent discrepancy between the subject line that
2 refers to a C-3-A Zone and the text of the email that
3 refers to a C-2 Zone? The subject matter says pet spa
4 in the C-3-A Zone and then in your analysis, you refer
5 to a C-2 Zone. Can you explain that?

6 MS. OGUNNEYE: Right. I referred to a C-2
7 Zone, because that zone is a more restrictive zone and
8 that's the first time there is any mention of any use
9 similar to the use in question.

10 MR. RUSHKOFF: So you're saying you found
11 the information you needed to analyze the C-3 Zone by
12 looking at the regs in the C-2 Zone?

13 MS. OGUNNEYE: Correct.

14 MR. RUSHKOFF: Okay. Now, there is a
15 reference in the first line further to our phone
16 conversation. As best as you can recall, is that the
17 phone conversation you testified to earlier, an
18 inquiry from the public?

19 MS. OGUNNEYE: Yes.

20 MR. RUSHKOFF: Do you remember anything
21 more about it?

22 MS. OGUNNEYE: Nothing more than I have
23 said already, no.

24 MR. RUSHKOFF: Okay. Now, this email
25 discusses several matter-of-right uses in a C-2-A

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1 Zone. Can you explain briefly how these uses led you
2 to conclude that a pet spa was a matter-of-right use
3 in a C-2 Zone?

4 MS. OGUNNEYE: Okay. In a C-2 Zone a
5 public bath, physical culture and health services are
6 matter-of-right uses and in looking at a spa, it
7 implies the use of a spa in general. Health services
8 -- I'm sorry.

9 MR. RUSHKOFF: Actually, let me go back
10 and break it down for you.

11 MS. OGUNNEYE: Yes.

12 MR. RUSHKOFF: Because I know it's a very
13 broad question. Why don't we start with public bath,
14 physical culture or health service. Why did you
15 select that from all of the matter-of-right uses in
16 the C-2 Zone as relevant to your analysis? You felt
17 that that was relevant?

18 MS. OGUNNEYE: Right. The inquiring
19 question was a pet spa, and for health services you
20 can have a spa for humans and under health services,
21 you are required to get a license through the Health
22 Department. So on the same note, the pet spa could
23 qualify under that being that they are not -- there is
24 no distinction as to whether it's for humans or for
25 pets.

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1 Now, in looking back in the residential
2 zone, there is a mention of human clinics or a clinic
3 for humans, so the mindset was pretty much that well,
4 as long as they can comply with whatever the Health
5 Department regulations are, then it would be an
6 allowable use.

7 Then I looked further at the veterinary
8 hospital and a hospital is a place where pets or
9 animals are cared for. They do stay there overnight.

10 They can go as inpatient or outpatient and the pet
11 shop is a place where pets are kept, sold, pet
12 supplies, accessories, toys, etcetera.

13 MR. RUSHKOFF: Okay. Now, you found each
14 of these in the C-2 Zone. Did you also go through and
15 look at the uses in, I guess what would be the next
16 most restrictive zone, a C-1 Zone?

17 MS. OGUNNEYE: Correct.

18 MR. RUSHKOFF: Is that correct?

19 MS. OGUNNEYE: Correct.

20 MR. RUSHKOFF: Did you go through the uses
21 of a C-1 Zone and find uses that related to the care
22 of animals?

23 MS. OGUNNEYE: Not in a C-1 Zone, no.

24 MR. RUSHKOFF: And you testified you found
25 them in a C-2 Zone?

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1 MS. OGUNNEYE: Correct.

2 MR. RUSHKOFF: And so now, did you
3 actually find the term pet spa in the C-2 Zone
4 Regulations?

5 MS. OGUNNEYE: No, I didn't, but section
6 721.4 in DCMR 11 notes that other similar -- you could
7 apply other services of similar use.

8 MR. RUSHKOFF: Okay. I would like you to
9 look in the same exhibit to a letter. Let's see.
10 This would be on page 4, a letter dated July 30, 2003.

11 CHAIRPERSON GRIFFIS: Page 4 of what?

12 MR. RUSHKOFF: I'm sorry, of the same
13 exhibit, Exhibit 30.

14 CHAIRPERSON GRIFFIS: Exhibit?

15 MR. RUSHKOFF: Was it 36?

16 CHAIRPERSON GRIFFIS: Okay.

17 MS. OGUNNEYE: Yes, 36.

18 MR. RUSHKOFF: Yes, Exhibit 36, page 4.
19 There is a letter from Denzil Noble to Steve Sher. I
20 will just ask you if you have seen that letter before?

21 MS. OGUNNEYE: Yes, I have.

22 MR. RUSHKOFF: Now, were you the
23 individual who prepared the letter?

24 MS. OGUNNEYE: No, I wasn't.

25 MR. RUSHKOFF: Okay. But you are familiar

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1 with its contents?

2 MS. OGUNNEYE: Yes, I am.

3 MR. RUSHKOFF: Okay. Now, let's see. In
4 the second paragraph it states that "DCRA has no legal
5 basis for withholding a Certificate of Occupancy (C of
6 O) for WagTime at 1412 Q Street, N.W."

7 Can you explain that statement, that DCRA
8 doesn't have a legal basis for withholding a C of O?

9 MS. OGUNNEYE: Because it's -- we consider
10 it a matter-of-right use.

11 MR. RUSHKOFF: Okay. And then there is a
12 reference to, in the next paragraph, the conditional
13 issuance is based on the following commitment made by
14 the applicant.

15 Can you explain why the C of O was based
16 on certain commitments?

17 MS. OGUNNEYE: That was in response to a
18 letter that came from a representative of the owner,
19 at which point they had proposed these conditions.

20 MR. RUSHKOFF: Is that the letter at pages
21 6 and 7 of Exhibit 36?

22 MS. OGUNNEYE: Yes, it is.

23 MR. RUSHKOFF: Okay. And then going back
24 to the letter at pages 4 and 5, there is a statement
25 again in the third paragraph that the conditional

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1 issuance is -- excuse me. Wait, actually strike that.
2 I'm going to go back to a different part of the
3 letter.

4 Oh, okay. The first sentence of the third
5 paragraph says "A six month conditional C of O was
6 issued on July 23, 2003 for WagTime." Can you explain
7 why this C of O was conditionally issued and for only
8 a six month period?

9 MS. OGUNNEYE: It was issued for six
10 months in hopes that DCRA would be able to monitor
11 activities on the site. If any residents were to call
12 in and complain, we would go back and take a look and
13 make sure that they were pretty much complying with
14 the conditions they imposed on themselves.

15 MR. RUSHKOFF: Now, is it your conclusion
16 that there was something, anything in the regulations
17 that required you to limit the Certificate of
18 Occupancy to six months under these circumstances?

19 MS. OGUNNEYE: No, there isn't.

20 MR. RUSHKOFF: Was there any reason for
21 you to have imposed these conditions other than the
22 fact that they were offered by the applicant?

23 MS. OGUNNEYE: No, there wasn't.

24 MR. RUSHKOFF: Okay. Now, you have been
25 present in the hearing room through most of this case,

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1 and I think you are aware that while the pet spa issue
2 that you were looking at last summer involved a
3 variety of uses, this case has focused on the issue of
4 dog boarding as opposed to grooming or the sale of pet
5 supplies. Now that you know that this case is focused
6 on the issue of dog boarding, which of the C-2 uses do
7 you feel are most relevant to the analysis here?

8 MS. OGUNNEYE: It would be the veterinary
9 hospital.

10 MR. RUSHKOFF: And why is that?

11 MS. OGUNNEYE: Because at the hospital the
12 dogs do stay for -- well, they stay overnight. I
13 can't speculate as to how many nights, but dogs do
14 stay overnight and get cared for.

15 MR. RUSHKOFF: Okay. I don't have any
16 further questions for the witness.

17 CHAIRPERSON GRIFFIS: Anything else then
18 in the presentation? Are you finished with your case?

19 MR. RUSHKOFF: Other than a closing
20 statement, which we wouldn't do now, no, we would rest
21 our case here.

22 CHAIRPERSON GRIFFIS: Yes, you would.

23 MR. RUSHKOFF: We would do closing now?

24 CHAIRPERSON GRIFFIS: We would do closing
25 now, yes.

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1 MR. RUSHKOFF: Okay.

2 CHAIRPERSON GRIFFIS: Yes.

3 CHAIRPERSON GRIFFIS: Unless you want to
4 take questions.

5 MR. RUSHKOFF: Before cross examination?

6 CHAIRPERSON GRIFFIS: That's fine. We'll
7 do it that way. Let me jump in then with Board
8 questions, then we'll go to cross examination.

9 First of all, Ms. Ogunneye, if I'm
10 following all your testimony and the written
11 submission, you indicated that the temporary C of O
12 was issued, so that DCRA could monitor the situation
13 there and then, at the expiration of the Certificate
14 of Occupancy, it was anticipated that the proprietor
15 would come back in for your consideration. There are
16 two primary questions that I have to ask for you.

17 First of all, on what basis would you have
18 granted or denied a new Certificate of Occupancy and
19 second, what jurisdiction or where in the regs do you
20 find that you are allowed to give time requirements or
21 lay out the judgment of which you will issue or not
22 issue a Certificate of Occupancy?

23 MR. RUSHKOFF: Well, I would just politely
24 just ask if maybe we could break it down into two
25 questions?

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1 CHAIRPERSON GRIFFIS: Yes, I had to load
2 them all up. The first question is, of course, the
3 temporary expires and you have the store owner comes
4 back in. They say we're ready, we want our C of O.

5 MS. OGUNNEYE: Right.

6 CHAIRPERSON GRIFFIS: What is it that you
7 base your judgment on whether you grant it or not
8 grant it?

9 MS. OGUNNEYE: If we had had numerous
10 complaints from citizens in the neighborhood within
11 that time frame, then maybe --

12 CHAIRPERSON GRIFFIS: Do I understand you
13 correctly to say then that if there was evidence of
14 detrimental impact, you would not issue a Certificate
15 of Occupancy?

16 MS. OGUNNEYE: We would. Again, it's a
17 matter-of-right use, so we would have to.

18 CHAIRPERSON GRIFFIS: So what would keep
19 you from issuing a Certificate of Occupancy?

20 MS. OGUNNEYE: That was the decision of
21 the Acting Zoning Administrator and, again, it had no
22 bearing as to whether or not it was a matter-of-right.

23 It was just --

24 CHAIRPERSON GRIFFIS: All right. Let me
25 ask the larger question then.

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1 MS. OGUNNEYE: Yes.

2 CHAIRPERSON GRIFFIS: Which is attendant
3 to that.

4 MS. OGUNNEYE: Right.

5 CHAIRPERSON GRIFFIS: You indicated that
6 the time restriction or requirement, that there was no
7 time requirement that you had to impose based on the
8 regulations was your statement. What is the
9 jurisdiction that allowed you to put a time
10 requirement on it and call for a matter-of-right use,
11 that's the Zoning Administrator's issuance, for a
12 matter-of-right use, what allowed you to put a time
13 requirement on it and then monitor the community's
14 opinion of that use?

15 MS. OGUNNEYE: Right. Can I just confer
16 for a quick moment?

17 CHAIRPERSON GRIFFIS: Okay.

18 MS. OGUNNEYE: The decision was made,
19 basically, because the applicant had imposed it on
20 themselves and they were willing to put the conditions
21 out.

22 CHAIRPERSON GRIFFIS: Okay. But do you
23 find that you had, based on the regulations, the
24 jurisdiction to take that type of action? Can I
25 condition a non matter-of-right use to get a

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1 Certificate of Occupancy?

2 MS. OGUNNEYE: No.

3 CHAIRPERSON GRIFFIS: Do I have to
4 condition a matter-of-right use in order to make it
5 palatable for the Zoning Administrator?

6 MS. OGUNNEYE: You don't have to, but if
7 you choose to there is really no harm done. It's just
8 trying to provide additional --

9 CHAIRPERSON GRIFFIS: Okay. Let me go
10 back to the first question then.

11 MS. OGUNNEYE: Yes.

12 CHAIRPERSON GRIFFIS: You stated that
13 there is no time requirement in the regulations that
14 you had to impose. Is it your testimony that you have
15 the jurisdiction to impose a time restriction on a
16 Certificate of Occupancy?

17 MS. OGUNNEYE: No, we don't, we don't.

18 CHAIRPERSON GRIFFIS: Okay. You indicated
19 that when you find, which is absolutely enumerated in
20 the Regulation 721.4, I believe, if there is not a
21 specific use stated that one finds, and it is your
22 obligation or responsibility to find whether the
23 proposed use is well, whatever it is.

24 MS. OGUNNEYE: Similar.

25 CHAIRPERSON GRIFFIS: Right, similar.

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1 MS. OGUNNEYE: Right.

2 CHAIRPERSON GRIFFIS: You know, fits
3 within the uses that are stated. Then you indicated
4 you research that to see. Can you speak more of what
5 type of research process you go through?

6 MS. OGUNNEYE: Basically, I go through the
7 regs, look up definitions, try and look up if such
8 uses had previously existed and make decisions.

9 CHAIRPERSON GRIFFIS: Is there any outside
10 resources that you use? I mean, it seems to me in my
11 reading of this is --

12 MS. OGUNNEYE: Right.

13 CHAIRPERSON GRIFFIS: Look, you know, when
14 the Zoning Regulations were written way, way back in
15 the '50s --

16 MS. OGUNNEYE: Right.

17 CHAIRPERSON GRIFFIS: -- there were
18 certain uses and, obviously, there was some sense in
19 this section anyway.

20 MS. OGUNNEYE: Right.

21 CHAIRPERSON GRIFFIS: To say that, you
22 know, there are going to be new uses that come up that
23 are going to be compatible, right?

24 MS. OGUNNEYE: Right.

25 CHAIRPERSON GRIFFIS: And so here is kind

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1 of the parameters of the environment of what's
2 compatible use matter-of-right. So my question is
3 where do you find a contemporary use that isn't
4 stated? Is there other avenues or, I don't know,
5 resources that you find that lends itself to finding
6 matter-of-right uses that aren't stated?

7 MS. OGUNNEYE: No, there isn't, mostly
8 based on experience.

9 CHAIRPERSON GRIFFIS: Yes.

10 MS. OGUNNEYE: I would say pretty much
11 experience and other uses that are similar that would
12 have been approved in the past.

13 CHAIRPERSON GRIFFIS: Okay. So your
14 knowledge of what type of use and intensity as matter-
15 of-right that is actually listed, if I'm understanding
16 you correctly, and the basis of those approvals in the
17 past gives you the knowledge base and that's the type
18 of research you would do. You would conceivably talk
19 to other zoning technicians and other people that had
20 been part of approval processes?

21 MS. OGUNNEYE: Correct.

22 CHAIRPERSON GRIFFIS: Okay. How many
23 telegraph offices have you approved recently? Okay.
24 That's all the questions I have. Other Board Members?
25 Yes?

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1 MS. OGUNNEYE: May I just add something?
2 Well, one moment, please. Okay. I'm done. I'm
3 sorry.

4 VICE CHAIR MILLER: Ms. Ogunneye, I
5 believe you said that the first C of O was issued for
6 six months with conditions, so that DCRA could monitor
7 the operation and see if there were any problems and
8 if there were any complaints.

9 Were there any complaints?

10 MS. OGUNNEYE: No, there weren't, there
11 wasn't.

12 VICE CHAIR MILLER: So all the complaints
13 that are coming before the BZA, at this time, didn't
14 come before DCRA. Is that correct?

15 MS. OGUNNEYE: Which is shocking to us,
16 yes.

17 MR. WEMPLE: Can we --

18 CHAIRPERSON GRIFFIS: No.

19 VICE CHAIR MILLER: Not now. In using
20 721.4, which allows you to look for similar uses where
21 a use might not be defined, in the regulations has
22 there ever been a time where you haven't been able to
23 fit a use, do you know what I'm saying, within the
24 regulations that are on the books, that it was so
25 dissimilar that you could not find that it was

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1 similar?

2 MS. OGUNNEYE: I'm sure there might be a
3 use that could come up that we couldn't find a
4 similarity for. That is a possibility, but in this
5 case we were able to discern what was similar.

6 VICE CHAIR MILLER: And is it your
7 position now that you believe this use is similar to a
8 veterinary hospital? I understand that's your
9 position. Is it still your position that it's similar
10 to a public bath, physical culture or health service?

11 MS. OGUNNEYE: The health service, yes,
12 except for the fact that when the Health Regulations
13 get applied, I believe the Health Regulations
14 specifies human beings there.

15 VICE CHAIR MILLER: So is it your personal
16 conclusion that animals are similar enough to humans
17 and that's why it falls within that category?

18 MS. OGUNNEYE: No, I'm saying that the spa
19 part of the pet spa is similar in use to the health
20 service part. In other words, there is no distinction
21 as to whether the health services is for human beings
22 or for animals.

23 VICE CHAIR MILLER: Well, what are those
24 two types of health services that we're talking about,
25 giving an animal a bath and a person taking a bath,

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1 just that one part of this operation? This operation
2 is more than giving clients baths.

3 MS. OGUNNEYE: Yes, correct, correct. And
4 I believe you were referring to the public bath,
5 physical culture and health service section.

6 VICE CHAIR MILLER: Yes.

7 MS. OGUNNEYE: And what I'm saying is I
8 was concentrating more on the health service part of
9 that one definition, because it does say public bath,
10 physical culture or health services.

11 VICE CHAIR MILLER: So it's your
12 conclusion that health services are the same whether
13 they -- are similar enough between animals and humans?

14 MS. OGUNNEYE: Unless the reg specifies
15 whether it is for animals or humans. Again, in R-4 it
16 does specify under hospitals, sanitariums and it does
17 mention clinic for humans.

18 VICE CHAIR MILLER: Okay. I'll move on.
19 With respect to Exhibit 36, page 4, that letter to Mr.
20 Sher makes reference to the Environmental Policy Act.

21 Did DCRA do some in-depth review of this
22 operation to make sure that it complies with the
23 Environmental Policy Act?

24 MS. OGUNNEYE: Yes, I'm sure they did. To
25 go through the Certificate of Occupancy process, you

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1 have to get inspections from all other disciplines
2 within BLRA.

3 VICE CHAIR MILLER: And is that in our
4 record?

5 MS. OGUNNEYE: I know that the letter does
6 mention that in the second paragraph, that based on
7 this review it has been determined that DCRA has no
8 legal basis for withholding a Certificate of Occupancy
9 for WagTime at 1412 Q Street, N.W., after all required
10 inspections have been approved. The last inspection
11 approved was on July 21, 2003.

12 VICE CHAIR MILLER: Right, that's actually
13 where I'm coming from, that it makes reference to that
14 and I'm wondering if that's in the file anywhere, any
15 indication of what they look at or what they --

16 MS. OGUNNEYE: If you needed to see it, we
17 could provide it, but it's not "part of the zoning
18 purview." That's why we --

19 VICE CHAIR MILLER: I only bring it up,
20 because I think there is an issue here with respect to
21 the waste from the animals and it's an issue in this
22 case, the environmental and health consequences.

23 MS. OGUNNEYE: Okay. I'm sure at the time
24 of the -- well, I wouldn't speculate to that.

25 CHAIRPERSON GRIFFIS: Any other questions

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1 from the Board? Mr. Etherly?

2 BOARD MEMBER ETHERLY: Let me follow the
3 thread that Mrs. Miller was kind of pursuing for a
4 moment, but I don't want to take it too deeply,
5 because I like the speed at which we're moving along
6 here.

7 But with regard to that question of spa
8 and there was a little bit of discussion in the
9 examination that Mr. Rushkoff led you through
10 regarding that term spa, and I'm just trying to get a
11 sense of would your determination have had a different
12 outcome if the conditions had not been proffered, so
13 to speak, on this? Actually, strike that question.
14 Let me ask what I'm getting at maybe a little more
15 directly.

16 And I hesitate, because I share the
17 Chairman's disdain to an extent for taking witnesses
18 through hypotheticals, because I like to stay focused
19 on the facts of the particular case, but I want to
20 perhaps anticipate some cross examination to an
21 extent.

22 At what point would that similarity for
23 you begin to be a problem, animal spa or pet spa and
24 human spa? At what point would that analogy not work
25 for you? I mean, would there be a number of animals

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1 attached to it or would there be perhaps some other
2 characteristics?

3 MS. OGUNNEYE: No, unfortunately, with
4 such uses there is not. We don't --

5 BOARD MEMBER ETHERLY: And it's fair to
6 say that there is not an obvious cutoff point that
7 kind of comes to mind.

8 MS. OGUNNEYE: Right.

9 BOARD MEMBER ETHERLY: I mean, that's okay
10 to answer that.

11 MS. OGUNNEYE: I guess the easiest way to
12 answer it is when that part came up during the email
13 and the phone conversation, the question put to me
14 then was about a pet spa. That was it, just pet spa.

15 BOARD MEMBER ETHERLY: Okay.

16 MS. OGUNNEYE: So I had to pretty much
17 take pet, take spa, work with those two and try and
18 figure out where can I place it within the Zoning
19 Regs.

20 BOARD MEMBER ETHERLY: Okay.

21 MS. OGUNNEYE: In terms of similarity.

22 BOARD MEMBER ETHERLY: Okay. Thank you.

23 Thank you, Mr. Chair.

24 CHAIRPERSON GRIFFIS: Ms. Miller?

25 VICE CHAIR MILLER: I'm sorry. I thought

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1 of a few more questions.

2 MS. OGUNNEYE: Sure.

3 VICE CHAIR MILLER: The latest Certificate
4 of Occupancy has no conditions now. The previous one
5 had conditions limiting the hours that the animals
6 were to be outside, the number of animals outside,
7 dogs in particular, with supervision, etcetera.

8 Can you explain the change in one having
9 conditions and one not at this point, the Certificate
10 of Occupancy?

11 MS. OGUNNEYE: Right. Again, there was no
12 legal basis to have had the conditions there in the
13 first place. Since the applicant proposed it, we went
14 ahead and put it in there since we didn't have any
15 complaints or issues that would pretty much have
16 caused them to not comply with those conditions.
17 Again, it didn't need to be put in place. It was put
18 in place. At the end of the time period we took the
19 conditions off.

20 VICE CHAIR MILLER: Do you think that some
21 of these conditions might be indications of
22 differences between this type of operation and, for
23 instance, a veterinary hospital, for instance, how
24 many dogs might be outside at one time?

25 MS. OGUNNEYE: Not particularly, because

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1 there is nothing in the regs that -- in other words,
2 if the regs state specifically that you can only have
3 so many dogs in the whole institution, then it would
4 be so much easier, but we don't have that.

5 VICE CHAIR MILLER: I guess my question is
6 is it part of your analysis when trying to figure out
7 whether this use fits in a category, say, such as a
8 veterinary hospital, which to me seems like the more
9 reasonable category than a public bath.

10 MS. OGUNNEYE: Right.

11 VICE CHAIR MILLER: Do you say well, are
12 there differences between this operation and a
13 veterinary hospital that may or may not be
14 significant?

15 MS. OGUNNEYE: In reference to the pet spa
16 itself or the whole use that WagTime has right now?

17 VICE CHAIR MILLER: The whole use of the
18 operation, because that's what is getting the
19 Certificate of Occupancy, right?

20 MS. OGUNNEYE: Right. The Certificate of
21 Occupancy would bear more so on the veterinary
22 hospital and the pet shop, not the health services,
23 physical culture or public bath. Again, that one only
24 came into play because of the pet spa.

25 VICE CHAIR MILLER: Okay. But my question

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1 is when you're deciding whether you can really fit it
2 into the category or not, whether it's similar enough
3 or not to be given this matter-of-right status, do you
4 look at the differences and then say well, this
5 difference is significant or this difference is not
6 significant?

7 MS. OGUNNEYE: Yes, we would, we would.

8 VICE CHAIR MILLER: So what differences
9 did you look at in determining that they weren't
10 significant in order for them not to fall within the
11 category of veterinary hospital?

12 MS. OGUNNEYE: I mean, I still say they do
13 fall within veterinary hospital. I'm not so sure I
14 understand the line of questioning, because with a
15 hospital we wouldn't be limiting the number of beds or
16 anything like that. There is nothing in the regs that
17 tells you so many beds.

18 CHAIRPERSON GRIFFIS: Have you processed a
19 Certificate of Occupancy for a veterinary hospital in
20 your experience in the last two years?

21 MS. OGUNNEYE: No, I haven't.

22 CHAIRPERSON GRIFFIS: Obviously, there has
23 been some in the District. Is that true?

24 MS. OGUNNEYE: I couldn't say
25 categorically, but I'm sure there is.

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1 CHAIRPERSON GRIFFIS: Do you know of any
2 veterinary hospitals in the District?

3 MS. OGUNNEYE: Personally, no.

4 CHAIRPERSON GRIFFIS: Okay.

5 MS. OGUNNEYE: I live out in Maryland.

6 CHAIRPERSON GRIFFIS: That's probably the
7 worst thing you have said all day. Okay. Well, if
8 you don't have knowledge, I'm not going to follow-up.

9 MS. OGUNNEYE: I'll be moving into D.C.

10 CHAIRPERSON GRIFFIS: Anything further,
11 Mr. Etherly?

12 BOARD MEMBER ETHERLY: No.

13 CHAIRPERSON GRIFFIS: Okay. Let's go to
14 cross. Oh, I'm sorry. Let me just interrupt you,
15 because I believe there was a comment or a gasp at the
16 table when someone tried to cut in about letters in
17 opposition and clearly, the appropriate time is to
18 take that up either at cross examination or in your
19 case presentation, which is why we didn't let everyone
20 volley in, but let's move ahead.

21 MS. DOUGHTY: Okay. We'll do it. Thank
22 you. Ms. Ogunneye, I just want to ask one question
23 about pet spa, public baths, grooming and then the
24 other questions I have I want to focus on veterinary
25 hospital. On the Certificate of Occupancy, the

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1 description of the use is 24-hour dog boarding and
2 grooming with accessory retail sale of pet supplies.

3 And I just wondered whether, I'm just
4 trying to understand your testimony, is it that it is
5 the grooming component and only the grooming component
6 that is described on the C of O that you would
7 consider to be similar to a public bath or health
8 service?

9 MS. OGUNNEYE: Correct.

10 MS. DOUGHTY: So grooming and public bath?

11 MS. OGUNNEYE: And the health service.

12 MS. DOUGHTY: Yes, a direct correlation
13 between those two. It's not 24-hour dog boarding that
14 is similar to public bath or health service?

15 MS. OGUNNEYE: Correct.

16 MS. DOUGHTY: Thank you. I would like to
17 ask you some questions about the in-depth review that
18 was conducted before the C of O was issued in this
19 case, and I believe the in-depth review is referred to
20 in Mr. Noble's letter to Mr. Sher and it is also
21 referred to in a letter from Mr. Noble to me.

22 CHAIRPERSON GRIFFIS: Okay. Why don't you
23 just ask the question?

24 MS. DOUGHTY: Okay. When this appeal was
25 filed and as we were approaching the hearing date, we

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1 asked DCRA, the appellants asked for access to the
2 file, because we had received this letter about in-
3 depth review.

4 The contents of the file that you made
5 available to the appellants did not include this in-
6 depth review, and I just wondered why it is that it is
7 not in the file and whether or not it can be made
8 available to the appellants?

9 MS. OGUNNEYE: You mean in-depth?

10 MS. DOUGHTY: Yes, does the in-depth
11 review have a written form? Is there a written
12 summary of it? Is there any documentation whatsoever
13 of the in-depth review?

14 MS. OGUNNEYE: No, there wouldn't be.

15 MS. DOUGHTY: Okay. So since there is no
16 documentation, let's try and establish what the in-
17 depth review included and what it did not.

18 Did the in-depth review include an
19 assessment of veterinary hospitals and of the
20 characteristics, the specific characteristics of
21 veterinary hospitals?

22 MS. OGUNNEYE: In the review process, all
23 I'm expected to do is to go through the Zoning Regs
24 and determine where the use falls in. I am not
25 expected to go out and see how many of any kind of use

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1 that already exists, unless if it's in an overlay that
2 requires that you limit the number of a particular
3 use.

4 MS. DOUGHTY: So I want to be clear what
5 I'm talking about here before I draw any conclusions.

6 When I talk about the in-depth review I'm talking
7 about the in-depth review that Mr. Noble referred to.

8 You referred to it in your testimony as, and he
9 refers to it, going above and beyond the Zoning
10 Regulations, also including the Building Codes and the
11 Environmental Protection Act.

12 I don't want to talk about the Building
13 Codes or the Environmental Protection Act. Just that
14 part of the in-depth review that relates to the Zoning
15 Regulations, to your zoning and to your protection.
16 So I'm really asking you about how you reached this
17 judgment about similar to and what were the
18 characteristics of a dog boarding kennel, you know, in
19 your in-depth review, what were the characteristics of
20 a veterinary hospital in terms of noise, in terms of
21 numbers of dogs outside, you know, these
22 characteristics?

23 Did you examine these in reaching a
24 judgment about similar to?

25 MR. RUSHKOFF: Objection to the breadth of

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1 the question. If we could maybe just focus on just a
2 question.

3 MS. DOUGHTY: One.

4 MR. RUSHKOFF: Did you do this or did you
5 do that?

6 MS. DOUGHTY: Okay. Okay. Did you make
7 an assessment about the noise characteristics of
8 veterinary hospitals?

9 MS. OGUNNEYE: No, I didn't. It's not
10 required.

11 MS. DOUGHTY: Did you make an assessment
12 about the number of dogs that would normally be at a
13 veterinary hospital and the number of dogs that might
14 be at a boarding kennel?

15 MS. OGUNNEYE: Again, everything was done
16 in accordance to the Zoning Regs and there is no
17 guidelines as to -- there is no set number of dogs
18 that are allowed.

19 MS. DOUGHTY: So how did you reach a
20 judgment about the intensity of the two uses? I mean,
21 how did you establish to your satisfaction that a
22 kennel involves the same intensity of use as a
23 veterinary hospital, involves the same impacts?

24 MS. OGUNNEYE: Again, we didn't look at it
25 as a kennel. We looked at it as a grooming place, a

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1 pet supplies store and then the dogs probably stay
2 overnight after getting groomed.

3 MS. DOUGHTY: So you considered the dogs
4 staying overnight similar to a veterinary hospital,
5 but not, you know, dogs are also inside veterinary
6 hospitals during the day. I'm just trying to
7 understand whether you're making a distinction here
8 between whether the dogs are there overnight or if
9 they weren't there overnight, if the dogs would have
10 been boarded only during the day, is it your testimony
11 that this facility would not be similar to a
12 veterinary hospital if the dogs were at the facility
13 only during the day?

14 MS. OGUNNEYE: It could still be
15 comparable to a hospital, because pets go to the
16 veterinary hospital and are there during the day and
17 go home.

18 MS. DOUGHTY: Okay, okay. Well, that has
19 been asked and answered. Can I just ask you whether
20 you made any reference to the BOCA Codes in reaching
21 your determination that the boarding kennel is a
22 similar use to a veterinary hospital, the Building
23 Officials and Code Administrators classification of
24 uses and occupancy?

25 CHAIRPERSON GRIFFIS: For what? What

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1 would they look at BOCA for?

2 MS. DOUGHTY: Sorry?

3 MS. FERSTER: I object to that question.
4 I think it's outside the scope.

5 CHAIRPERSON GRIFFIS: I beat you to it.
6 What would they look at BOCA for?

7 MS. DOUGHTY: I'm simply trying to
8 establish whether or not they did.

9 CHAIRPERSON GRIFFIS: I know, but why?

10 MS. DOUGHTY: Who knows what they did.

11 CHAIRPERSON GRIFFIS: You ought to know
12 why you're asking the question. Why are you asking
13 the question?

14 MS. DOUGHTY: I'm asking the question,
15 because they are -- you know, some information that we
16 received indicated that they did look at BOCA in
17 reaching this decision.

18 MS. FERSTER: Again, I renew my objection.
19 It's outside of the scope of her testimony.

20 CHAIRPERSON GRIFFIS: Well, it isn't if it
21 was utilized. What are you basing that on, your
22 information that they looked at BOCA to make this
23 analysis?

24 MS. DOUGHTY: That that was one of the
25 inputs.

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1 CHAIRPERSON GRIFFIS: I know, but how do
2 you know that?

3 MS. DOUGHTY: Because I was told that by
4 somebody who was told that.

5 CHAIRPERSON GRIFFIS: Oh, okay.

6 MS. DOUGHTY: It's merely a question.

7 CHAIRPERSON GRIFFIS: And now you have
8 told me, which puts me in the loop, right? Okay.

9 MS. DOUGHTY: I'm simply trying to
10 establish.

11 CHAIRPERSON GRIFFIS: Ms. Ogunneye, do you
12 ever refer to BOCA Building Code for establishing
13 definitions or establishing similarity of uses for
14 zoning?

15 MS. OGUNNEYE: No, we don't.

16 CHAIRPERSON GRIFFIS: Are you aware that
17 that happened in this case in instant?

18 MS. OGUNNEYE: Not from a zoning
19 standpoint.

20 CHAIRPERSON GRIFFIS: Do you ever go to
21 BOCA and look at the definitions of uses in BOCA and
22 then translate that into the Zoning Regulations?

23 MS. OGUNNEYE: No, we don't.

24 CHAIRPERSON GRIFFIS: Okay. Let's move
25 on.

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1 MS. DOUGHTY: You have testified, I
2 believe, that there were no complaints in the period
3 between the first C of O being issued and the C of O
4 coming up for renewal, and that this lack of
5 complaints constituted your monitoring of compliance
6 with the conditions. Is that right?

7 MS. OGUNNEYE: I'm sorry?

8 MS. DOUGHTY: Yes, okay. What mechanism
9 does your office have for receiving complaints?

10 MS. OGUNNEYE: People call in. We have --
11 there are help lines. People call in, call in
12 complaints. They could call into the Zoning Division.
13 They could call into Building Land Regulatory
14 Administration Division. I'm sure they could call the
15 Mayor's Office. There are so many avenues.

16 MS. DOUGHTY: So you would be aware if a
17 citizen had called the Mayor's Office to complain
18 about this use?

19 MS. OGUNNEYE: Definitely, yes.

20 MS. DOUGHTY: Are you aware that on August
21 25, 2003 Stephanie Mencimer wrote directly to the
22 Acting Zoning Administrator, who is also the director
23 of BLRA, complaining about the noise and other impacts
24 associated with this use? There is a letter. I can
25 make that letter available to counsel and to the Board

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1 if they wish to see it.

2 MR. RUSHKOFF: The question is just
3 whether she is aware of the letter?

4 MS. DOUGHTY: Yes, whether she is aware of
5 this letter of complaint.

6 CHAIRPERSON GRIFFIS: Right, that's the
7 question. Ms. Ogunneye?

8 MS. OGUNNEYE: I would have to see it to
9 answer that.

10 UNIDENTIFIED SPEAKER: Well, she has
11 already seen it. Okay.

12 MS. DOUGHTY: Well, you have already said
13 that there have been no -- there were no complaints.

14 MS. OGUNNEYE: That I am aware of, yes.

15 CHAIRPERSON GRIFFIS: So you can't be
16 aware of this letter then. Is that true? Using the
17 logic, if this is a letter of complaint and you have
18 stated that you aren't aware of any complaints --

19 MS. OGUNNEYE: Right, that would be the
20 logic.

21 CHAIRPERSON GRIFFIS: Okay.

22 MS. DOUGHTY: Now, when one telephoned up
23 DCRA to try to make a complaint about noise, you know,
24 where do you think a person would be directed to if
25 you're talking to the switchboard operator at DCRA?

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1 MS. OGUNNEYE: It wouldn't be to Zoning.

2 MS. DOUGHTY: I agree. In fact, you know,
3 are you aware that citizens calling up to complain
4 about this use were directed to the Neighborhood
5 Stabilization Program, to Mr. Mosley?

6 CHAIRPERSON GRIFFIS: Were you aware of
7 that?

8 MS. OGUNNEYE: No.

9 MS. DOUGHTY: So during the course of your
10 -- you know, I have a number of dates here, September
11 the 23rd, a phone call.

12 CHAIRPERSON GRIFFIS: She's not aware of
13 them though.

14 MS. DOUGHTY: Yes, October the 7th,
15 exactly.

16 CHAIRPERSON GRIFFIS: Okay.

17 MS. DOUGHTY: You're not aware of any of
18 these, multiple telephone calls?

19 CHAIRPERSON GRIFFIS: She already answered
20 that.

21 MS. DOUGHTY: Okay. When you were
22 assessing compliance with the conditions or assessing
23 whether or not to reissue this C of O, did you
24 consult --

25 MR. RUSHKOFF: Okay. I think at this time

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1 I'm going to object to this. I have tried to be
2 indulgent about this, but I don't see how DCRA's
3 handling of complaints that were or weren't made goes
4 to the issue of whether or not the decision was
5 correct when they decided to issue the C of O, I
6 guess, initially on a temporary basis and then later
7 on a permanent basis based on a matter-of-right
8 determination. So I guess I would object to further
9 questioning on the grounds that it's just not relevant
10 to the issues in the case.

11 MS. DOUGHTY: Well, the --

12 VICE CHAIR MILLER: Excuse me, Mr. Chair.

13 I would like to say something following this, because
14 I think it's very --

15 CHAIRPERSON GRIFFIS: Actually, let me
16 just interrupt for a minute. It's perfectly relevant
17 based on the fact that Ms. Ogunneye actually opened it
18 up and indicated that they were going to monitor the
19 conditions at the site in order to establish whether
20 they would reissue a Certificate of Occupancy,
21 basically, setting up a process I'm not aware of.
22 However, I don't think we need to belabor the point.

23 MS. DOUGHTY: Okay.

24 CHAIRPERSON GRIFFIS: I mean, I think we
25 have really hit this home of where were the complaints

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1 were going and who got them and what was done with
2 them. Go ahead.

3 VICE CHAIR MILLER: I just also just want
4 to put this out to you, because separate from all
5 those other complaints that may never have reached
6 you, it looks to me like the second Certificate of
7 Occupancy was issued January 28, 2004 and you did make
8 the statement that the first one was conditional to
9 see whether there were any complaints. So as of
10 January 28, 2004 the appeal in this case had already
11 been filed in which we have heard many complaints.

12 So can you address whether you are aware
13 of that aspect?

14 MS. OGUNNEYE: Yes, again, I stated before
15 that those conditions were put forward by the
16 applicant. Zoning in no way imposed it on them. They
17 imposed it of their own free will and like Mr. Griffis
18 mentioned, there is nowhere in the Zoning Regs that
19 says we should put X conditions or within X time.
20 Call it indulgent.

21 VICE CHAIR MILLER: Basically, your
22 issuance of the second Certificate of Occupancy was
23 not because there hadn't been complaints, but it was
24 because you determined it was a matter-of-right?

25 MS. OGUNNEYE: That would be correct.

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1 VICE CHAIR MILLER: It didn't matter
2 whether there were other things. Okay.

3 MS. DOUGHTY: I just have one or two
4 further questions. Can you tell me how often you
5 would do this? How many cases have you, for example,
6 attached or agreed to the attachment of conditions to
7 a C of O, and I mean zoning or use conditions not
8 Building Code conditions?

9 MS. OGUNNEYE: Maybe to clarify the issue
10 better, I might have to refer to the Building Codes
11 issue, because there are times that in issuing a C of
12 O you have to go through Building Code inspections
13 anyway and if under the Building Codes requirements
14 conditions have to be put forth, but it would have no
15 bearing on the zoning aspect. It's just that they
16 would have to fulfill the BOCA part for Zoning to do
17 the issuance of the Certificate of Occupancy.

18 MS. DOUGHTY: So you're not aware of any
19 other cases where conditions have been placed on the
20 use?

21 MS. OGUNNEYE: You --

22 MS. DOUGHTY: Either voluntary conditions
23 or, you know, conditions that affect the --

24 CHAIRPERSON GRIFFIS: Right. Do you
25 understand the question?

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1 MS. OGUNNEYE: Yes.

2 CHAIRPERSON GRIFFIS: Okay.

3 MS. OGUNNEYE: We don't put conditions on
4 uses. I mean, it's either the use is matter-of-right
5 or not. If it's not, then they go before the Board.

6 MS. DOUGHTY: Okay.

7 MS. OGUNNEYE: The only conditions we
8 would apply would be on something other than the use
9 itself.

10 CHAIRPERSON GRIFFIS: Have you ever done
11 this before, a similar situation, I think that's the
12 question, where you had a matter-of-right use and
13 there were volunteered conditions on it? Are you
14 aware of that ever being done?

15 MS. OGUNNEYE: Most times the conditions
16 are usually other than the use.

17 CHAIRPERSON GRIFFIS: Okay.

18 MS. OGUNNEYE: And this one wasn't based
19 on the use itself, just conditions.

20 CHAIRPERSON GRIFFIS: Okay. So in your
21 reflection, at this point, trying to recall the stuff
22 that you do, there is not something that pops into
23 mind?

24 MS. OGUNNEYE: No, not from a use
25 standpoint, no.

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1 CHAIRPERSON GRIFFIS: Okay. Others?

2 MS. DOUGHTY: So is it -- are you saying
3 then that this Board, the Board, should ignore the
4 conditions when the Board is considering whether or
5 not this use is a matter-of-right use? It should
6 completely ignore the conditions, because, you know,
7 it should --

8 MR. DONOHUE: Mr. Chairman, I'm going to
9 object. This is going beyond the scope of her
10 testimony. She explained that they looked at the
11 conditions. She explained the monitoring procedures
12 and she has testified to some length as to how they
13 arrived at the acceptance of the conditions proffered
14 by WagTime.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. DONOHUE: But the question is should
17 the Board ignore all that.

18 CHAIRPERSON GRIFFIS: Right.

19 MR. DONOHUE: It's beyond the scope.

20 CHAIRPERSON GRIFFIS: That's very true,
21 but rephrase. Well, why don't you try and rephrase
22 it, because it isn't actually a direct cross
23 examination question based on her testimony.

24 MS. DOUGHTY: Do you think the conditions
25 imposed on the C of O are relevant to the issue of

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1 whether a boarding kennel is similar to a veterinary
2 hospital?

3 MS. OGUNNEYE: I'm sorry. Could you
4 repeat that?

5 MS. DOUGHTY: Do you believe the
6 conditions that were agreed as part of the C of O are
7 relevant to the assessment or to the issue of whether
8 the boarding kennel, a boarding kennel, is similar, a
9 similar use, to a veterinary hospital?

10 MS. OGUNNEYE: No.

11 MS. DOUGHTY: So when you are assessing
12 the similarity of these two uses, you're thinking
13 about it in terms of -- you are ignoring the 20 dogs
14 outside and you're thinking --

15 MR. RUSHKOFF: Objection.

16 MS. DOUGHTY: -- it could be any number of
17 dogs?

18 CHAIRPERSON GRIFFIS: Let's get questions,
19 please.

20 MS. DOUGHTY: Okay. All right. Let's
21 move on. To the best of your knowledge, has DCRA ever
22 conducted any noise tests at the premises?

23 MS. OGUNNEYE: It's not part of Zoning's
24 purview. We don't conduct noise test levels.

25 MS. DOUGHTY: So under what circumstances

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1 would a zoning inspector be sent to the premises?

2 MS. OGUNNEYE: To ensure that they do have
3 a valid Certificate of Occupancy, make sure they are
4 parking within where parking spaces are, whatever
5 zoning requirements are.

6 MS. DOUGHTY: Okay. Thank you.

7 CHAIRPERSON GRIFFIS: Next? Who is up
8 next?

9 MR. WEMPLE: I'll go.

10 CHAIRPERSON GRIFFIS: Hold on a second.

11 MS. FERSTER: Do you want the intervenor
12 next?

13 CHAIRPERSON GRIFFIS: Well, why don't you
14 get ready, but yes, you're up next. Ms. Miller, you
15 have a quick question?

16 VICE CHAIR MILLER: Ms. Ogunneye, I have
17 one more question. I think, you know, when you're
18 looking to see if this use fits within veterinary
19 hospital, I think you said well, there aren't any
20 guidelines in the regulations like that that limit the
21 number of animals or whatever, and I'm just wondering,
22 there aren't any guidelines, right, so you look at
23 this term.

24 So how do you evaluate what falls within
25 that term? Is it based on your just general

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1 understanding or is there someplace you go to?

2 MS. OGUNNEYE: I guess the place to go to
3 would be other similar veterinary hospitals to look at
4 how those have been applied in the past if it were a
5 hospital.

6 VICE CHAIR MILLER: But, I mean, you
7 didn't do that?

8 MS. OGUNNEYE: No, I didn't, because this
9 wasn't a hospital.

10 BOARD MEMBER ETHERLY: I mean, perhaps
11 what -- Ms. Miller, I think, is sniffing around the
12 same question I'm sniffing at.

13 MS. OGUNNEYE: Right.

14 BOARD MEMBER ETHERLY: We need some
15 insight into what did you think about? What hit your
16 mind?

17 MS. OGUNNEYE: Okay. I guess --

18 BOARD MEMBER ETHERLY: As you started
19 trying to massage that similarity question, and I
20 understand your difficulty.

21 MS. OGUNNEYE: Right.

22 BOARD MEMBER ETHERLY: There is no
23 guideline for how to do it, but you did it.

24 MS. OGUNNEYE: Okay. The similarities is
25 you look at the health services. That takes care of

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1 the grooming part. You look at the hospital. That
2 takes care of staying overnight. You look at the pet
3 supply. That takes care of the pet supply.

4 Now, in a pet store that sells dogs, cats,
5 whatever, those dogs stay there overnight. They don't
6 transport them out of the pet shop and bring them back
7 the next day. So those are pretty much, you know --

8 BOARD MEMBER ETHERLY: Okay. So for you
9 it was a fairly intuitive kind of exercise.

10 MS. OGUNNEYE: Yes.

11 BOARD MEMBER ETHERLY: You didn't look it
12 up. You didn't go specifically to look at a
13 description of a hospital or a spa somewhere. You
14 didn't pick up a piece of paper somewhere in the dark
15 recesses of DCRA. It was just you fairly thought it
16 out. You didn't go to a dictionary or an
17 encyclopedia.

18 MS. OGUNNEYE: Pretty much yes, and since
19 the Zoning Regs doesn't have -- because they do have
20 definitions for some uses or some things, there isn't
21 one there.

22 BOARD MEMBER ETHERLY: Okay. So you
23 looked, but you did look?

24 MS. OGUNNEYE: Again, if I looked in the
25 dictionary, it's just going to explain what the use is

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1 or a definition of the use.

2 BOARD MEMBER ETHERLY: Okay.

3 MS. OGUNNEYE: It's not going to give me
4 the number --

5 BOARD MEMBER ETHERLY: Okay. Ms. Miller,
6 I --

7 MS. OGUNNEYE: -- that goes with the use.

8 VICE CHAIR MILLER: Is it fair to say that
9 you basically used your general understanding of what
10 a veterinary hospital was, for instance, for that
11 category?

12 MS. OGUNNEYE: That's fair enough, yes.

13 VICE CHAIR MILLER: Okay. Thank you.

14 CHAIRPERSON GRIFFIS: Okay. Let's
15 continue.

16 MR. DONOHUE: Thank you, Mr. Chairman, Ed
17 Donohue on behalf of WagTime. I'm going to be brief,
18 Mr. Chair, because I think this witness has answered a
19 lot of questions, but let me just refer you back to
20 subsection 721 both .2 and .3, permitted uses in the
21 C-2 District.

22 And calling your attention to the
23 veterinary hospital. I believe your testimony was
24 that with respect to overnight stays, you thought
25 veterinary hospitals was the most relevant.

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1 MS. OGUNNEYE: Correct.

2 MR. DONOHUE: Is that correct?

3 MS. OGUNNEYE: Correct.

4 MR. DONOHUE: And do you see a limitation
5 under the heading that says veterinary hospital? For
6 example, is the veterinary hospital limited by number
7 of dogs?

8 MS. OGUNNEYE: No, it's not.

9 MR. DONOHUE: By hours of operation?

10 MS. OGUNNEYE: No.

11 MR. DONOHUE: By outdoor recreation area?

12 MS. OGUNNEYE: No.

13 MR. DONOHUE: And the C-2 District is a
14 more restrictive zone than is the C-3 District,
15 correct?

16 MS. OGUNNEYE: That's correct.

17 MR. DONOHUE: So then a veterinary
18 hospital is, of course, permitted by right in the C-3
19 District?

20 MS. OGUNNEYE: That's correct.

21 MR. DONOHUE: And no restrictions in that
22 District either?

23 MS. OGUNNEYE: No.

24 MR. DONOHUE: And calling your attention
25 to P for pet shop, are there restrictions on the

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1 number of pets located in a pet shop?

2 MS. OGUNNEYE: No, there aren't.

3 MR. DONOHUE: And the pet shop is, first
4 of all, permitted in the C-2 District and also in the
5 C-3-A, correct?

6 MS. OGUNNEYE: That's correct.

7 MR. DONOHUE: And are there limitations on
8 the hours of operation?

9 MS. OGUNNEYE: No, there isn't.

10 MR. DONOHUE: Is there any limitation on
11 outdoor recreation area? In other words, could a pet
12 store have an outdoor area for exercise of its dogs?

13 MS. OGUNNEYE: It's not noted.

14 MR. DONOHUE: It's not what? I'm sorry.

15 MS. OGUNNEYE: No, it's not noted in the
16 regs.

17 MR. DONOHUE: Not noted. And no
18 limitation on the number of dogs, correct?

19 MS. OGUNNEYE: Correct.

20 MR. DONOHUE: And just a few minutes ago
21 you explained, in response to a question, that it is
22 common for animals that don't sell during the course
23 of the day to reside in the pet store overnight. Is
24 that correct?

25 MS. OGUNNEYE: That's correct.

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1 MR. DONOHUE: And no limitation on that or
2 no restriction under zoning, correct?

3 MS. OGUNNEYE: Correct.

4 MR. DONOHUE: I would like to go to the
5 letter that received so much discussion earlier, and
6 it is the letter dated July 30, 2003 to Steve Sher,
7 signed by Mr. Noble. And in response to a question,
8 and I think it came from the Board, as to why the
9 conditions, I believe what you said was, they were
10 offered by the applicant.

11 MS. OGUNNEYE: That's correct.

12 MR. DONOHUE: And I believe you also said
13 that the purpose for issuing a conditional or
14 provisional Certificate of Occupancy was to see
15 whether the conditions were, in fact, complied with,
16 correct?

17 MS. OGUNNEYE: Correct.

18 MR. DONOHUE: Now, Mr. Rushkoff mentioned
19 earlier that you were at the earlier hearing. Is that
20 true?

21 MS. OGUNNEYE: The earlier WagTime?

22 MR. DONOHUE: The hearing at the Board,
23 yes.

24 MS. OGUNNEYE: Yes, I was.

25 MR. DONOHUE: All right. And calling your

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1 attention to the letter. You've got it in front of
2 you?

3 MS. OGUNNEYE: Yes.

4 MR. DONOHUE: You see the condition listed
5 as 1, which says "No more than 20 dogs are permitted
6 outside at any one time."

7 MS. OGUNNEYE: Yes, I do.

8 MR. DONOHUE: Did you hear any testimony
9 that there were, in fact, in excess of 20 dogs outside
10 at any one time?

11 MS. OGUNNEYE: No, I didn't.

12 MR. DONOHUE: I'm calling your attention
13 to Condition 2. "Use of the outdoor space at rear of
14 the property is permitted only between 9:00 a.m. and
15 5:00 p.m." Did you hear any prior testimony that the
16 use of the outdoor space was used in excess of the
17 hours that are shown, 9 to 5?

18 MS. FERSTER: I'm going to object, at this
19 point, only because I don't think the issue here again
20 is whether or not the noise or other impacts of this
21 facility are relevant to the issues in EPL. This is a
22 question of whether or not the Zoning Administrator
23 properly determined whether or not this use is similar
24 to other matter-of-right uses.

25 CHAIRPERSON GRIFFIS: I absolutely agree.

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1 However, there has been now so many questions and
2 actual testimony based on these conditions, that I
3 don't see how I could preclude a cross examination
4 question on that exact testimony that Ms. Ogunneye has
5 already provided. So I think we can get through it
6 fairly quickly, but I think I'm going to have to allow
7 it.

8 MR. DONOHUE: Condition 3, "Use of the
9 outdoor space must be supervised by employees." Did
10 you hear any prior testimony that the use of the
11 outdoor space was unsupervised by employees?

12 MS. OGUNNEYE: No, I didn't.

13 MR. DONOHUE: That's it, Mr. Chairman.

14 CHAIRPERSON GRIFFIS: Thank you very much.

15 MR. DONOHUE: With respect to that letter.

16 CHAIRPERSON GRIFFIS: I'm sorry, I didn't
17 hear the last part.

18 MR. DONOHUE: I said that's it with
19 respect to that letter. I just have one other
20 question.

21 CHAIRPERSON GRIFFIS: Oh, okay.

22 MR. DONOHUE: There was a question about
23 the complaint procedures and I think, frankly, some
24 criticism of DCRA in its handling of correspondence.
25 And I'll call your attention to the email, the print

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1 of the email that Mr. Rushkoff introduced and it is
2 dated June 4, 2003 from you to Mr. Paul Huffheiser
3 with a copy to Stephanie Mencimer. Do you see that?

4 MS. OGUNNEYE: Yes, I do.

5 MR. DONOHUE: So, apparently, you and Ms.
6 Mencimer have email corresponded with respect to this
7 use. Is that correct?

8 MS. OGUNNEYE: Through Paul Huffheiser,
9 yes.

10 MR. DONOHUE: All right. Did Ms. Mencimer
11 take advantage of your email address to notify you of
12 any zoning violations during the prior Certificate of
13 Occupancy?

14 MS. OGUNNEYE: I'm sorry, rephrase that.

15 MR. DONOHUE: During the period of time
16 when the previous C of O was issued, July to January
17 28th, did the appellant, Stephanie Mencimer, contact
18 you via email to notify you of zoning violations at
19 WagTime?

20 MS. FERSTER: Can we be more specific
21 about what sort of zoning violation?

22 MR. DONOHUE: I think it was on the
23 certificate.

24 MS. FERSTER: I mean, there are many
25 zoning violations. Are we talking about parking

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1 requirements?

2 CHAIRPERSON GRIFFIS: Wait a minute. It's
3 his question though.

4 MR. DONOHUE: It's a question. Did she
5 contact you via the email address? We all have seen a
6 copy of -- we now know your email address, and I'm
7 asking, as one of the principal appellants in the
8 case, whether she contacted you via email to notify
9 you of an assertion or an allegation of a zoning
10 violation?

11 MS. OGUNNEYE: No.

12 MR. DONOHUE: That's all I have, Mr.
13 Chairman.

14 CHAIRPERSON GRIFFIS: Thank you.

15 MR. DONOHUE: Thank you.

16 CHAIRPERSON GRIFFIS: Next?

17 MS. FERSTER: Okay. Ms. Ogunneye, let's
18 start with the temporary Certificate of Occupancy that
19 was provided by your counsel in the packet that was
20 distributed. Can you turn to that packet?

21 MS. OGUNNEYE: Sure.

22 MS. FERSTER: To have it in front of you.
23 Okay. Turning first to page 2 of the Certificate of
24 Occupancy, I'm sorry, yes, which is page 3 of Mr.
25 Rushkoff's submission, it indicates on the area for

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1 zoning division, there is no signature by any zoning
2 official. Why is that? Why is there no signature by
3 a zoning person in this space?

4 MS. OGUNNEYE: Actually, it's signed on
5 the lower line.

6 MS. FERSTER: Okay. Who is she?

7 MS. OGUNNEYE: Swan Mac.

8 MS. FERSTER: And who is Swan Mac?

9 MS. OGUNNEYE: A zoning technician.

10 MS. FERSTER: Okay. And this space where
11 she signed as examiner's use indicates that a fee was
12 paid. That is correct?

13 MS. OGUNNEYE: Correct.

14 MS. FERSTER: Okay. And why didn't she
15 sign under the zoning division approval space? This
16 is just an error?

17 MS. OGUNNEYE: No, it's not an error. I
18 believe Mr. Noble signed and he put his signature up
19 top.

20 MS. FERSTER: Okay. So this temporary
21 Certificate of Occupancy was approved personally by
22 the Acting Zoning Administrator, Mr. Noble. Is that
23 correct?

24 MS. OGUNNEYE: You could say that, yes.

25 MS. FERSTER: Okay. How many Certificates

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1 of Occupancy does Mr. Noble normally personally
2 authorize?

3 MS. OGUNNEYE: As the Acting Zoning
4 Administrator or as a BLRA Administrator?

5 MS. FERSTER: As the Acting Zoning
6 Administrator.

7 MS. OGUNNEYE: Not many.

8 MR. RUSHKOFF: Objection to relevancy, Mr.
9 Chairman.

10 CHAIRPERSON GRIFFIS: Yes, why is it
11 relevant how many he does?

12 MS. FERSTER: I think I would like to
13 establish, particularly since the at issue is so-
14 called in-depth review by the Zoning Office, that Mr.
15 Noble -- I just want to know why Mr. Noble personally
16 undertook to examine this particular Certificate of
17 Occupancy, particularly considering --

18 CHAIRPERSON GRIFFIS: That's not a good
19 question. Why did Mr. Noble personally particularly
20 look at this Certificate of Occupancy? Is that normal
21 procedure? Two points to the question.

22 MS. OGUNNEYE: Yes, he looks at it if --

23 CHAIRPERSON GRIFFIS: Is this the standard
24 way Mr. Noble spends this much time looking at a
25 Certificate of Occupancy?

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1 MS. OGUNNEYE: No, he doesn't.

2 CHAIRPERSON GRIFFIS: Okay. And why in
3 this particular case did he spend so much time?

4 MS. OGUNNEYE: If there are issues that
5 need to be clarified maybe, if the technician isn't so
6 clear on which way to go maybe, if there are any
7 other --

8 CHAIRPERSON GRIFFIS: Perhaps more
9 complicated than most Certificate of Occupancies of
10 which he wouldn't spend time on. Is that correct? Is
11 that what you are saying?

12 MS. OGUNNEYE: Yes, but not from a zoning
13 standpoint.

14 CHAIRPERSON GRIFFIS: I see. I don't see
15 actually. What do you mean?

16 MS. OGUNNEYE: Again, a Certificate of
17 Occupancy application has to go through the inspection
18 process.

19 CHAIRPERSON GRIFFIS: Okay.

20 MS. OGUNNEYE: Structural, mechanical,
21 fire, health, all those other things.

22 CHAIRPERSON GRIFFIS: You're saying --

23 MS. OGUNNEYE: A number of issues.

24 CHAIRPERSON GRIFFIS: Mr. Noble was doing
25 all of those?

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1 MS. OGUNNEYE: Yes, he is the Building
2 Land Regulation's Administrator.

3 CHAIRPERSON GRIFFIS: Yes.

4 MS. OGUNNEYE: And through the BOCA Code,
5 he can enforce conditional approvals.

6 CHAIRPERSON GRIFFIS: Okay.

7 MS. OGUNNEYE: When that is the case, he
8 will note it on the Certificate of Occupancy. And
9 that would be under his purview as the Building Land
10 Regulatory Administrator.

11 CHAIRPERSON GRIFFIS: I see.

12 MS. OGUNNEYE: Not as the Zoning
13 Administrator.

14 CHAIRPERSON GRIFFIS: I'll hand it back to
15 you, Ms. Ferster.

16 MS. FERSTER: Okay. So you are testifying
17 that Mr. Noble personally authorized this particular
18 Certificate of Occupancy due to complexities that were
19 unrelated to the zoning issues that are part of this
20 case?

21 MS. OGUNNEYE: I wouldn't say complexity,
22 but again, the applicant put forward conditions and
23 the conditions really don't have much bearing on
24 zoning.

25 MS. FERSTER: Well, that wasn't my

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1 question.

2 MS. OGUNNEYE: Maybe from --

3 MS. FERSTER: I wasn't talking about the
4 conditions. I was talking about I'm just trying to
5 understand that I thought I heard you say that there
6 were non-zoning reasons why Mr. Noble took it upon
7 himself to personally authorize this Certificate of
8 Occupancy. And if so, I would like to know what those
9 non-zoning reasons were.

10 MS. OGUNNEYE: I believe what I was saying
11 is, because the question was does Mr. Noble make it a
12 habit, you know, to review the Certificate of
13 Occupancies and put conditions on it, and I was -- I
14 explained that he does do that whenever he needs to
15 apply conditions from a BOCA standpoint.

16 MS. FERSTER: Okay. Did Mr. Noble apply
17 any conditions from a BOCA standpoint on this
18 particular Certificate of Occupancy?

19 MS. OGUNNEYE: Again, the conditions that
20 were applied were imposed by the applicant. It was
21 not necessary from a zoning standpoint. Maybe his
22 mindset was more from a BOCA standpoint, but I don't
23 believe the BOCA issue is part of the case. That's
24 why I stayed away from that.

25 CHAIRPERSON GRIFFIS: Okay. And hearing

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1 Ms. Ferster's past objection, I think she agrees with
2 you.

3 MS. FERSTER: Okay.

4 CHAIRPERSON GRIFFIS: Next question.

5 MS. FERSTER: Yes. Well, let's go to the
6 conditions then. You testified that the conditions
7 were imposed because the applicant, essentially, self-
8 imposed as conditions, correct? These were the
9 conditions that were proffered by the applicant.
10 That's correct, right?

11 MS. OGUNNEYE: Yes, correct.

12 MS. FERSTER: Okay. Now, if you turn to
13 the letter as part of the -- that counsel has prepared
14 from Mr. Sher, it indicates that there are three
15 conditions that the applicant is offering. Is that
16 correct?

17 CHAIRPERSON GRIFFIS: Let's move quickly
18 ahead.

19 MS. OGUNNEYE: That's correct.

20 CHAIRPERSON GRIFFIS: We've been here the
21 whole time.

22 MS. FERSTER: Yes, I would like to -- yes,
23 I would like to --

24 CHAIRPERSON GRIFFIS: We know the
25 conditions.

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1 MS. FERSTER: -- ask this question. Thank
2 you. I understand.

3 CHAIRPERSON GRIFFIS: No, you don't
4 understand.

5 MS. FERSTER: I'm just going forward.

6 CHAIRPERSON GRIFFIS: Because you've now
7 done it twice.

8 MS. FERSTER: If you could give me a
9 little more latitude on this question?

10 CHAIRPERSON GRIFFIS: Really, it's really
11 faster if you listen to what I'm saying. You don't
12 need to establish so much when we've already had all
13 of that stated. We know what the conditions are. We
14 know they are on a C of O. Get directly to the heart
15 of your question.

16 MS. FERSTER: Well, my heart, the heart of
17 my question is are there three conditions? Three, the
18 number three, that the applicant offered be
19 established. Is that correct?

20 MS. OGUNNEYE: Yes, that's correct.

21 MS. FERSTER: Okay. Now, if you turn to
22 Mr. Noble's letter of January -- June 3rd to Mr. Sher,
23 June 30th, sorry, to Mr. Sher, it indicates that Mr.
24 Noble has imposed four conditions. Is that correct?

25 MS. OGUNNEYE: That's correct.

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1 MS. FERSTER: Okay. So there is a fourth
2 condition that, apparently, Mr. Noble imposed that was
3 not requested by the applicant. Is that correct?

4 MS. OGUNNEYE: If you go back to the body
5 of the letter from Steve Sher, he did make mention in
6 the last paragraph and I don't know if you want to
7 read it.

8 MS. FERSTER: I've read it.

9 MS. OGUNNEYE: Okay. And that's where he
10 extracted the number four from.

11 MS. FERSTER: Okay. So Mr. Noble
12 extracted a fourth condition, but you would agree that
13 this condition was not specifically proffered by --
14 you previously agreed that only three conditions were
15 specifically proffered by the applicant. Is that
16 correct? And Mr. Noble extracted a fourth condition
17 on his own initiative and imposed that fourth
18 condition as part of the temporary Certificate of
19 Occupancy?

20 MS. OGUNNEYE: Well, the letter states
21 that Ms. Striber is continuing to investigate what she
22 can do to put a temporary cover over part or all of
23 the rear yard, and that is explicit in the letter.

24 MS. FERSTER: But the applicant did not
25 specifically offer to self-impose that condition on

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1 itself. Is that correct?

2 MS. OGUNNEYE: Again, the whole body of
3 the letter is admissible to Noble and he just pretty
4 much reiterated what he understood from the body of
5 the letter.

6 MS. FERSTER: Okay. Well, I'll move on
7 then, because I think the letter speaks for itself.
8 Let's turn to the January 28th Certificate of
9 Occupancy. Do you have that in front of you?

10 UNIDENTIFIED SPEAKER: That's not in here.

11 MS. FERSTER: Do you need it?

12 MS. OGUNNEYE: Yes, please.

13 MS. FERSTER: That's July. Okay. Turning
14 to the second page of that Certificate of Occupancy in
15 the space for office use it sets out Zoning Division
16 approval and it indicates that it was accepted by Faye
17 O. on J 28, June -- January 28th. That's you, is that
18 correct?

19 MS. OGUNNEYE: Yes, that's me.

20 MS. FERSTER: Okay. And underneath your
21 name it states per Zoning Administrator. Is that
22 correct?

23 MS. OGUNNEYE: That's correct.

24 MS. FERSTER: Now, was this notation
25 intended to reflect that the decision to issue this

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1 Certificate of Occupancy was made by Mr. Noble?

2 MS. OGUNNEYE: Not particularly, I mean.

3 MS. FERSTER: Well, why did you put that
4 notation in there?

5 MS. OGUNNEYE: Because we had jointly
6 reviewed the process and he wasn't in his office,
7 because I couldn't get him to sign it, so I went ahead
8 and signed on his behalf.

9 MS. FERSTER: Okay. So this was signed on
10 his behalf, by you on his behalf. Okay. Now, the
11 temporary Certificate of Occupancy, as we've all
12 noted, imposed these four conditions on the applicant.

13 When the applicant then applied for a permanent
14 Certificate of Occupancy, what efforts did you take to
15 monitor whether the applicant had complied with those
16 four conditions?

17 MS. OGUNNEYE: Again, we have a system
18 whereby when complaints come in, we have persons that
19 schedule inspections for the inspectors to go out and
20 follow-up on whatever the issues are. And being that
21 nothing came through, there was nothing to schedule or
22 to follow-up on.

23 MS. FERSTER: So you're saying no
24 inspections were made to determine whether or not
25 there was compliance with those conditions?

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1 MS. OGUNNEYE: Again, there are no
2 conditions that -- I think I've mentioned it many
3 times over the applicant imposed it. We went along.
4 There were no complaints.

5 MS. FERSTER: That's correct.

6 MS. OGUNNEYE: Based on those specific
7 conditions.

8 MS. FERSTER: And I just want to confirm
9 that, therefore, no inspections were made. And can
10 you just answer that yes or no? Were inspections made
11 during that six month period when the Certificate of
12 Occupancy was in place? That's all I want to know.
13 Just yes or no or I don't know.

14 MS. OGUNNEYE: I mean, I believe as memory
15 serves me right that we would have had a Zoning
16 Inspector go by. She might have visited there. But
17 not from a complaint standpoint.

18 MS. FERSTER: Okay. Just simply
19 monitoring compliance with the temporary Certificate
20 of Occupancy. And did the inspector determine that
21 the conditions had been satisfied?

22 MS. OGUNNEYE: Yes.

23 MS. FERSTER: And is there some kind of
24 document in the record that reflects that
25 determination?

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1 MS. OGUNNEYE: Not in the records, no.

2 MS. FERSTER: Okay. And so the inspector
3 determined, for example, that the fourth condition
4 that requires a canopy in the rear yard, that
5 condition was met. Is that correct?

6 MS. OGUNNEYE: That canopy again was
7 proposed by the applicant. It is not required by
8 Zoning Regulations.

9 MS. FERSTER: Okay. But did the Zoning
10 Inspector determine whether or not that condition had
11 been met?

12 MS. OGUNNEYE: Well, it didn't need --

13 MR. DONOHUE: Mr. Chairman, I'm sorry, but
14 I've got to object. She was asked whether she knew if
15 the inspection took place and she said I don't know.
16 And she said -- and Ms. Ferster said well, is that
17 typical? Is that common? She said I think maybe a
18 Zoning Inspector went out. Now, she is being asked to
19 imply as to what the inspector had in his or her mind.
20 We're getting pretty far down the road of
21 speculation.

22 CHAIRPERSON GRIFFIS: Agreed. If there
23 isn't any report, there is no way to substantiate
24 whether what she says is correct or not.

25 MS. FERSTER: Okay.

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1 CHAIRPERSON GRIFFIS: So let's move ahead.

2 MS. FERSTER: Okay. All right. Let's
3 move to the use issue as opposed to the process by
4 which this -- these Certificates of Occupancy were
5 approved. Do you agree, first of all, that the
6 principal use as authorized by the Certificate of
7 Occupancy are dog boarding and dog grooming. Is that
8 correct?

9 MS. OGUNNEYE: That's correct.

10 MS. FERSTER: Okay. And you have
11 testified previously that in determining again
12 focusing on the dog boarding use at a veterinary
13 hospital was the most relevant use that you compared
14 dog boarding to. Is that correct?

15 MS. OGUNNEYE: That's correct.

16 MS. FERSTER: Okay. And I did not hear
17 you testify that a pet shop was one of the uses that
18 you believed were similar to dog boarding. Is that
19 correct or do you want to correct that now?

20 MS. OGUNNEYE: Again, I looked at more
21 than one different uses in making the determination,
22 and I believe I broke down how each one of those three
23 uses were applicable.

24 MS. FERSTER: Okay. That's fine.

25 MS. OGUNNEYE: In my mind.

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1 MS. FERSTER: I just want to clarify in my
2 mind that, in fact, the pet shop was more -- pet shop
3 use was most relevant to the accessory use of retail
4 pet supplies as distinct from dog boarding. Is that
5 correct?

6 MS. OGUNNEYE: It could well be both
7 sides.

8 MS. FERSTER: Okay. So your testimony is
9 that -- I just want to be clear, because this affects,
10 of course, the cross examination that I am going to
11 provide and the length of that cross examination,
12 because previously you had testified that veterinary
13 hospital use was the most relevant use and cross
14 examination focused on the similarity between dog
15 boarding and veterinary hospitals. But if you are now
16 testifying that, in fact, part of your analysis
17 focused also on the similarity between pet shops and
18 veterinary hospitals, I need to ask you a lot more
19 questions about that analysis. So I just want to be
20 clear.

21 CHAIRPERSON GRIFFIS: Pet shops and
22 boarding or pet shops and --

23 MS. FERSTER: Pet shops and dog boarding.

24 CHAIRPERSON GRIFFIS: Okay.

25 MS. FERSTER: Right?

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1 CHAIRPERSON GRIFFIS: Right. You said
2 veterinary hospitals.

3 MS. FERSTER: I'm sorry.

4 CHAIRPERSON GRIFFIS: That's all right.
5 Boy, I hope we don't have to go too long, but there it
6 is. Was it part of your analysis, the boarding
7 aspect, of potentially of pet stores?

8 MS. OGUNNEYE: Again, all three uses were
9 part and parcel of the whole use.

10 MS. FERSTER: I understand that, but it is
11 important, since, of course, the appellants are not
12 challenging the retail pet supply aspect of the
13 Certificate of Occupancy as an accessory use.

14 MS. OGUNNEYE: Yes.

15 MS. FERSTER: But only challenging the dog
16 boarding use to understand whether or not your
17 determination that dog boarding, as one of the
18 principal uses at issue here, was similar to a pet
19 shop or not.

20 MS. OGUNNEYE: The only similarity is the
21 fact that the pets are boarded overnight.

22 MS. FERSTER: Okay. All right. But
23 again, before we have to go down a list, a very long
24 list of questions that probe into the similarities
25 between dog boarding and pet shops, again, you had

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1 testified that veterinary hospitals --

2 CHAIRPERSON GRIFFIS: I think we are --

3 MS. FERSTER: -- were most relevant.

4 CHAIRPERSON GRIFFIS: You didn't hear what
5 she said. Choose your course.

6 MS. FERSTER: So --

7 CHAIRPERSON GRIFFIS: Don't keep asking
8 her the same questions.

9 MS. FERSTER: All right. Well, then, I'm
10 going to have to go down a very long list of questions
11 relating to pet shops.

12 CHAIRPERSON GRIFFIS: Not very long you
13 won't. It's a pet shop and a boarding center. Ask
14 the direct question we can get to, right to the heart
15 of the matter.

16 MS. FERSTER: All right. I just want to
17 start first with a couple of questions about the
18 similarity between veterinary hospitals and dog
19 boarding. Okay. Let me just clarify first. You
20 understand that dog boarding is one of the principal
21 uses that is authorized by the Certificate of
22 Occupancy, correct?

23 MR. DONOHUE: Objection.

24 CHAIRPERSON GRIFFIS: What's the
25 objection?

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1 MR. DONOHUE: She is asking her if she
2 knows that the Certificate of Occupancy says. And she
3 is asking her and she is implying that that's the
4 principal use of the premises. And the Certificate of
5 Occupancy speaks for itself.

6 MS. FERSTER: Well, I asked that question
7 only because I heard her testify at some earlier point
8 that she thought dog boarding was an accessory use and
9 I wanted to establish clearly whether or not she
10 believes that dog boarding is the principal use or the
11 accessory use.

12 MS. OGUNNEYE: I don't believe I ever said
13 that the boarding was an accessory use.

14 MS. FERSTER: Well, I perhaps misheard
15 then. Can you just clarify for the record that you
16 understand that dog boarding is the principal use or
17 one of the principal uses authorized by the
18 Certificate of Occupancy?

19 MS. OGUNNEYE: Yes, 24-hour dog boarding
20 is.

21 MS. FERSTER: Okay. All right. Okay.
22 And you also testified that you believed the dog
23 boarding use was -- well, let me just back up one
24 minute. Are you aware that veterinary hospitals must
25 be licensed and must meet detailed licensing standards

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1 relating to cleanliness and sanitation, including in
2 exercise areas, in order to receive and maintain
3 licensure?

4 MS. OGUNNEYE: I'm not sure about the
5 exercise area, but I'm sure there are other licensing
6 agencies that do get involved in the process, yes.

7 MS. FERSTER: Okay. And you are aware
8 then of the regulations at 22 DCMR governing animal
9 facilities and veterinary hospitals?

10 MS. OGUNNEYE: That's not part of my
11 purview.

12 MS. FERSTER: Okay. But you are generally
13 aware that that licensing scheme is out there. Are
14 you aware of any licensing scheme relating to the
15 cleanliness, etcetera, of dog boarding facilities? Is
16 a dog boarding facility required to be licensed by the
17 District of Columbia?

18 MS. OGUNNEYE: Again, that's not under my
19 purview.

20 MS. FERSTER: So you don't know?

21 MS. OGUNNEYE: I wouldn't say I don't
22 know, but in relations to my review process, it really
23 doesn't play a part.

24 MS. FERSTER: Okay. So you just didn't
25 inquire into that issue?

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1 MS. OGUNNEYE: I would say that I don't
2 see why I'm required to, not that I didn't.

3 MS. FERSTER: You didn't know.

4 MS. OGUNNEYE: I didn't say I didn't know.

5 MS. FERSTER: Okay. But you -- do you
6 know?

7 MR. RUSHKOFF: Excuse me. I'm going to
8 object, at this point. The witness has testified, I
9 think, exhaustively as to the thought process that she
10 went through in making this decision. I think that
11 counsel is raising issues that are very appropriate
12 for argument, but I'm not sure they are appropriate
13 for this witness. So I'm not saying that these are
14 irrelevant.

15 CHAIRPERSON GRIFFIS: I tend to agree. I
16 don't think we're going to push her much farther and
17 find out more in terms of her analysis and how she
18 founded it. So far we've asked it six different ways.

19 MS. FERSTER: All right.

20 CHAIRPERSON GRIFFIS: And we're getting a
21 similar answer. So I think we do move on and put it
22 to the case presentation.

23 MS. FERSTER: All right. Okay. Now,
24 let's see, okay, turning to the similarity between --
25 well, let me ask you then, go through just a list of

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1 questions about pet shops, just to get that on the
2 record, since you have now testified that you believe
3 that dog boarding facilities are similar to pet shops.

4 Did you attempt to examine or determine, examine any
5 pet shops in making your determination that dog
6 boarding facilities were similar to pet shops?

7 MS. OGUNNEYE: Again, when I do my review,
8 I look at the uses and I apply the regs the way the
9 regs are intended to be applied.

10 MS. FERSTER: Okay.

11 MS. OGUNNEYE: I don't --

12 MS. FERSTER: Okay. So you undertook no
13 examination of pet shops and did not make any
14 comparison of the similarities in terms of operations
15 between pet shops and dog boarding facilities. Is
16 that correct?

17 CHAIRPERSON GRIFFIS: You mean, outside of
18 what she --

19 MS. FERSTER: In your determination.

20 CHAIRPERSON GRIFFIS: -- has already said
21 or are you looking for something additional?

22 MS. FERSTER: Again, I would simply -- I
23 understand what Ms. Ogunneye reviewed and that she
24 reviewed it in terms of the Zoning Regulations, but I
25 just want it to be on the record that she did not, in

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1 fact, undertake a specific inquiry into pet shops.

2 CHAIRPERSON GRIFFIS: I know that is what
3 you want on the record, but you -- we keep getting the
4 same answer. Her answer is on the record.

5 MS. FERSTER: Well, her answer I find
6 somewhat evasive in the sense that I keep asking her
7 did you undertake an examination of pet shops.

8 CHAIRPERSON GRIFFIS: I think we leave it
9 as it is. If you can --

10 MS. FERSTER: She doesn't say yes or no.

11 CHAIRPERSON GRIFFIS: -- please, direct
12 your attention --

13 MS. FERSTER: She says this is what I
14 looked at. I guess we can infer that that is a no.

15 CHAIRPERSON GRIFFIS: I don't know if you
16 can. You take it for what she says. I can't keep --
17 how many more times do we ask the same question?

18 MS. FERSTER: Okay. Well, then again, I--
19 all I can say is --

20 CHAIRPERSON GRIFFIS: Make a darn good
21 case.

22 MS. FERSTER: -- I put a question to the
23 witness that was similar to the question relating to
24 veterinary hospitals when, in fact, the issue was
25 whether or not dog boarding was similar to veterinary

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1 hospitals and I'm not going to go through that,
2 because appellants, of course, have already gone
3 through the question did you look at any or go and
4 examine any veterinary hospitals? Are you familiar
5 with how veterinary hospitals are operated?

6 CHAIRPERSON GRIFFIS: And we were all here
7 for that.

8 MS. FERSTER: You went all through with
9 that and I won't go through that, but now we've got
10 pet shops on the table, and again I feel the need to
11 go through that whole litany of questions relating to
12 pet shops, unless Ms. Ogunneye can indicate that she
13 did not look at pet shops.

14 CHAIRPERSON GRIFFIS: I know, but you're
15 going to keep asking questions until she says she
16 didn't look at pet shops? I mean it doesn't make any
17 sense.

18 MS. FERSTER: She didn't -- yes, that is
19 exact. We are here to determine --

20 CHAIRPERSON GRIFFIS: Well, put it
21 together in your case.

22 MS. FERSTER: Okay.

23 CHAIRPERSON GRIFFIS: You're not getting
24 that answer from her.

25 MS. FERSTER: All right.

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1 CHAIRPERSON GRIFFIS: What more can we do?

2 MS. FERSTER: All right. Then let the
3 record reflect --

4 CHAIRPERSON GRIFFIS: We have been doing
5 this for almost 20 minutes just on this issue.

6 MS. FERSTER: -- that I have asked a
7 question, and I just have to let the -- for the
8 record, I just have to, you know, let the record
9 reflect that I have asked this question of Ms.
10 Ogunneye and she did not answer that question, for the
11 record.

12 CHAIRPERSON GRIFFIS: If the record hasn't
13 gotten that yet, we're all in trouble.

14 MS. FERSTER: Yes. Okay. So just to go
15 then to the question of intensity. When you testified
16 in response to a question from the appellant that the
17 conditions that were imposed by the temporary
18 Certificate of Occupancy were not relevant to your
19 determination of whether the dog boarding use was
20 similar or not, if that -- do you mean by that that,
21 in fact, your review in assessing similarity between
22 dog boarding and any other matter-of-right use did not
23 look at the intensity of that use? Is that correct?
24 Is that a factor that is relevant?

25 MS. OGUNNEYE: The relevant --

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1 MS. FERSTER: Which is noise or --

2 CHAIRPERSON GRIFFIS: Let her answer the
3 question.

4 MS. OGUNNEYE: The relevant factor is what
5 is the use and where can the use be, and there is no
6 notation in the regs as to the number of dogs, the
7 number of pets, hours of operation.

8 MS. FERSTER: Okay. I have one last
9 question. Do you have the Zoning Regulations handy?

10 MS. OGUNNEYE: I believe I do.

11 MS. FERSTER: Okay. If you can turn to
12 section 721, "Use is a matter-of-right." Okay. And
13 you testified that this is the section, of course,
14 that you referred to in determining whether dog
15 boarding was matter-of-right. Okay. And that lists
16 uses ranging from A to X.

17 MS. OGUNNEYE: That's correct.

18 MS. FERSTER: To which are veterinary
19 hospitals and pet shops and, of course --

20 MS. OGUNNEYE: Yes.

21 MS. FERSTER: That's correct?

22 MS. OGUNNEYE: That's correct.

23 MS. FERSTER: Okay. Would it be fair to
24 characterize each of these uses that are listed in
25 section 721.2 as uses that are either by their nature

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1 not particularly noisy uses or that include conditions
2 that are designed to eliminate -- designed to limit
3 their noise.

4 MR. DONOHUE: Objection, Mr. Chairman,
5 this is testimony. She has asked a question about
6 section 721 and asked to see whether there are
7 limitations in the phrase "pet shop" or "veterinary
8 hospital."

9 CHAIRPERSON GRIFFIS: Yes, I don't see
10 where it was going.

11 MR. DONOHUE: That's part of the
12 intervenor's case if anything.

13 MS. FERSTER: Okay. Well, I just wanted
14 to -- I mean, I won't go there if you don't -- see,
15 it's directly relevant. This is a section that --

16 CHAIRPERSON GRIFFIS: What's the question?

17 MS. FERSTER: Again, I will say, as the
18 Zoning Administrator or a zoning person with expertise
19 in interpreting this provision, determining similarity
20 of uses, which is the issue before you --

21 CHAIRPERSON GRIFFIS: All right. Excuse
22 me. What's the question?

23 MS. FERSTER: These are all the uses that
24 are similar, okay. And then I want to know whether or
25 not one characteristic that all these uses have in

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1 common, in her view, is that they are either not
2 particularly noisy or include within them limitations
3 on their ability to cause noise.

4 CHAIRPERSON GRIFFIS: In all of 721?

5 MS. FERSTER: Well, okay.

6 CHAIRPERSON GRIFFIS: Matter-of-right
7 uses?

8 MS. FERSTER: Let's take --

9 CHAIRPERSON GRIFFIS: You can answer the
10 question, Ms. Ogunneye.

11 MS. FERSTER: -- just one.

12 CHAIRPERSON GRIFFIS: Do you find that
13 these fall into that category, no noise?

14 MS. OGUNNEYE: There's no such category.

15 CHAIRPERSON GRIFFIS: What's your
16 experience with bowling alleys? Are they noisy?

17 MS. OGUNNEYE: Yes, they are.

18 MS. FERSTER: Okay. Now, since you
19 referred to bowling alleys, with particularly bowling
20 alleys, isn't it correct that bowling alleys are
21 permitted use provided that they shall be
22 soundproofed? That's correct?

23 MS. OGUNNEYE: Is that in the Zoning Regs?

24 MS. FERSTER: Do you have them in front of
25 you?

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1 CHAIRPERSON GRIFFIS: Yes, that's under
2 721.2(e). It's a specific on that use.

3 MS. FERSTER: Is there any other uses
4 identified in this list that you consider particularly
5 noisy uses?

6 MS. OGUNNEYE: I can't say. I really
7 couldn't answer that. I'll have to visit all the uses
8 to make that determination.

9 MS. FERSTER: All right. That's it. I
10 have no more questions.

11 CHAIRPERSON GRIFFIS: All right. Okay.
12 And it was my understanding that the ANC is not
13 represented. Is that correct?

14 MR. RUSHKOFF: Excuse me? I didn't hear
15 you.

16 CHAIRPERSON GRIFFIS: Just the ANC.

17 MR. RUSHKOFF: It's my understanding as
18 well.

19 CHAIRPERSON GRIFFIS: No ANC member is
20 here? Okay. Do you have any redirect?

21 MR. RUSHKOFF: I'll ask just a couple of
22 questions on one point that came from the Chair. You
23 were asked a question about jurisdiction. Let me just
24 ask you first, are you an attorney?

25 MS. OGUNNEYE: No, I'm not.

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1 MR. RUSHKOFF: Okay. I believe you were
2 asked whether or not you had jurisdiction to impose
3 conditions on the Certificate of Occupancy. Do you
4 recall a question about whether you had jurisdiction
5 to impose certain conditions or time limitations? And
6 I believe your response was that you didn't think you
7 had jurisdiction to do so.

8 MS. OGUNNEYE: That's correct.

9 MR. RUSHKOFF: I would like to rephrase
10 the question and let's drop the term jurisdiction and
11 just ask you do you believe that the Zoning
12 Administrator is allowed to accept conditions that are
13 voluntarily offered by the applicant?

14 MS. OGUNNEYE: It would have no bearing on
15 the issuance of the Certificate of Occupancy, but if
16 he chooses to, yes, he can.

17 MR. RUSHKOFF: Okay. I have no further
18 questions.

19 CHAIRPERSON GRIFFIS: Thank you. Any
20 cross on that limited specific testimony?

21 MR. DONOHUE: No, sir.

22 CHAIRPERSON GRIFFIS: Anyone else? Ms.
23 Ferster?

24 MS. FERSTER: No.

25 CHAIRPERSON GRIFFIS: Okay. Thank you.

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1 All right. Is the owner ready to have case
2 presentation?

3 MR. DONOHUE: Mr. Chair, I would like to
4 request a couple minute break, at this point, before
5 the --

6 CHAIRPERSON GRIFFIS: Well, you don't need
7 to request it. I'm just wondering whether you are
8 ready to go?

9 MR. DONOHUE: Yes.

10 CHAIRPERSON GRIFFIS: Okay. And how long
11 are you going to need?

12 MR. DONOHUE: We're going to talk about
13 that on the break.

14 CHAIRPERSON GRIFFIS: Gotcha.

15 MR. RUSHKOFF: I have a question, a
16 procedural question. Where in the procedure should a
17 closing or summation by DCRA go? Should that -- could
18 that go at the end? I have no great desire to do it
19 now, but I can.

20 CHAIRPERSON GRIFFIS: Yes, yes.

21 MR. RUSHKOFF: Or we can all do closings
22 at the same time?

23 CHAIRPERSON GRIFFIS: This is what I'm
24 going to do, because based on, first of all, I think
25 it is important for the Board when these go over days

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1 is to have summations at the end all together, so what
2 I'm going to do is allow -- I'm going to have 10
3 minutes for the participants in the case for closings
4 and then the appellant, of course, is allowed the
5 rebuttal testimony and then closings, which will be a
6 different time, which I'm not going to establish, at
7 this point, but well within that. So why don't we do
8 that, so that we have evidence and then we can hear it
9 all together. Perhaps you submit it in writing. Who
10 knows. But nonetheless, let's take 10 minutes?

11 MR. DONOHUE: Okay. Five is plenty.

12 CHAIRPERSON GRIFFIS: Good. 10 minutes
13 we'll be back.

14 (Whereupon, at 4:51 p.m. a recess until
15 5:13 p.m.)

16 CHAIRPERSON GRIFFIS: Very well. Let's
17 reconvene. One matter, of course, here I seem to have
18 recollection that we were going to stop at 6:00, based
19 on some schedule. Is that still a burden? Are people
20 able to go a bit beyond 6:00? Is Ms. Ferster here?

21 MS. DOUGHTY: No, and she is not able to
22 go beyond.

23 UNIDENTIFIED SPEAKER: No, she has another
24 meeting.

25 CHAIRPERSON GRIFFIS: I didn't hear a

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1 single word of all those voices.

2 MR. WEMPLE: Andrea Ferster cannot go
3 beyond 5:55.

4 CHAIRPERSON GRIFFIS: 5:55. Okay.

5 MR. MACY: And I'm leaving at 5:45.

6 CHAIRPERSON GRIFFIS: It looks like we're
7 all getting out of there, huh? Okay. Well, let's go
8 as far as we can.

9 MR. DONOHUE: Mr. Chairman, my name is Ed
10 Donohue on behalf of WagTime and it may please you to
11 know that the, what are we, appellees are not going to
12 put on any witnesses. We have submitted a rather
13 detailed letter briefed to you dated March 16th. If
14 permitted, I would like to just make a couple of
15 comments and then we'll waive any presentation on
16 behalf of WagTime.

17 And the comments are really just this.
18 There was a long discussion about the conditions
19 proffered, I'll use the term, in the prior C of O, and
20 in the period of time in which the prior C of O was
21 stamped and what all had happened. But I'll remind
22 the Board that the current C of O does not have
23 conditions. So it is interesting to discuss whether
24 it was appropriate to offer whether it is appropriate,
25 frankly, for the Zoning Administrator to have imposed

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1 the conditions.

2 But that Certificate of Occupancy expired
3 of its own terms and is literally moot. The question
4 before the Board is the Certificate of Occupancy
5 issued on January 28, 2004, and the conditions again
6 do not appear in that Occupancy Certificate.

7 The second point is one that came up, in
8 fact, just a few moments ago and there was some
9 discussion about section 721 and about some of the
10 uses that had limitations, bowling alley being one,
11 some others that I had called out in our brief, fast
12 food restaurants, those kinds of things. And it is
13 clear to me, and I think I'll address this in closing,
14 but I'll just mention it now, that the Zoning
15 Commission knows how to impose conditions, either
16 soundproofing or hours of operation or, for example,
17 drive-thru in fast food restaurants. They know how to
18 do that when appropriate, when necessary and they
19 didn't do it in this case.

20 And as the DCRA testimony explained,
21 veterinary hospital, pet shops, etcetera, the uses
22 that were deemed to be similar also do not have
23 limitations in terms of number of occupants, be they
24 human or dog, hours of operation, etcetera. So I'll
25 just point that out. I would ask you to look at the

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1 submission that we dated or we submitted on March the
2 16th and it does go through our rather detailed
3 opposition. And with that, I'm going to rest.

4 CHAIRPERSON GRIFFIS: Indeed. Questions
5 from the Board? Let's go to cross. Appellants?

6 MR. MACY: No questions.

7 MS. DOUGHTY: No, no questions.

8 MR. DONOHUE: No objection.

9 CHAIRPERSON GRIFFIS: Any cross? Nothing?
10 DCRA?

11 MR. RUSHKOFF: Well, we wouldn't pose
12 questions given that I don't think he was here as a
13 witness, but he was really arguing as counsel, so we
14 have no questions.

15 CHAIRPERSON GRIFFIS: No, I understand
16 that, but based on the submission, I mean, I'm not
17 sure how we would cross the submission, but certainly
18 we could have answers to it or questions based on
19 that.

20 MR. RUSHKOFF: I think we'll just reserve
21 it for our argument.

22 CHAIRPERSON GRIFFIS: For your closing,
23 you mean?

24 MR. RUSHKOFF: Closing.

25 CHAIRPERSON GRIFFIS: Well, then that's

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1 everybody. Let's assess then. The ANC will be called
2 next to present a case. Again, the ANC hasn't shown
3 up to do that, correct?

4 MS. BAILEY: Yes.

5 CHAIRPERSON GRIFFIS: Okay. That being
6 said, in terms of intervenor's case, Ms. Ferster, why
7 don't we just come and assess. I understand that you
8 have time schedule difficulties, so is it possible --
9 how long do you need to present your case?

10 MS. FERSTER: Well, we have one witness
11 here, Armando Lourenco. We would want to qualify him
12 as an expert witness in the interpretation of Zoning
13 Regulations. He has a written statement.

14 CHAIRPERSON GRIFFIS: I understand. Okay.

15 MS. FERSTER: He can submit to the record
16 and then he is prepared to summarize that in, you
17 know, whatever time frame, you know, feel is most
18 appropriate. My restriction is I have to leave here
19 at 5:55 p.m., preferably, 5:50, but 5:55 p.m. But I'm
20 comfortable with him staying longer.

21 CHAIRPERSON GRIFFIS: So you want to go
22 ahead?

23 MS. FERSTER: Yes.

24 CHAIRPERSON GRIFFIS: All right. Let's do
25 it.

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1 MS. FERSTER: We can do it.

2 MR. RUSHKOFF: Well, I have a procedural
3 question, too. Is there a time limitation applicable
4 here that we're working under?

5 CHAIRPERSON GRIFFIS: Yes. We're going to
6 the strict regulations which outline it at 60 minutes
7 and certainly we won't take that.

8 MR. RUSHKOFF: Because as I read Rule
9 3117.4, it says "An appellant, applicant and persons
10 and parties, except an ANC in support, shall
11 collectively have no more than 60 minutes to present
12 testimony." And then it says "All persons and parties
13 in opposition shall collectively have no more than 60
14 minutes exclusive of cross examination." And as I
15 read that, it should be 60 minutes a side as opposed
16 to a whole other 60 minutes for an intervenor on the
17 same side as one of the existing parties in the case.

18 But, I mean, I'm not saying that we should be strict
19 as to the 60 minutes, but I think that expired, but I
20 think we probably should exercise some discretion to
21 keep this well less than anything close to another 60
22 minutes, given the guidance provided by the Rule.

23 CHAIRPERSON GRIFFIS: Absolutely. Good
24 point. I think we will. Let's proceed.

25 MS. FERSTER: Thank you. Oh, I'm sorry,

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1 Mr. Lourenco needs to be sworn.

2 CHAIRPERSON GRIFFIS: Right. Mr. Lourenco
3 is being proffered as an expert witness. The Board
4 has its information. Is there any objection from any
5 participants? Yes?

6 MS. FERSTER: Yes, Mr. Lourenco needs to
7 be sworn in.

8 CHAIRPERSON GRIFFIS: Okay.

9 MS. FERSTER: He was not present when the
10 previous ones were sworn.

11 CHAIRPERSON GRIFFIS: Well, let's make him
12 an expert or not, first, and then we'll deal with
13 that. Any note of opposition from any of the
14 participants on establishing Mr. Lourenco as an expert
15 in zoning?

16 MR. DONOHUE: I'm willing to stipulate.

17 CHAIRPERSON GRIFFIS: Okay.

18 MR. DONOHUE: Okay.

19 CHAIRPERSON GRIFFIS: Any concerns from
20 the Board in opposition? Very well. The Board has
21 the information. It has been reviewed. So I think I
22 can bestow expert status to Mr. Lourenco on D.C.
23 Zoning Code or Regulations. Mr. Lourenco, if you
24 wouldn't mind standing and giving your attention to
25 Ms. Bailey?

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1 (Whereupon, the witness was sworn.)

2 MR. LOURENCO: Good afternoon, Chairman
3 Griffis and Members of the Board. My name is Armando
4 Lourenco and I'm a private consultant on Building Land
5 Use Regulatory Matters. Immediately prior to my
6 working as a private consultant, I served as the
7 administrator of the Building Land Regulation
8 Administration of the Department of Consumer and
9 Regulatory Affairs. I also served as the Acting
10 Zoning Administrator of the District of Columbia from
11 July '98 to August '99.

12 I was retained by Mid-City Development to
13 review the Zoning Administrator's decision that is now
14 under appeal. I am here to testify before you under
15 respective findings based on my experience and
16 background as a Regulatory Officer in Land Use Matters
17 under the Zoning Regulations of the District of
18 Columbia. My findings are also tempered by the
19 particular appreciation of the difficulty of the
20 judgments involved, that comes from having actually
21 walked more than one mile in the proverbial shoes of
22 the Zoning Administrator.

23 Based on my review, I am firmly convinced
24 that the Certificates of Occupancy issued to the
25 applicant were issued in error. Furthermore, it is my

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1 opinion that in the process of issuing the original
2 temporary Certificate of Occupancy, the Zoning
3 Administrator exceeded his authority and made
4 decisions that were not properly within the authority
5 of the Board of Zoning Adjustment and the Zoning
6 Commission.

7 The relevance of the precedent
8 establishing that process goes well beyond the
9 specifics of this case and as such should be
10 considered by the Board in its deliberations on this
11 appeal. First, let me address what I consider to be a
12 judgment error on the part of the Zoning
13 Administrator. Section 32 of 3.8(a) requires any
14 established use to be designed in the Certificate of
15 Occupancy in terms of a use classification established
16 by the Zoning Regulations. Every now and then a use
17 is proposed that is not specifically established in
18 the regulations, such as the case of the dog boarding
19 facility in question.

20 On such cases, the longstanding practice
21 of the Office of the Zoning Administrator for
22 Districts, where similar uses are authorized, has been
23 to compare the proposed non-established use to other
24 uses established in the regulations and to make a
25 judgment based on the analogies between the compared

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1 uses. As for the differences between the proposed
2 views and the established comparable uses, the Zoning
3 Administrator is expected to assess the relative
4 impact of those differences, based on their external
5 effects, on the proposed location and surrounding
6 premises.

7 This has been generally accepted to be
8 within the interpretation of authority of the Zoning
9 Administrator and the record seems to support that
10 such was the thought process that led to the issuance
11 of the first conditional C of O to WagTime. Where we
12 believe the Zoning Administrator erred was in his
13 conclusion that dog boarding was a matter-of-right use
14 in C-3-A Zoning District. The best insight that the
15 record provides as to the rationale used by the Zoning
16 Administrator to make that determination is the
17 Memorandum of Points and Authorities filed by
18 Corporation Counsel on behalf of DCRA.

19 Two important points can be inferred from
20 that memorandum. First, that DCRA's determination
21 that a dog boarding facility is allowed as a matter-
22 of-right in a C-3 District was based mainly on the
23 similarity of dog boarding to veterinary hospital
24 services. Second, that such determination was correct
25 because, and I quote, "Such a facility must be

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1 operated in compliance with the District's Animal
2 Control and Noise Control Regulations."

3 I must confess that I have difficulty
4 understanding the second argument. It sounds as if
5 Corporation Counsel advocates that abandoning Zoning
6 Regulation controls because all uses must comply with
7 other municipal regulations anyway. Extending that
8 logic, one could defend the location of a gasoline
9 service station in an R-1 Zone, because such a
10 facility must be operated in compliance with the
11 District's Fire Prevention, Air Quality Control and
12 Transportation Regulations.

13 R-1 could also argue for the location of
14 an off-premises alcoholic beverage sales using the
15 Residential District, because such a facility must be
16 operated in compliance with the District's Alcoholic
17 Beverage Control Regulations and their patrons must
18 comply with laws against public drunkenness and other
19 police regulations and obtaining public order.

20 The fallacy of the conclusion of
21 Corporation Counsel's is mainly this patent.
22 Corporation Counsel's use of other municipal
23 regulations, as a panacea, to justify a questionable
24 zoning determination could easily be stretched to any
25 Zoning District where those regulations apply starting

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1 at R-1-A. What is at issue here is whether the Zoning
2 Administrator applied the Zoning Regulations
3 correctly, not whether he considered other municipal
4 regulations, which may work towards or against the
5 goals of the Zoning Regulations. And in any case, I'm
6 not within the purview of the Zoning Administrator of
7 this Board.

8 Going back to the main issue of the
9 similarity of uses, Corporation Counsel states that,
10 and I quote, "Veterinary hospitals provide overnight
11 boarding for dogs that are awaiting or recovering from
12 treatment. It follows that the dog boarding facility
13 is a service use similar to veterinary hospital and
14 like a veterinary hospital, it's permitted as a
15 matter-of-right in the C-2 District." The fallacy of
16 this logistic abuse is so cruel that it dispenses
17 further analogies.

18 Using the same reasoning, if guests are
19 temporarily lodged in hotels and inmates are
20 temporarily lodged in jails, it will follow that any
21 distinction between the two uses in the Zoning
22 Regulations would be superfluous and a detention
23 facility could be judged a matter-of-right using a C-R
24 Zone by similarity with a hotel, based on the same
25 defective logic applied by Corporation Counsel in the

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1 WagTime case. Of course, that would be absurd.

2 One cannot disregard the difference
3 between ailing dogs kept indoors and often sedated, as
4 occurs typically in animals under treatment or
5 observation, kept overnight in a veterinary hospital
6 and healthy adult dogs exercising outdoors as a group.

7 The same way one cannot ignore the difference between
8 the adverse potentially impact of the presence of a
9 jail versus a hotel, just because in one aspect
10 temporary boarding of individuals they have a
11 similarity.

12 In both cases, all aspects of this
13 external effect should be considered and compared to
14 determine whether any difference would effect
15 significantly the enjoyment of the properties adjacent
16 to or nearby the proposed use. What the Zoning
17 Administrator failed to apply correctly and
18 Corporation Counsel failed to address, in the case of
19 the WagTime C of O's was exactly the proper
20 methodology to assess the adverse external effects
21 that come from the presence of multiple healthy adult
22 dogs in the same exercise open air enclosure, a
23 characteristic that is normally absent from veterinary
24 hospitals.

25 The external effects, including noise and

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1 other, that the dog boarding use have an impact on the
2 adjacent owner's enjoyment of their properties that is
3 significantly more adverse than the effect of the type
4 of service that was used as as a term of comparison by
5 the Zoning Administrator. That is one of the reasons
6 why I believe the determination was erroneous and the
7 dog boarding use should not have been considered
8 similar to veterinary hospital use or for that matter
9 to a pet shop.

10 There is another detail that should not be
11 overlooked in this case. The Certificates of
12 Occupancy issued to WagTime lists dog boarding as a
13 principal use. The comparison to veterinary hospital
14 found only one similarity to an accessory use,
15 overnight boarding, that is incidental to veterinary
16 hospital services. The hasty conclusion of similarity
17 drawn by Corporation Counsel blurs the fact that the
18 intensity of the accessory use is naturally lower than
19 if the use is the principal use of the facility.

20 In this case, the difference in intensity
21 of the use is not only quantitative, it rises to the
22 level of a qualitative difference. It is clear that
23 if dog boarding was conducted only as an accessory
24 use, for example, accessory to pet shop, it would be
25 subordinated to the needs of the principal use and it

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1 would be present only to the extent that your
2 impression of the principal use would depict it. In
3 that case, as an accessory use, its presence would
4 have a much less external impact and it would not be
5 objectionable in a C-3 Zone.

6 I would like to call your attention to two
7 BZA cases dealing with similarity of uses, Appeals No.
8 12845 and 13714. They are worth reviewing here for
9 the insight they provide on the decision making
10 process of the Zoning Administrator. In both cases a
11 stricter standard of similarity than in the present
12 case was upheld by the Board of Zoning Adjustment and
13 in the first case was affirmed by the D.C. Court of
14 Appeals.

15 The methodology used by the Zoning
16 Administrator to determine similarity of uses in those
17 cases was based on characteristics common to all of
18 the specified allowable uses. At issue was the
19 determination of similarity of certain professional
20 practitioners to architects, dentists, doctors,
21 engineers and lawyers, those other provisions are
22 currently in section 501.3. The criteria used by the
23 Zoning Administrator and upheld by BZA were: (1)
24 Ethical standards; (2) Professional licensing; and (3)
25 Professional advocacy.

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1 The Board's decisions were to uphold the
2 determination that those practitioners, the financial
3 analysts and economists, a public affairs consultant
4 and the lobbyist were not similar to architect,
5 dentist, doctor, engineer and lawyer, because they did
6 not meet the professional licensing criteria, although
7 they met one or both of the other two criteria.

8 CHAIRPERSON GRIFFIS: What's the name of
9 those appeals that you listed? One is --

10 MS. FERSTER: We can provide you copies.

11 CHAIRPERSON GRIFFIS: Is one Shagnon?

12 MR. LOURENCO: O'Keefe was the oldest one,
13 that was --

14 CHAIRPERSON GRIFFIS: O'Keefe?

15 MR. LOURENCO: I think it was O'Keefe.

16 CHAIRPERSON GRIFFIS: O'Keefe.

17 MS. FERSTER: Yes, O'Keefe.

18 MR. DONOHUE: I was under the impression
19 that we were going to get a summary of this seven page
20 testimony.

21 CHAIRPERSON GRIFFIS: I know.

22 MR. DONOHUE: It seems like we're getting
23 a reading.

24 CHAIRPERSON GRIFFIS: We're going to get
25 to that, also.

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1 MR. DONOHUE: Thank you.

2 CHAIRPERSON GRIFFIS: What's the second
3 one?

4 MS. FERSTER: Oh, that's something else I
5 wanted to -- he has been referring to his testimony.
6 If I might, we'll just distribute that now.

7 MR. DONOHUE: Thanks.

8 MR. LOURENCO: The most recent one is
9 Solomon Culker.

10 CHAIRPERSON GRIFFIS: Okay.

11 MR. LOURENCO: That's the financial
12 analyst, economist.

13 CHAIRPERSON GRIFFIS: All right. Is there
14 any possible way you could summarize this piece and
15 then summarize also the procedural errors?

16 MR. LOURENCO: I can try.

17 CHAIRPERSON GRIFFIS: Only because --
18 good.

19 MR. LOURENCO: Okay. Anyway, the
20 methodology employed by the Zoning Administrator and
21 upheld by the Board of Zoning Adjustment was based on
22 common characteristics of the uses against which
23 similarity was being tested. In the case it's very
24 obvious to me, and I'm just going to go real quick
25 through this, it's very obvious to me that in this

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1 case the Zoning Administrator was convinced from the
2 beginning that noise would be a problem.

3 That is very patent in the four conditions
4 that the Zoning Administrator appended in that letter
5 to the conditional C of O. It's patent also clearly
6 in the letter that the Zoning Administrator got from
7 Holland and Knight and it seems to me that in
8 determining similarity to the uses listed in 721.2 or
9 721.3, but 721.2 since it's a service, in determining
10 that at least the Zoning Administrator should have had
11 the care to go through and analyze noise wise what was
12 the common threats through all those, A through X.

13 If you note this, both Item E and Item Q
14 have certain restrictions that tend to mitigate the
15 issue of external noise, the soundproofing of the
16 bowling alleys, the prohibition of external storage
17 for plumbing and heating shops. The Zoning
18 Administrator failed to do that. I think that is one
19 test that should have been taken since he was, from
20 the start, aware of the fact that noise would be a
21 potential problem.

22 If, as the Zoning Administrator's Office
23 testified here earlier, pet shops and veterinary
24 hospitals were within the realm of the uses that they
25 were comparing with, they should have noted that both

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1 pet shops and veterinary hospitals are required to be
2 licensed, have very strict conditions. They have to
3 maintain licensing. They have to renew it
4 periodically. They have a level of oversight that dog
5 boarding facilities don't.

6 If we wonder and, obviously, Faye Ogunneye
7 testified earlier here that she would normally not
8 look at that, I believe that's an error, because it's
9 obviously something that is very important. It is the
10 reason why those two cases that I cited -- in those
11 two cases the Board of Zoning Adjustment sided with
12 the Zoning Administrator in denying the C of Os for
13 those applicants simply because they weren't licensed.

14 They weren't subject to the same level of legal
15 standards in the practice of their profession.

16 In this case the importance of this appeal
17 also has to do with the fact that once you obtain a C
18 of O, you pretty much are set for life. You don't
19 need to come back before any Board. You need to
20 comply with all applicable regulations in general, but
21 there is nothing specific to the use, to the
22 objectionable use of dog boarding that would originate
23 a review of the license. The only license they need,
24 besides basic business license, the only license they
25 need to operate it is exactly this Certificate of

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1 Occupancy.

2 Now, on the matter of the procedural
3 errors, well, my written testimony that you have in
4 front of you is fully -- I would just like to point
5 out a couple of things. It's very uncommon to see --
6 well, it's common to see Certificates of Occupancy
7 with conditions, but they always come from Building
8 Code requirements. They aren't completely fulfilled
9 at a point where the facility needs to be occupied,
10 and the building official judges that it's safe to
11 occupy. So those are the conditional C of Os that Ms.
12 Ogunneye referred to before that she saw very often,
13 and they are perfectly within the authority of the
14 BLRA administrator, which in this case happens to be
15 the same person as the Acting Zoning Administrator,
16 which kind of creates a little bit of confusion.

17 But quite frankly, I thought very hard and
18 I can't remember a single C of O, I'm not saying it
19 doesn't exist, but I can't remember a single C of O
20 that I have seen in my life in being within DCRA for
21 almost 10 years where there was a condition placed on
22 the use, and what really struck me when I looked at
23 the record in this case is that here is a C of O that
24 has conditions on the use.

25 The letter, I have a note here that it

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1 would be helpful for the Board to gather an
2 explanation of exactly why there are use conditions on
3 this Certificate of Occupancy. Ms. Ogunneye's
4 testimony today did shed some light on this and, in my
5 opinion, it showed the troublesome trend, kind of a
6 slippery slope into what I would call zoning by public
7 opinion poll that we should all stay away from.

8 When the letter of the Administrator, I
9 can't tell if it's the Zoning Administrator, it's
10 signed Administrator, I believe it's the BLRA
11 Administrator, when the letter of the BLRA
12 Administrator states that BLRA will monitor for six
13 months these four conditions, to me those are
14 conditions that are imposed in the C of O.

15 I don't believe the Zoning Administrator
16 has any authority to impose those conditions based on
17 the Zoning Regulations, and I don't believe the Zoning
18 Administrator is properly equipped to determine which
19 conditions to impose. I believe that if there is a
20 case to impose conditions on something that doesn't
21 quite comply with the Zoning Regulations, then this is
22 the place where that case needs to be brought forth
23 and it's a collective body like this Board or the
24 Zoning Commission if it turns out to be a text
25 amendment.

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1 It's the collective wisdom of a Board like
2 that that needs to figure out if 20 dogs outside is
3 too much or too little or if 9:00 to 5:00 is okay or
4 it should be 10:00 to 4:00. Those are not decisions
5 that I believe the Zoning Administrator's Office is
6 properly equipped to deal with as we could ascertain
7 also from Ms. Ogunneye's testimony today.

8 The rest of it, I think you can read
9 through it on a day where you have difficulty
10 sleeping, but I just think that basically it's this
11 substitution of the Zoning Administrator to the
12 functions that should be in the realm of the Zoning
13 Commission, because basically what he does when he
14 says it's okay to have this here, but you need not to
15 have more than 20 dogs outside, he is creating a new
16 section of the Zoning Regulations that states in
17 741.2, in C-3 you can have dog boarding provided that
18 the outdoor portion of the facility shall have no more
19 than 20 dogs at any time. That is really what he did.

20 That is what I think is troublesome in this whole
21 process.

22 Having concluded that the C of Os issued
23 to her at the time were issued as a result of the
24 combination of erroneous judgment, misapplication of
25 the rules and exercise of authority not vested in the

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1 Zoning Administrator, I believe the Board should
2 uphold the appeal, should revoke the current
3 Certificate of Occupancy and require the applicant to
4 obtain a variance from the Board before reapplying for
5 a Certificate of Occupancy.

6 CHAIRPERSON GRIFFIS: Thank you very much.

7 So if I understand your last summation, what you are
8 indicating is that the ZA may have, in this
9 conditioning and monitoring of conditions, you are
10 pulling us to the thought of they may have, actually
11 set up, basically, a special exception procedure in
12 their office. Is that correct?

13 MR. LOURENCO: A special exception
14 procedure without even the guidance of a special
15 exception list, which is a very risky act to
16 undertake.

17 CHAIRPERSON GRIFFIS: So I understand that
18 correctly, your statement?

19 MR. LOURENCO: Yes, I believe that they
20 didn't make the case of similarity.

21 CHAIRPERSON GRIFFIS: I understand.

22 MR. LOURENCO: And then they --

23 CHAIRPERSON GRIFFIS: And on page 2, you
24 are drawing the Board to following an analogy, an
25 analysis by analogy, and you have indicated that we

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1 should look at what was done in this case as putting a
2 gasoline service station in an R-1 Zone. But wouldn't
3 that mean that there was a matter-of-right use of
4 similarity in an R-1 Zone and is there a similar use
5 in an R-1 Zone?

6 MR. LOURENCO: I consider that
7 overextending reality to make a point. My point is,
8 the point I want to make is if we start justifying a
9 zoning decision for which we can't find a
10 justification in the Zoning Regulations and say, as
11 the letter from Corporation Counsel says, I will read
12 it again, the letter says "In conclusion, DCRA's
13 determination that the dog boarding facility is
14 allowed as a matter-of-right in a C-3 District was
15 correct, because such a facility must be operated in
16 compliance with the District's strict Animal Control
17 and Noise Control Regulations."

18 What this tells me is the reason why the
19 decision was correct is because there are these other
20 regulations that address what, noise and not being
21 bitten by the dog. It's basically what these two
22 things say. I am protecting the public from the
23 potential --

24 CHAIRPERSON GRIFFIS: I see.

25 MR. LOURENCO: -- dangers of having all

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1 these dogs here and I am protecting the public from
2 noise, because I have these regulations.

3 CHAIRPERSON GRIFFIS: Understood. Okay.
4 Other questions from the Board?

5 BOARD MEMBER ETHERLY: If I could, Mr.
6 Chair, I just want to jump in, because I want to
7 follow that particular point. I appreciated your
8 discussion, Mr. Lourenco, regarding the kind of de
9 facto special exception procedure where there is no
10 authority to do one, to implement one, but what was
11 also of interest to me is in the discussion of the
12 similarity factor. I don't want to go to 12845 just
13 yet, the two cases that you reference, but you made
14 the interesting point that, because we did hear some
15 distinction in the cross examination of Ms. Ogunneye,
16 with regard to noise being specifically referenced in
17 the case of a bowling alley. And in your testimony
18 discussion you do speak to why there are only two
19 references to noise in the list of factors in 721.2.

20 Could you walk through that a little more,
21 so once again, bowling alley at 721.2(e), reference to
22 soundproofing, of course, and then I believe with
23 respect to --

24 MR. LOURENCO: Plumbing and heating shop.

25 BOARD MEMBER ETHERLY: Exactly, at Q,

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1 excluding outdoor storage. Could you walk through
2 that just a little more, so I'm clear on understanding
3 that. Is it your argument that --

4 MR. LOURENCO: Okay.

5 BOARD MEMBER ETHERLY: Walk through that.

6 MR. LOURENCO: Okay. My argument comes
7 from the two BZA cases that were decided by the Board
8 and was then reaffirmed by the D.C Court of Appeals
9 where the criterion or the criteria that were put
10 forth by the Zoning Administrator, which in that case
11 it was a reverse problem, the Zoning Administrator's
12 Office was being challenged in their decision, and the
13 defense that the Zoning Administrator's Office mounted
14 was based on the three criteria they had applied.

15 And they explain, let me just read Item 13
16 from 13 and second 14. Item 13 in Findings of Fact
17 says "The Zoning Administrator testified that in
18 determining what constitutes a similar professional
19 person, he reviewed the uses specifically cited in
20 paragraph 4101.44 and determined what characteristics
21 were common to all of them. The Zoning Administrator
22 cited three criteria for a professional as follows."
23 And those are the three criteria that I mentioned.
24 721.4 allows you to --

25 BOARD MEMBER ETHERLY: It's similar.

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1 MR. LOURENCO: -- consider as matter-of-
2 right similar uses to either uses in 721.2 or 721.3.
3 It's difficult to find many characteristics that are
4 common to 26 or 27, different uses, but we know for a
5 fact that the Zoning Administrator was seriously
6 concerned from the start with noise.

7 And if you analyze in light of noise all
8 of these uses, you notice that the two that were most
9 likely to create the greatest exterior noise, in fact,
10 at the property line are exactly tagged with
11 additional conditions, which are that the bowling
12 alley provided that it shall be soundproof and in the
13 case of the clanking that you normally have in
14 exterior outdoor storage of a plumbing or heating
15 shop, it's prohibited.

16 BOARD MEMBER ETHERLY: But doesn't that
17 then beg the question with regard to the street car
18 depot or the bus passenger depot? That isn't
19 similarly tagged with language regarding soundproofing
20 or some type of noise abatement measure.

21 MR. LOURENCO: Well --

22 BOARD MEMBER ETHERLY: I mean, you would
23 agree that that use has some noise attached to it?

24 MR. LOURENCO: Sure. There is noise
25 attached to all of them. There is noise attached to

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1 all of them. And if you look at, for instance, the
2 external effects in an M Zone, it's very interesting
3 to notice that the provision that says if the M Zone
4 borders on a Residential Zone, then you apply these
5 other conditions, which are the conditions of the CM
6 Zone, which are lower standards of level of sound
7 pressure.

8 BOARD MEMBER ETHERLY: Okay. Well, I
9 don't want to beat it too hard, because I want to be
10 sensitive to time and I want my colleagues to jump in,
11 but I just wanted to kind of massage that a little
12 bit. I mean, I'm intrigued by it, because it does
13 fill in the gap of what the ZA should look at when
14 trying to determine what is similar. And as you heard
15 Ms. Ogunneye's testimony, she struggled with there are
16 no guidelines for it and your rationale does offer
17 some type of guideline.

18 MR. LOURENCO: There are some types of
19 guidelines.

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

22 VICE CHAIR MILLER: Well, that is actually
23 my question. You know, if you were making this
24 decision to decide whether or not this facility's
25 operation was similar to a veterinary hospital, what

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1 would you have looked at? And you started to say
2 there are some guidelines, so I would be interested in
3 knowing what guidelines you're referring to.

4 MR. LOURENCO: Yes, Ms. Ogunneye actually
5 touched on something when she said experience.
6 Unfortunately, Ms. Ogunneye has two years of
7 experience on the job, so she hasn't been exposed to
8 the same level of experience that other Zoning
9 Administrators have benefitted from when they had to
10 make decisions like this. Obviously, I'm not going to
11 say that if I were the Zoning Administrator, I would
12 have done a better job than they did. I'm just saying
13 they didn't do a very good job. At least this I would
14 have done.

15 The other issue, if you look at 721.4,
16 721.4 allows you to draw a similarity with 721.2 or
17 .3. Even though you may have a service, in this case
18 the dog boarding facility would be a service, you may
19 draw similarities to the establishments on .3. That
20 is one of the things that they actually did. They
21 went and looked and they found two. Actually, they
22 mentioned they found three, but the third one, the
23 health service stuff, didn't really correlate with the
24 dog boarding, which is the problem here.

25 They actually found two. Okay. If they

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1 found those two, they should have looked further than
2 just at the surface. One of the resources that the
3 Zoning Administrator's Office should have used is past
4 BZA cases. I have had very brief interaction with
5 this case, not certainly as long as they have had.
6 They have had six months to research all sorts of
7 other things at least, but I would have certainly
8 looked at the record of other BZA cases and see if
9 there was any case where this issue of similar uses
10 had come up.

11 CHAIRPERSON GRIFFIS: Where else would you
12 look?

13 MR. LOURENCO: And how had it been
14 resolved. And if they had thought about the
15 methodology, for instance these two cases, the
16 methodology to determine the similarity, they could
17 have thought about other conditions of a pet shop and
18 veterinary hospital that go beyond the fact that the
19 dog slept here, which is not the issue. The issue is
20 not a dog slept here.

21 CHAIRPERSON GRIFFIS: But this is historic
22 designations.

23 MR. LOURENCO: The issue is a bunch of
24 dogs are outside all together and they are all
25 healthy.

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1 CHAIRPERSON GRIFFIS: Okay. That is an
2 excellent point. What are the resources? I think you
3 could run down them then. The past BZA cases?

4 MR. LOURENCO: Well, different
5 Administrators will do things differently, but I would
6 have picked up the phone and called a couple of the
7 attorneys that are always bugging me at the door when
8 I'm the Zoning Administrator and pick their minds.
9 They normally have a lot of cases they remember that
10 they can give me references to. Corporation Counsel
11 certainly can do legal research and come up with -- I
12 used to work very well with them, but, in essence,
13 past cases of the Board and past cases that went to
14 court are one of the important sources you can use to
15 come --

16 CHAIRPERSON GRIFFIS: Court cases?

17 MR. LOURENCO: Court cases.

18 CHAIRPERSON GRIFFIS: I don't think Ms.
19 Miller is going to disagree with you there.

20 VICE CHAIR MILLER: No.

21 CHAIRPERSON GRIFFIS: Okay. Other
22 questions, Ms. Miller?

23 VICE CHAIR MILLER: Okay. So those --

24 MR. LOURENCO: I'm not an attorney.

25 VICE CHAIR MILLER: Those are your

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1 resources. Are there like basic factors you can look
2 at that like impact on the community or licensing?

3 MR. LOURENCO: Yes.

4 VICE CHAIR MILLER: Or basic categories?

5 MR. LOURENCO: Essentially, if you look at
6 the objectives of the Zoning Regulations and what the
7 Zoning Regulations are supposed to protect, the value
8 of property, foster an environment that's conducive to
9 the development of business and so on and so forth,
10 you have to put that all together and from there you
11 can infer criteria that would allow you to assess the
12 impact of this use, which is not specified.
13 Therefore, it's an unknown on the environment and you
14 can compare that with, for instance, the impact of all
15 these others and that's, for instance, where the noise
16 issue comes, where the other issue would come.

17 If you look, of course, the external
18 effects criteria of zones, of the industrial zones,
19 don't apply further up, but the principle is there.
20 They don't apply further up, because further up things
21 are defined. The problem is you have an undefined
22 use, so unless you use somehow the criteria of that
23 type, you are at a loss.

24 CHAIRPERSON GRIFFIS: Okay.

25 VICE CHAIR MILLER: Okay.

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1 CHAIRPERSON GRIFFIS: Others?

2 MR. LOURENCO: But if you're at a loss,
3 you send them here.

4 VICE CHAIR MILLER: I guess that leads to
5 my last question.

6 UNIDENTIFIED SPEAKER: Five was --

7 VICE CHAIR MILLER: I think which went to
8 the letter from the law firm with the conditions.
9 Would you have interpreted that as a flag that there
10 is a problem here and, therefore, it doesn't fit into
11 matter-of-right?

12 MR. LOURENCO: I can only speculate.
13 There are lots of things in this process that are very
14 unusual. It's very unusual that the Zoning
15 Administrator personally got so involved. His
16 signature is in four different places in the
17 application, and Ms. Ogunneye testified that, de
18 facto, he had approved the first C of O.

19 Obviously, there is a letter. I believe
20 it's in the record. I just looked at it. There is a
21 letter trying to obtain compliance from a previous
22 location of a facility that indicated that there was
23 dog boarding going on without a C of O and in the
24 meantime, it changed. I don't even know what --

25 CHAIRPERSON GRIFFIS: Okay. Understood.

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1 MR. LOURENCO: So there is, obviously,
2 lots of things that indicate that this is not
3 something that just slipped by.

4 CHAIRPERSON GRIFFIS: Anything else?

5 MR. LOURENCO: And it's in the disposition
6 that I have problems.

7 BOARD MEMBER ETHERLY: Well, one final
8 question. With respect to the analysis that you're
9 laying out for the similar to language, are you aware
10 of any instances or any cases where that analysis has
11 been applied in the past by DCRA or by the Zoning
12 Administrator either in this particular context,
13 which, as a lawyer, oftentimes when we look at
14 precedent, it's great to find a case that has your
15 exact same set of facts, but it's rare.

16 So either in this context or in other
17 places where the similar to language is used, do you
18 recall any instances where this particular analysis
19 has been applied?

20 MR. LOURENCO: Off the top of my head and
21 I couldn't tell you where it is.

22 BOARD MEMBER ETHERLY: Okay. That's fair,
23 that's fair.

24 MR. LOURENCO: The only one I recall, I
25 have some recollection, while I was the Zoning

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1 Administrator there was one exactly like this, two
2 cases where, if I'm not mistaken, it was some sort of
3 licensed health practitioner, I can't -- chiropractor,
4 I believe it was, that had applied for the application
5 of 521.8, I believe it is, based on the similarity
6 with doctors, architects.

7 BOARD MEMBER ETHERLY: Okay.

8 MR. LOURENCO: Lawyers and so on.

9 BOARD MEMBER ETHERLY: Okay.

10 CHAIRPERSON GRIFFIS: Good. Anything
11 else, Mr. Etherly?

12 MR. LOURENCO: I can't recall what the
13 disposition was.

14 BOARD MEMBER ETHERLY: Okay. That's fine.
15 Thank you. Thank you, Mr. Chair.

16 CHAIRPERSON GRIFFIS: No other questions?
17 Cross?

18 MR. RUSHKOFF: Mr. Lourenco, you are not
19 saying, are you, that the Board should draw any
20 adverse inference from the fact that the Zoning
21 Administrator decided to give this matter his personal
22 attention?

23 MR. LOURENCO: No, no, not at all, not at
24 all.

25 MR. RUSHKOFF: Okay. So it's not a factor

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1 against his decision that he became personally
2 involved in this case. Is that right?

3 MR. LOURENCO: Yes, that's fair.

4 MR. RUSHKOFF: Okay. Now, I think you
5 mentioned that in Corporation Counsel's memo that it
6 was an error to consider that all uses must comply
7 with other municipal regulations. Is that correct?

8 MR. LOURENCO: I'm sorry, can you restate
9 the question?

10 MR. RUSHKOFF: You believe it was an
11 error, don't you, that Corporation Counsel considered
12 the fact that uses would have to comply with other
13 municipal regulations?

14 MR. LOURENCO: No, what I said, I read
15 exactly the statement that you wrote.

16 MR. RUSHKOFF: Yes.

17 MR. LOURENCO: Or your office wrote and
18 the statement, I think it reads very clearly. It says
19 that the decision is correct, because these have to
20 comply with the other.

21 MR. RUSHKOFF: Okay. So you're saying it
22 was a fallacy for Corporation Counsel to reason, which
23 will assume that it would comply with other
24 regulations?

25 MR. LOURENCO: I think the fallacy is in

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1 not finding zoning arguments to defend a zoning
2 determination and saying it's correct, because I
3 believe this letter doesn't make the case that the
4 determination of matter-of-right is a correct
5 determination for all the reasons that I already
6 explained. And in the end, the sentence says "It's
7 correct, because such a facility must be operated in
8 compliance with the District's strict Animal Control
9 and Noise Control Regulations."

10 MR. RUSHKOFF: Okay.

11 MR. LOURENCO: The reason why I say it's a
12 fallacy is because a zoning decision must be founded
13 on zoning arguments and not complimented by, anyway
14 there is, these other regulations out there to take
15 care of the noise.

16 MR. RUSHKOFF: Yet, isn't it true that
17 you're asking the Board on page 4 of your testimony to
18 consider that a pet shop and a veterinary hospital are
19 licensed facilities and are subject to periodic
20 inspections and license renewal and are held to
21 detailed public health sanitary standards and
22 standards for animal health and welfare? Isn't it
23 true that you are asking the Board to consider that?

24 MR. LOURENCO: Yes, I am.

25 MR. RUSHKOFF: So would it be correct to

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1 say that in doing this similarity study, when you're
2 looking at what is already listed as an expressly
3 allowed use, you do look at the overall regulatory
4 scheme to judge how much of an external effect is
5 created? Isn't that correct, isn't that what you're
6 asking the Board to do in weighing this existing use?

7 MR. LOURENCO: You are going down the same
8 path again. Just because I have to comply with the
9 police regulations as a citizen, that doesn't make me
10 regulated as a citizen. Professionally, I am
11 regulated, because my profession happens to be
12 regulated. Professionally, I'm regulated and that
13 imposes upon me duties that I believe are in the law
14 to protect the public from adverse impact of what I
15 might do professionally. Yet, both professionally and
16 as a private citizen, I have to comply with these
17 regulations. All these apply to me, too, and I am not
18 a regulated entity.

19 And the difference is the Board of Zoning
20 Adjustment, it wasn't me, the Board of Zoning
21 Adjustment and the D.C. Court of Appeals found that
22 the fact that an economist is not a licensed
23 profession was sufficient to deny a C of O by
24 similarity. That is a fact.

25 MR. RUSHKOFF: So I'm just trying to

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1 understand your testimony. You testimony is that to
2 the extent that a regulation applies very specifically
3 to a use, it should be considered and to the extent
4 that a regulation applies more broadly, it should not
5 be considered. Is that it?

6 MR. LOURENCO: No, we're trying to
7 determine similarity and similarity is not just the
8 superficial. On the surface, what's the difference
9 between a law office and an economist's office or an
10 engineer's office? On the surface it's pretty much
11 the same thing, 9:00 to 5:00, you put a tie and a suit
12 on and you walk in and out of the building and there
13 is not a lot more impact on the neighborhood, but the
14 Zoning Regulations say otherwise. The Zoning
15 Regulations allow in that particular zone uses that
16 were similar to those uses. In determining that
17 similarity, it was deemed that the regulatory
18 environment of those professions was important.

19 Now, what I'm pointing is there is nothing
20 regulating animal, I'm sorry, dog boarding. There is
21 nothing regulating dog boarding to the extent that
22 there is regulating in extreme detail a veterinary
23 hospital or a pet shop. There is nothing regulating
24 dog boarding that can be comparable. There is one
25 similarity between those two that is not shared by dog

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1 boarding. You know, I'm just looking at a couple of
2 aspects. I'm sure there are other aspects where the
3 dissimilarities can be demonstrated.

4 MR. RUSHKOFF: I'm just trying to focus,
5 and if you can just add anything to clarify, I'm just
6 trying to focus on when it is that the decision maker,
7 whether it be the Zoning Administrator or the Board,
8 should be looking at the regulatory environment in
9 which the use will occur and when that is considered
10 to be a patent fallacy, and I'm just trying to
11 understand when it's a patent fallacy and when, on the
12 other hand, I think you described it the second time
13 as an important distinction that was missed by the
14 Zoning Administrator. So I'm just trying to
15 understand when we're supposed to do it and when we're
16 not.

17 MR. LOURENCO: I don't know how many times
18 I need to answer the same question.

19 MR. RUSHKOFF: Okay.

20 MR. LOURENCO: The fallacy on the last
21 sentence is because you state that the decision was
22 correct, because such a facility must be operated in
23 compliance with other regulations.

24 MR. RUSHKOFF: Okay.

25 MR. LOURENCO: And you can't justify the

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1 correctness of a zoning decision by the fact that
2 we're all subject to the law of gravity. We all are,
3 but that's not what makes the zoning decision correct.

4 And the only issue before this Board is was it
5 correct to determine that that use was matter-of-right
6 in C-3 or in C-2 down to C-3. But that is the issue
7 before this Board and based on what's important here,
8 I am saying this is a fallacy, because this does not
9 prove anything.

10 MR. RUSHKOFF: But you do think the Board
11 is supposed to consider external effects, correct?

12 MR. LOURENCO: If you want to know what I
13 think, which is different, what I think is I think
14 this case should have come to the Board and not be
15 decided by the Zoning Administrator.

16 MR. RUSHKOFF: I move to strike that. He
17 is not responding to the question. I am just asking
18 should the Board be considering -- I'm just trying to
19 get a handle on what we're supposed to consider here.

20 Should the Board be considering or the Zoning
21 Administrator, I don't think there is a difference
22 here, should the decision maker be considering
23 external effects such as noise?

24 MR. LOURENCO: Yes.

25 MR. RUSHKOFF: Okay. Now, in considering

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1 external effects, are you saying it's irrelevant that
2 in the District of Columbia a dog boarding facility is
3 subject to maximum sound levels of 65 decibels
4 daytime, 60 decibels nighttime in Commercial Zones,
5 and if you're bordering a Residential Zone, 55
6 decibels nighttime? Are you saying that that should
7 not be considered by the decision maker?

8 MR. LOURENCO: Okay. The short answer to
9 that is there's no rule. Okay. On one side, the two
10 BZA cases do show that the regulatory environment,
11 regulatory environment not generic regulations that
12 apply throughout, the regulatory environment of the
13 specific facility, the specific operation that's
14 receiving the C of O, the regulatory environment
15 obviously was important. It was considered very
16 important in those two cases. So it's not my opinion.
17 It's the Board's opinion. It's the Court of Appeals'
18 opinion. That's one thing.

19 The second thing is you are saying that
20 these regulations are very strict. I heard testimony
21 here today that there was numerous complaints sent
22 over to DCRA. Yet, the record doesn't show any report
23 of inspections with readings and so on, so I'm really
24 not sure if the enforcement of the strict regulations
25 is very effective.

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1 CHAIRPERSON GRIFFIS: Wait. You're not
2 saying that the Zoning Administrator --

3 MR. LOURENCO: Regardless -- excuse me.

4 CHAIRPERSON GRIFFIS: You're not saying
5 that the Zoning Administrator takes into account then
6 the enforcement mechanisms or the possibility of the--

7 MR. LOURENCO: No.

8 CHAIRPERSON GRIFFIS: I think we're going
9 a little bit astray from the question.

10 MR. LOURENCO: I was saying regardless,
11 it's not a zoning issue. It's not proper to even be
12 speculating about it.

13 CHAIRPERSON GRIFFIS: Okay.

14 MR. LOURENCO: I'm sorry if I strayed.

15 CHAIRPERSON GRIFFIS: That's all right.
16 Next question?

17 MR. RUSHKOFF: Okay. Now, after your
18 discussion of external effects, you point to a case
19 that I haven't had an opportunity to read, but I will
20 rely on your summary of it in which you state that one
21 of the factors considered in similarity of
22 professional practitioners was ethical standards.

23 MR. LOURENCO: Yes, the existence or not
24 of ethical standards for the profession.

25 MR. RUSHKOFF: Is it your testimony that

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1 whether or not a profession has proper ethical
2 standards it has some bearing on the Zoning
3 Administrator's decision as to whether it's a similar
4 use?

5 MR. LOURENCO: Not for this case, for the
6 two cases here, which were based on a different
7 section, that that was obviously relevant, because
8 those were the three criteria that --

9 MR. RUSHKOFF: Was the Zoning
10 Administrator in that other case focused on an
11 external effect analysis?

12 MR. LOURENCO: I don't know.

13 MR. RUSHKOFF: Well, if it wasn't an
14 external effects analysis, what possible relevance
15 would that case have in helping us or guiding us as to
16 how an external effects analysis is done in a case
17 involving noise and smell and other externalities?

18 MR. LOURENCO: I am not saying that the
19 other case is so, so, so like this case and that you
20 can just make a one to one extrapolation from one side
21 to the other. The reason why I brought up these other
22 cases is because these are cases where it's patent.
23 The type of criteria and the reasoning to infer those
24 criteria, it's patent, the reasoning that was at the
25 source of coming up with those criteria by the Zoning

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1 Administrator in a process that was deemed appropriate
2 by the Board of Zoning Adjustment. To that extent, I
3 think it's more on the methodology than on the
4 specifics of the case. No one is asking for the
5 professional education and the ethical standards of
6 the dog boarding facility, obviously.

7 Now, whether or not that has anything to
8 do with external effects, in one of the cases one of
9 the arguments that was used is that if we start
10 relaxing the standing and letting anything be similar
11 to architects, engineers, lawyers and doctors, pretty
12 soon the effect on the neighborhood is that you have
13 all these other nonprofessional services that just --
14 commercial type offices that just overwhelm the
15 neighborhood. To that extent, I believe there is some
16 external effect consideration, but I don't think it's
17 clear on the record. At least the portion that I
18 read, I don't think it's clear that that was one of
19 the concerns of the Zoning Administrator.

20 CHAIRPERSON GRIFFIS: Good. Next
21 question?

22 MR. RUSHKOFF: In the letter that was sent
23 by Denzil Noble to Steve Sher that we discussed, you
24 had an opportunity to see that letter?

25 MR. LOURENCO: Yes.

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1 MR. RUSHKOFF: The one listing
2 commitments. In that letter it says "It has been
3 determined that DCRA has no legal basis for
4 withholding a Certificate of Occupancy." Is it your
5 belief that that is anything but a determination that
6 this is a matter-of-right use? Does that have some
7 other meaning other than it's a matter-of-right use?

8 MR. LOURENCO: I believe that's a question
9 that only Mr. Noble can answer. It's certainly worded
10 in a strange way. It's worded in such a way that it
11 looks like there was a time before that when there
12 were reasons to withhold. It's unusually written.
13 Let's put it that way, but I'm not inside his head. I
14 don't know how he came up with that.

15 MR. RUSHKOFF: Because I think you
16 testified before that you think this was really a kind
17 of a special exception procedure. What statement in
18 the record do you believe gives the strongest support
19 for your conclusion that this was a special exception
20 determination, as opposed to a matter-of-right use
21 determination?

22 MR. LOURENCO: I really -- I don't want to
23 split hairs here, but I believe it was the Chair that
24 said that. I kind of went along with it, but I didn't
25 actually say that it was a special exception process.

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1 I agree that it was kind of like, but I need the
2 letter.
3

1 E-V-E-N-I-N-G S-E-S-S-I-O-N

2 (6:00 p.m.)

3 MR. RUSHKOFF: And maybe I can shortcut
4 it.

5 MR. LOURENCO: I need the letter, because
6 I have it somewhere here. I got so many papers.
7 Okay. A sentence that says "Based on this review, it
8 has been determined that DCRA has no legal basis for
9 withholding a Certificate of Occupancy," it's just a
10 strange way of wording it, because it looks like they
11 thought they had a legal basis for withholding a
12 Certificate of Occupancy and then after that, they
13 determined that they didn't.

14 MR. RUSHKOFF: Okay.

15 MR. LOURENCO: That's not how you usually
16 deal with an application. When an application comes
17 in you have two ways. You either consider it's a
18 matter-of-right and you issue it or you consider it's
19 not a matter-of-right and you send them to BZA. In
20 this case, for some reason that I don't know, I'm not
21 privy to these decisions, someone was obviously, at a
22 certain point, considering withholding a Certificate
23 of Occupancy, which -- but the next paragraph says "A
24 six month conditional C of O was issued on July 23rd.
25 The conditional issuance is based on the following

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1 commitments made by the applicant, which DCRA will
2 monitor over the six month period."

3 And then the conditions come, none of
4 which is the type of condition I normally expect in a
5 conditional C of O, which are like, you know, finish
6 installing the other two elevators or things that
7 aren't relevant to safety, but may allow the issuance
8 of Certificate of Occupancy, but these are use
9 conditions. And use conditions, I don't believe the
10 Zoning Administrator has the authority to impose use
11 conditions on matter-of-right. These are use
12 conditions that the Administrator here said were going
13 to be monitored. To me this word means that I will be
14 watching over you to make sure you meet these
15 conditions.

16 CHAIRPERSON GRIFFIS: Good. Understood.

17 MR. LOURENCO: It's common sense plus the
18 fourth condition that he made up and he says required.

19 MR. RUSHKOFF: Okay.

20 MR. LOURENCO: On the fourth condition.

21 MR. RUSHKOFF: Okay. Suppose the proposed
22 use was only dog grooming, because I think the parties
23 are in agreement that dog grooming is a similar use.
24 Well, let me just start out asking you do you think
25 dog grooming would not raise the same issues as dog

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1 boarding?

2 MR. LOURENCO: Well, let me see if I make
3 myself real clear. The issue here to me is how the
4 decision was made, which I believe was made
5 incorrectly and was made incorrectly, because it
6 certifies as a principle use, a use that I believe
7 does not fit in C-3-A. Now, if you want my personal
8 opinion of whether dog grooming would be okay in C-3-
9 A, I can give it to you, but I don't see how it's
10 relevant here.

11 MR. RUSHKOFF: Okay. Well, let me move on
12 and we'll see if we need to.

13 MR. LOURENCO: I'm also speaking on behalf
14 of my client.

15 MR. RUSHKOFF: Okay.

16 MR. LOURENCO: And I'm not authorized to
17 proffer on that.

18 MR. RUSHKOFF: I think your client has
19 made a representation that dog grooming wouldn't be a
20 problem, but I don't think we need to deal with that.

21 Suppose that, for whatever reason, the
22 Zoning Administrator determined the dog grooming was a
23 matter-of-right use. Okay? Just take that as an
24 assumption. And then suppose, for whatever reason,
25 the applicant submitted an application to do dog

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1 grooming from 9:00 a.m. to 5:00 p.m. and, I don't
2 know, never more than five dogs on the premises at a
3 time, and that's what it says on the application.

4 Is it your testimony that the Zoning
5 Administrator must reject the application, because
6 there are conditions being imposed by the applicant
7 that simply are not necessary for a matter-of-right
8 use?

9 MR. LOURENCO: If the Zoning Administrator
10 rejected all the applications that have a little
11 irregularity in it, we wouldn't even be here, because
12 both of these applications are full of them. This
13 being said, it would be appropriate for the Zoning
14 Administrator to issue the C of O for a dog grooming
15 facility without conditions whether or not more
16 conditions are written in there.

17 There are some Certificates of Occupancy
18 where it's relevant the number of occupants or it's
19 relevant the size of the premises and so on, which are
20 stated in the application and are transferred into the
21 C of O. Would I say that the C of O was irregular if
22 they added for five dogs? Probably not.

23 MR. RUSHKOFF: Okay. What if the
24 application is received and the Zoning Administrator
25 says I'm going to try to do this the right way. I am

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1 going to reject it, because it doesn't just say dog
2 grooming. And suppose the applicant were to say to
3 the Zoning Administrator you know what, we're afraid
4 there is going to be litigation before the BZA and
5 we're afraid there is going to possibly be an appeal
6 to the D.C. Court of Appeals, and what we're going to
7 do is we have added some conditions, because we have
8 got a side deal with people in the community not to
9 litigate with us.

10 Are you saying that the Zoning
11 Administrator must reject it even though the Zoning
12 Administrator knows it will lead to litigation?

13 MR. LOURENCO: Okay. If -- we don't have
14 to suppose. I can tell you exactly how that's
15 supposed to be done. There are many licenses, permits
16 and so on that are issued pursuant to private
17 agreements. The position, at least while I was there,
18 the position that we always took at the advice of
19 Corporation Counsel is the city does not enforce
20 private agreements. Therefore, you know, if you have
21 a private agreement with so-and-so, you got to take it
22 to the court. We are not taking up that.

23 When there are conditions that must be
24 attached, then a covenant is drawn, it goes to
25 Corporation Counsel for legal sufficiency and form,

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1 comes back, gets recorded and that condition attaches
2 to the property. Those are the conditions the city
3 can enforce.

4 Now, has there even been cases where C of
5 Os were issued like this that have conditions and
6 shouldn't? Yes, sure. The difference here is we're
7 not talking about a matter-of-right use. We're
8 talking about a use where the fact of whether it's a
9 matter-of-right is debateable and the correct position
10 the Zoning Administrator should have taken is in
11 doubt, I'm sending it to the Board of Zoning
12 Adjustment, let them decide if there are any
13 conditions that must be attached. The Board of Zoning
14 Adjustment can attach conditions beyond what's in
15 the --

16 CHAIRPERSON GRIFFIS: Okay. We're going
17 to stick to the answer to the question.

18 MR. RUSHKOFF: Yes.

19 CHAIRPERSON GRIFFIS: Okay. Next
20 question?

21 MR. RUSHKOFF: Do you believe that dog
22 boarding facilities should be in CM Zones?

23 CHAIRPERSON GRIFFIS: Only in CM Zones?
24 Is that what you mean?

25 MR. RUSHKOFF: Only, right, only, instead

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1 of --

2 CHAIRPERSON GRIFFIS: Right.

3 MR. RUSHKOFF: I'm just trying to figure
4 out where these --

5 CHAIRPERSON GRIFFIS: A clarification of
6 the question. Is that the only place they can go,
7 should go, rather, the question was?

8 MR. LOURENCO: I really am not sure, but I
9 believe probably CM, M Zones, yes.

10 CHAIRPERSON GRIFFIS: Next question?

11 MR. RUSHKOFF: And you're aware that even
12 prisoners cannot be housed on a permanent basis in a
13 CM Zone? Are you aware of that?

14 MR. LOURENCO: Even prisoners?

15 MR. RUSHKOFF: Correctional, permanent
16 correctional facilities cannot be placed in CM Zones.
17 Are you aware of that fact? Okay.

18 MR. LOURENCO: Yes, I'm aware.

19 MR. RUSHKOFF: Or as a general
20 proposition, the CM Zones are considered to be not
21 suitable places for human habitation. Would that be
22 correct?

23 MR. LOURENCO: I don't know where this
24 question is leading.

25 CHAIRPERSON GRIFFIS: It's just trying to

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1 get an answer.

2 MR. LOURENCO: But if you're trying to --

3 MR. RUSHKOFF: Just go, have fun.

4 CHAIRPERSON GRIFFIS: Is that your
5 understanding?

6 MR. LOURENCO: Can you repeat the
7 question?

8 MR. RUSHKOFF: Is it your understanding
9 that CM Zones are considered as a general proposition
10 to be areas that are not suitable for human
11 habitation?

12 MR. LOURENCO: Yes. Okay.

13 MR. RUSHKOFF: Okay. So it would be your
14 view that the only place for dog boarding facilities
15 to go in the District would be in the zone that is
16 considered to be unfit for human habitation?

17 MR. LOURENCO: When you asked me the first
18 question, I responded without a lot of conviction. I
19 haven't thought through the whole thing. This case is
20 about C-3. It's not about CM and M.

21 CHAIRPERSON GRIFFIS: Okay. If you don't
22 have an answer, then you don't have an answer.

23 MR. LOURENCO: I don't have an opinion
24 right now.

25 CHAIRPERSON GRIFFIS: Okay. Next

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1 question.

2 MR. RUSHKOFF: And I got a last question.

3 MR. LOURENCO: But certainly, I wouldn't
4 compare dogs and humans.

5 CHAIRPERSON GRIFFIS: Okay. Next
6 question?

7 MR. RUSHKOFF: If there are people in the
8 District of Columbia with the inclination and the
9 money to pay for small boarding facilities that meet
10 the District's animal control and sound limitation
11 requirements, is it your belief that there is simply
12 no way for the Zoning Administrator to provide a place
13 other than CM Districts for these activities?

14 MR. LOURENCO: Not at all. I said here
15 repeatedly the Zoning Administrator should have sent
16 the case here and there is an avenue here to assess
17 the impact, to figure out what is the best way to
18 accommodate that type of facility. I just said the
19 Zoning Administrator erred in making that decision
20 himself, based on as thin arguments as we have seen.
21 That is where the error is.

22 CHAIRPERSON GRIFFIS: How does it come to
23 this Board, Mr. Lourenco?

24 MR. LOURENCO: Pardon?

25 CHAIRPERSON GRIFFIS: What sort of relief

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1 would it be asking the Board? Isn't it your position
2 that it's a use variance they would have to come for?

3 MR. LOURENCO: Yes, I believe it would be
4 a use variance, yes.

5 CHAIRPERSON GRIFFIS: Okay. That's not a
6 walk in the park.

7 MR. LOURENCO: I know it's not a walk in
8 the park. I'm just saying why is the Zoning
9 Administrator the entity that needs to bear that
10 burden when, obviously, the matter is much more
11 complicated than that.

12 CHAIRPERSON GRIFFIS: Right. No, I
13 understand. Other questions?

14 MR. RUSHKOFF: I think you mentioned the
15 possibility of poor enforcement of laws by District
16 Agencies. Should the Zoning Administrator consider
17 that the barking of dogs under District Law gives rise
18 to a private right of action under Nuisance Law?
19 Should that be a consideration?

20 MR. LOURENCO: I'm sorry. Can you repeat
21 the question? Should the Zoning Administrator?

22 MR. RUSHKOFF: Should the Zoning
23 Administrator consider private enforcement that is
24 available under District Law to individuals who are
25 unable to reasonably enjoy their property because of

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1 the barking of dogs?

2 MR. LOURENCO: Should the Zoning
3 Administrator consider private enforcement?

4 MR. RUSHKOFF: Right.

5 MR. LOURENCO: As what, as an avenue to
6 compliment the Zoning Regulations?

7 MR. RUSHKOFF: As a factor that affects
8 external effects. I mean, for example, should it
9 matter? Let's just say you have -- there's two
10 possibilities. You could have a situation where a
11 particular external effect simply is not actionable,
12 it's just not actionable, there is nothing you can do
13 about. For example, you know, perhaps odor from a gas
14 station may simply not be actionable. If you are
15 allowed to have a gas station there, people who are
16 nearby are stuck with the smell.

17 Suppose though that in the case of a dog
18 boarding facility, the people around are, in fact, not
19 stuck with it under District Law, but can bring a
20 private right of action and seek court intervention,
21 should that be a factor in judging these external
22 effects?

23 MR. LOURENCO: Not at all.

24 MR. RUSHKOFF: Okay.

25 MR. LOURENCO: I mean, the Zoning

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1 Administrator has nothing to do with that.

2 MR. RUSHKOFF: Okay.

3 CHAIRPERSON GRIFFIS: Good. Next question.

4 MR. RUSHKOFF: No further questions.

5 CHAIRPERSON GRIFFIS: Very well. Cross?

6 MR. DONOHUE: Mr. Lourenco, Ed Donohue on
7 behalf of WagTime. I will try to be very brief, Mr.
8 Chair. Let me take you from the CM District to the C-
9 3-A District or actually, let's go back to C-2,
10 because that's where we first find permitted uses like
11 veterinary hospital and pet shop.

12 MR. LOURENCO: Yes.

13 MR. DONOHUE: And similar questions that I
14 asked Faye earlier today. For example, on pet shops,
15 are there limitations on the size, hours of operations
16 or number of animals in a pet shop?

17 MR. LOURENCO: No.

18 MR. DONOHUE: Likewise, with veterinary
19 hospitals, are there limitations on the number of
20 beds, hours of operation, number of animals kept,
21 etcetera?

22 MR. LOURENCO: No.

23 MR. DONOHUE: Are there limitations with
24 respect to outdoor areas, for example, use from the
25 veterinary hospital for recuperative dog walks?

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1 MR. LOURENCO: No, there is nothing in the
2 Zoning Regulations.

3 MR. DONOHUE: Nothing appears there,
4 correct, sir?

5 MR. LOURENCO: Yes.

6 MR. DONOHUE: And that's 721, which arises
7 to the existing zone, which is C-3, and it's also
8 permitted -- let me back up. Because it's permitted
9 by right under 721, it is also permitted by right in
10 the C-3-A District, correct?

11 MR. LOURENCO: Whatever is permitted in C-
12 2, yes, that's correct.

13 MR. DONOHUE: Without limitation, without
14 restrictions as we discussed?

15 MR. LOURENCO: Of course.

16 MR. DONOHUE: What is the zoning envelope
17 for the C-3-A Zone District?

18 MR. LOURENCO: What do you mean?

19 MR. DONOHUE: What height is permitted in
20 the C-3-A District?

21 MR. LOURENCO: Height of building?

22 MR. DONOHUE: Height of building.

23 MR. LOURENCO: Do you think I know this by
24 heart?

25 MR. DONOHUE: It's been a couple years, I

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1 know.

2 MR. LOURENCO: 65 feet, I guess. I think
3 it's 65.

4 MR. DONOHUE: While you're there, would
5 you also give us the FAR permitted in the C-3-A
6 District?

7 MR. LOURENCO: 3.5, 4, something like
8 that, 65 feet.

9 MR. DONOHUE: Let's go to --

10 MR. LOURENCO: 2.5 for nonresidential.

11 MR. DONOHUE: Maximum permitted FAR under
12 771.2.

13 MR. LOURENCO: 2.5 for nonresidential.

14 MR. DONOHUE: 2.5 for nonresidential? All
15 right. So 2.5 FAR for a pet shop permitted by right,
16 correct?

17 MR. LOURENCO: Yes.

18 MR. DONOHUE: 2.5 and permitted by right
19 for a veterinary hospital, correct?

20 MR. LOURENCO: Yes.

21 MR. DONOHUE: And without limitation as to
22 numbers, hours of operation, outdoor facilities,
23 etcetera?

24 MR. LOURENCO: Well, there is limitation
25 on the percentage of lot occupancy, 75 percent.

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1 MR. DONOHUE: Yes. Any limitations on the
2 use as we discussed under 721 and 741?

3 MR. LOURENCO: No.

4 MR. DONOHUE: So presumably, a 2.5 FAR
5 animal hospital or pet shop in a C-3-A District by
6 right?

7 MR. LOURENCO: That's correct.

8 MR. DONOHUE: Is it fair to assume there
9 may be external effects from such a use?

10 MR. LOURENCO: Sure.

11 MR. DONOHUE: I would agree. Let me refer
12 to the BZA cases that you asked us to consider and,
13 like Mr. Rushkoff, I haven't had a chance to read them
14 in detail, but I noticed that -- well, let me ask you.
15 What is the underlying zoning in the two cases?

16 MR. LOURENCO: It's CR I believe.

17 MR. DONOHUE: You may want to take a look
18 at that.

19 MR. LOURENCO: Okay.

20 CHAIRPERSON GRIFFIS: SP-2.

21 MR. LOURENCO: SP, SP, SP.

22 MR. DONOHUE: And can I ask you to read
23 subsection 500.1, which describes the SP Zone?

24 CHAIRPERSON GRIFFIS: Of the regulations?

25 MR. DONOHUE: Yes, I'm sorry, 11 DCMR

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1 500.1.

2 MR. LOURENCO: Yes.

3 MR. DONOHUE: Would you read it for the
4 Board, please?

5 MR. LOURENCO: "The SP District is
6 designed to supervise those areas adjacent to C-3-C
7 and C-4 Districts and other appropriate areas that
8 contain the following: Existing apartments, offices
9 and institutions and B, mixed use buildings."

10 MR. DONOHUE: And could I ask you to refer
11 to the C-3-A, which is the existing zoning of this
12 premises, specifically subsection 740.1?

13 MR. LOURENCO: Yes.

14 MR. DONOHUE: And would you read that
15 subsection for the Board, please?

16 MR. LOURENCO: "The C-3 District is
17 designed to accommodate importance of centers
18 supplementary to the Central Business District."

19 MR. DONOHUE: Is it fair to say that the
20 C-3-A is a more permissive Zone District?

21 MR. LOURENCO: Of course.

22 MR. DONOHUE: And the SP, obviously, more
23 restricted?

24 MR. LOURENCO: Of course.

25 MR. DONOHUE: The use is contemplated in

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1 both BZA cases, 13714 and 12845. Are they interior
2 uses?

3 MR. LOURENCO: Oh, on those two cases?

4 MR. DONOHUE: Yes, yes.

5 MR. LOURENCO: Yes, pretty much, yes.

6 MR. DONOHUE: For example, on 12845?

7 MR. LOURENCO: With exterior impact.

8 MR. DONOHUE: Well, 12845 says that the
9 proposed use would be the subject 5th floor of the
10 subject building, interior, right?

11 MR. LOURENCO: Yes.

12 MR. DONOHUE: Is it fair to say that the
13 Board of Zoning Adjustment might be more concerned
14 about uses in an interior setting, particularly an
15 interior residential setting?

16 CHAIRPERSON GRIFFIS: Did you ask him if
17 we were more concerned?

18 MR. LOURENCO: I don't --

19 MR. DONOHUE: I'm asking him. Counsel for
20 intervenor has asked us to look at these two cases as
21 being relevant to --

22 CHAIRPERSON GRIFFIS: Right, right.

23 MR. DONOHUE: How do you determine
24 similarity?

25 CHAIRPERSON GRIFFIS: Sure.

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1 MR. DONOHUE: And it strikes me and I'll
2 read, "The property is developed with a 237 unit
3 condominium building. Of the units, 216 are used for
4 residential uses." I asked him since he asked us to
5 consider these cases, whether it's fair to infer that
6 the Board of Zoning Adjustment would be more concerned
7 about interior use, and particularly a residential
8 building.

9 MR. LOURENCO: I guess they will probably
10 be concerned with some exterior impact, traffic and so
11 on, which is part of their concern with having offices
12 in those settings. But the reason, the point that I
13 was making when I raised those, I'm well aware of the
14 fact that 501.3 and 721.4 are not the same section.
15 They don't address the same issues.

16 I brought the cases up, because they
17 illustrate the methodology that I think is a correct
18 and appropriate methodology to infer similarity of
19 uses, as opposed to what apparently wasn't done in
20 this case.

21 CHAIRPERSON GRIFFIS: Okay.

22 MR. DONOHUE: Let me move on. It's my
23 last line of questions. Just a couple, Mr. Chair.

24 Let's talk about the conditional
25 Certificate of Occupancy. Are you aware that the

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1 existing Certificate of Occupancy does not have the
2 conditions that we have been discussing so much this
3 afternoon?

4 MR. LOURENCO: Yes.

5 MR. DONOHUE: And that the prior
6 Certificate of Occupancy expired of its own terms?

7 MR. LOURENCO: Yes.

8 MR. DONOHUE: Okay. We had a fairly
9 lengthy discussion about the authority for DCRA to
10 impose conditions on Certificates of Occupancy, and I
11 believe it was your testimony that there are other C
12 of Os where conditions are opposed and you used the
13 example of when elevators hadn't been completed, but
14 that it wasn't a safety issue and you could issue the
15 Certificate of Occupancy.

16 So I guess what I would ask you is this.
17 If you are aware of C of Os that are issued
18 conditionally, what's the authority for the DCRA to do
19 that in that type of case?

20 MR. LOURENCO: It comes from 12 DCMR, the
21 Building Code. When you issue a Certificate of
22 Occupancy, you are stating, you are certifying that
23 the building is completed and is in compliance with
24 the Building Code and the Zoning Regulations. There
25 is one portion of the approval of the C of O that is

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1 under the jurisdiction of the Zoning Administrator.
2 There is another portion that is under the
3 jurisdiction of another official, the building
4 official, which in this case happens to be the same
5 person. It doesn't help clarify the issues.

6 So when those conditions are imposed, they
7 are never imposed based on a zoning rule. They are
8 always imposed based on something that's pending from
9 the Building Code compliance.

10 MR. DONOHUE: So for example, if a fire
11 stair were required, you could issue a Certificate of
12 Occupancy on the trust and faith that the developer
13 would put the Fire Code in?

14 MR. LOURENCO: No, no. What I said is
15 when the things that are missing are not relevant to
16 safety, it's a fairly common occurrence to have a C of
17 O issued with conditions, the conditions being
18 completing the unfinished items that aren't relevant
19 to safety, but are required by code nonetheless.

20 MR. DONOHUE: So is it your testimony or
21 is it your belief that there is no authority for the
22 DCRA to issue a C of O with conditions imposed as to
23 use?

24 MR. LOURENCO: That is my belief, yes.

25 MR. DONOHUE: So that the current

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1 Certificate of Occupancy that has no such conditions
2 shouldn't bother you? Does that follow?

3 MR. LOURENCO: On that point it doesn't
4 bother me, the current Certificate of Occupancy.

5 CHAIRPERSON GRIFFIS: Anything else?

6 MR. DONOHUE: No, sir.

7 CHAIRPERSON GRIFFIS: Okay.

8 MR. DONOHUE: Thank you.

9 CHAIRPERSON GRIFFIS: How many questions
10 do you have?

11 MS. DOUGHTY: A couple of brief questions.

12 CHAIRPERSON GRIFFIS: Okay, brief.

13 MS. DOUGHTY: Mr. Lourenco, the case that
14 Mr. Rushkoff mentioned and that we have been talking
15 about where ethical standards were one of the criteria
16 -- can I just clarify, was that case an analysis of
17 similar to, so that was a case where the Zoning
18 Administrator was required to judge similar to and he
19 had identified or defined characteristics that he was
20 going to use to judge similar to? Is that what that--

21 MR. LOURENCO: That's my understanding of
22 the essence of the case.

23 MS. DOUGHTY: Okay.

24 MR. LOURENCO: That's correct.

25 MS. DOUGHTY: And that that methodology

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1 used, followed by the Zoning Administrator was upheld
2 by the Board?

3 MR. LOURENCO: That's correct.

4 MS. DOUGHTY: Can I just ask, Mr. Rushkoff
5 asked about the matter of the Noise Regulations, the
6 Noise and the Animal Control Regulations on the one
7 hand versus licensing requirements on the other hand.

8 Is it your understanding that the Noise Regulations
9 would apply to all uses? You know, the Noise
10 Regulations apply generally. They would apply whether
11 this is a veterinary hospital, whether it's a pet
12 shop, whether it is a dog boarding kennel?

13 MR. LOURENCO: That's my understanding of
14 those regulations, yes.

15 MS. DOUGHTY: So how, in your view, you
16 know, would it be possible, in your view, for the
17 Zoning Administrator to use the Noise Regulations to
18 distinguish between uses, to pick out differences
19 between uses when, in fact, those regulations apply to
20 all uses?

21 MR. LOURENCO: I don't believe the Noise
22 Regulations are a tool that the Zoning Administrator
23 has in his arsenal. He has lots of tools, but not
24 that one.

25 MS. DOUGHTY: Right. Okay.

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1 MR. LOURENCO: I don't know if that
2 answers your question.

3 MS. DOUGHTY: Yes. Now, Mr. Donohue
4 asked, pointed out, asked you to agree or disagree
5 whether or not there were any hours of operation or
6 any other conditions placed on veterinary hospitals by
7 section 721 of the Zoning Regulations, and I heard
8 your testimony that there were not.

9 While there are no conditions based on
10 veterinary hospitals in that section of the Zoning
11 Regulations, isn't it true that the licensing
12 requirements that apply to veterinary hospitals could,
13 in fact, result in conditions obtaining to the way
14 that you must be operated?

15 MR. DONOHUE: Mr. Chairman, I'm going to
16 object, because Mr. Lourenco was qualified, accepted,
17 in fact, as an expert in zoning. I don't know that he
18 is an expert in the licensing of veterinary hospitals.

19 CHAIRPERSON GRIFFIS: I tend to agree.
20 Let's move on.

21 MS. DOUGHTY: Okay. Regarding the CM Zone
22 and the M Zone, I just wonder whether the fact that
23 standards of external effects do apply beginning from
24 the CM Zone and also apply in the M Zone, whether that
25 might be a factor that might lead you to believe that

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1 -- you know, and I don't want to put words in your
2 mouth, but that may be a factor that would lead you to
3 believe that the CM Zone was perhaps a more
4 appropriate zone for uses that have significant
5 external effects or external effects above the level
6 of those uses that are matter-of-right in lower zones?

7 MR. LOURENCO: It's not.

8 CHAIRPERSON GRIFFIS: Why are we trying to
9 figure out what his opinion is for external effects in
10 the CM Zone and matter-of-right uses not in lower
11 zones?

12 MS. DOUGHTY: Well, Mr. Rushkoff asked
13 that, made a great deal of whether or not Mr. Lourenco
14 believes that a dog boarding facility would be
15 appropriately located in a CM Zone.

16 CHAIRPERSON GRIFFIS: Okay. So?

17 MS. DOUGHTY: So my question is --

18 CHAIRPERSON GRIFFIS: But why do you need
19 to make a big deal out of it?

20 MS. DOUGHTY: What I'm trying to ask Mr.
21 Lourenco is is it the existence within the Zoning
22 Regulations for that zone, is it the existence of the
23 standards for external effects that would lead him to
24 that assessment?

25 CHAIRPERSON GRIFFIS: To put the dog

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1 kennel in the CM Zone? Okay. That's a fascinating
2 question. As the CM Zone outlines all these external
3 effects like ash and coal and spewing gas and volcanic
4 rock, is that what led you to the fact that dog
5 kennels should be there? After 6:00 I get --

6 MR. LOURENCO: It's getting late. I'm
7 trying to not let anybody put words in my mouth, but
8 I'm not very successful.

9 CHAIRPERSON GRIFFIS: What led you to --

10 MR. LOURENCO: I am not advocating that CM
11 is --

12 CHAIRPERSON GRIFFIS: No, no, but here is
13 the question. What led you to say that CM Zones is a
14 zone of which dog kennels are allowed?

15 MR. LOURENCO: I'm not saying it's the
16 most appropriate area to put that, but allowed.

17 CHAIRPERSON GRIFFIS: I know that. But
18 you say that it's a Zone District of which they are
19 allowed.

20 MR. LOURENCO: Any use that is not
21 forbidden is allowed in an M Zone.

22 CHAIRPERSON GRIFFIS: Okay. Next
23 question?

24 MR. LOURENCO: When the question came, I
25 said CM, M.

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1 CHAIRPERSON GRIFFIS: Exactly.

2 MR. LOURENCO: I haven't really given it
3 much thought.

4 MS. DOUGHTY: Yes.

5 CHAIRPERSON GRIFFIS: Pretty quick. Next
6 question?

7 MR. LOURENCO: Maybe C-3, who knows.

8 MS. DOUGHTY: I'm finished. Thank you.

9 MR. LOURENCO: Once it's properly
10 addressed.

11 CHAIRPERSON GRIFFIS: Okay. Thank you,
12 Mr. Lourenco. That was well done. Any other cross?
13 Okay. No other cross? Very well. Then I think we
14 need to conclude. We can say goodbye to Mr. Etherly.
15 Let's go through the procedure. What we have left is
16 closing and then any rebuttal. Is there anticipated
17 rebuttal witnesses?

18 MS. DOUGHTY: Yes, there are.

19 CHAIRPERSON GRIFFIS: How many?

20 MS. DOUGHTY: Possibly three. I will have
21 to review the testimony that we have heard here today
22 to establish whether it would be two or whether it
23 would be three.

24 CHAIRPERSON GRIFFIS: Well, there goes
25 that day. Ms. Bailey, why don't we look at another

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1 date for the schedule? That's going to push us out to
2 June.

3 MS. DOUGHTY: Well, okay. Excuse me. All
4 right. Okay. No more than two brief rebuttal
5 witnesses if that helps.

6 CHAIRPERSON GRIFFIS: Okay. So we're
7 going to need two and a half hours.

8 MS. DOUGHTY: Really? Well, how many for
9 one rebuttal witness? How much time for one?

10 CHAIRPERSON GRIFFIS: Let me assess.
11 April 20th, Ms. Bailey, we could slip it in early on
12 that afternoon.

13 MS. DOUGHTY: Mr. Chairman?

14 CHAIRPERSON GRIFFIS: Yes?

15 MS. DOUGHTY: Ms. Ferster is not available
16 on April the 20th.

17 CHAIRPERSON GRIFFIS: On the 20th?

18 MS. DOUGHTY: Right. She is also not
19 available on May the 17th before 2:00 p.m. and not
20 available on May the 18th.

21 CHAIRPERSON GRIFFIS: Well, we definitely
22 won't schedule it on the 17th.

23 MS. DOUGHTY: Okay.

24 CHAIRPERSON GRIFFIS: Because that's
25 Monday.

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1 MS. DOUGHTY: Good. Obviously, it's not.
2 That date is not right.

3 MS. BAILEY: There is a possibility of May
4 the 11th, Mr. Chairman. From my understanding last
5 week, Sidwell Friends School may be requesting a
6 postponement.

7 CHAIRPERSON GRIFFIS: Haven't we loaded
8 that afternoon already? It seems we keep laying it on
9 that one, because Sidwell dropped. That's fine.
10 Let's put it on the 11th. I'm not precluding you from
11 calling as many witnesses you want for rebuttal. I
12 just need to assess it, especially trying to squeeze
13 it in as quickly as possible. I don't think there is
14 -- well, there it is. Let's check schedule. May 11th
15 is open, first in the afternoon?

16 MS. BAILEY: Yes, sir.

17 MS. DOUGHTY: May 11th at 1:00 p.m.?

18 CHAIRPERSON GRIFFIS: That's right.

19 MS. DOUGHTY: Yes, that's fine with me.

20 CHAIRPERSON GRIFFIS: WagTime?

21 MR. DONOHUE: Fine.

22 CHAIRPERSON GRIFFIS: Government?

23 MR. RUSHKOFF: May 11th at 1:00 p.m.?

24 Fine.

25 CHAIRPERSON GRIFFIS: You have to be here,

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1 don't you? You can't check your schedule. Oh, no,
2 that's not true. Okay. And intervenor, Mr. Wemple,
3 are you aware of schedule?

4 MS. DOUGHTY: I have it.

5 CHAIRPERSON GRIFFIS: You have the
6 schedule? Okay. So May 11th we're okay? What we're
7 going to do is we're going to have the rebuttal first,
8 then we'll have the cross of the rebuttal witnesses.
9 Then we'll go to closing and any order that we have
10 already set up, and then we'll end with your closing.

11 Sound good?

12 MS. DOUGHTY: So our closing will be the
13 last?

14 CHAIRPERSON GRIFFIS: Can you turn your
15 mike on?

16 MS. DOUGHTY: So --

17 CHAIRPERSON GRIFFIS: Yes, you are given
18 that great honor of closing last.

19 MS. DOUGHTY: Really? Good. Thank you.

20 CHAIRPERSON GRIFFIS: The last word. No,
21 actually I get that, but nonetheless, okay, do we have
22 anything attendant to submissions prior to that, Ms.
23 Bailey? Did we bring up anything for today?

24 MS. BAILEY: I have a couple of things,
25 Mr. Chairman. I don't know if the Board still wants

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1 them or not, and there was some discussion about the
2 letters both in opposition and in support.

3 CHAIRPERSON GRIFFIS: Right. I'm sorry.
4 Excellent. We're going to just get a list into the
5 record. You're not going to do it tonight, but at
6 some point prior to the next hearing we'll have it all
7 submitted in, who is adopting what as part of their
8 submissions.

9 MS. BAILEY: Mr. Donohue had asked that if
10 it's necessary that he respond to the Clean Hands Act
11 letter, because he had not had an opportunity to
12 review it prior to today. Ms. Miller had discussed
13 environment and health inspections at the site, if one
14 was conducted by DCRA. I'm not quite sure if she
15 needs documentation from DCRA to indicate whether they
16 did do an inspection at the site or not.

17 CHAIRPERSON GRIFFIS: Environmental?

18 MS. BAILEY: There was discussion about
19 it, Mr. Chairman. I'm not sure if it's needed.

20 CHAIRPERSON GRIFFIS: What sort of
21 environmental study was done, conducted? What are we
22 talking about, the EISS?

23 MR. RUSHKOFF: I will try to respond to
24 that. I believe it was a legal analysis of whether or
25 not an Environmental Impact Statement was needed and I

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1 think the determination was that, based on the size of
2 the project, that there didn't need to be.

3 CHAIRPERSON GRIFFIS: So you're talking
4 about the EISS process or something different?

5 MR. RUSHKOFF: EISS, yes, yes. I mean,
6 there is a -- that's --

7 CHAIRPERSON GRIFFIS: Do I have that
8 right?

9 MR. RUSHKOFF: I think the reason there
10 isn't a record of it is, I believe, it was --

11 CHAIRPERSON GRIFFIS: Wouldn't there have
12 to be the cover sheet where you have to check off a
13 certain portion of which it wouldn't be needed or you
14 don't go beyond question 4 or you always pass go or
15 you go to the --

16 MR. RUSHKOFF: I think because it didn't
17 meet the financial threshold, they didn't even get to
18 the form.

19 CHAIRPERSON GRIFFIS: Okay.

20 MR. RUSHKOFF: I think.

21 CHAIRPERSON GRIFFIS: Why don't we just
22 have that clear and just submit it in. If it's there,
23 let's take it.

24 MR. RUSHKOFF: Okay.

25 CHAIRPERSON GRIFFIS: If it isn't, then

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1 let's figure out why.

2 MR. RUSHKOFF: Okay. I'll do that.

3 MS. BAILEY: That's not what I was
4 referring to, Mr. Chair.

5 MR. RUSHKOFF: Oh, I'm sorry. Well, I
6 just got myself into trouble.

7 CHAIRPERSON GRIFFIS: What were you
8 talking about?

9 MS. BAILEY: There is a letter addressed
10 to Steven Sher from Denzil Noble and in that letter,
11 it talks about an inspection.

12 CHAIRPERSON GRIFFIS: An environmental
13 inspection?

14 MS. BAILEY: Well, perhaps I -- what I'm
15 speaking about is the second paragraph of this letter.
16 It talks about inspection to be conducted by DCRA and
17 Ms. Miller had concerns of whether those inspections
18 were ever done by DCRA, and that's what I was alluding
19 to.

20 CHAIRPERSON GRIFFIS: Oh, right. Right.
21 Yes, that was just a limited piece of Ms. Ogunneye's
22 testimony. Was that correct, right, and she was
23 saying that she thought there might have been one, but
24 wasn't aware if there were records and if there is,
25 when inspectors goes out, it's our experience in

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1 hearing civil infractions and such that they may take
2 notes. They may fill out something. If there is
3 something of that availability, let's see it.

4 MR. RUSHKOFF: Okay.

5 MR. DONOHUE: We can submit that, as well,
6 Mr. Chair, if you would like. We have got the list of
7 inspections, dates, times.

8 CHAIRPERSON GRIFFIS: Oh, excellent. See
9 that? Okay. What else?

10 MS. BAILEY: That's it, sir.

11 CHAIRPERSON GRIFFIS: That's it?

12 MS. BAILEY: That's it for me.

13 CHAIRPERSON GRIFFIS: Excellent. In which
14 case, when should they have them in, Ms. Bailey?

15 MS. BAILEY: Let's see, May 11th. April
16 27th, Mr. Chairman.

17 CHAIRPERSON GRIFFIS: Wonderful. Okay.
18 Anything else? Everyone clear on schedule, procedure?

19 Okay. I would anticipate on May 11th that we'll have
20 those submissions in, of course, timely before that.
21 We'll do the closings and then we will set this for a
22 decision making, and we'll go through the last
23 filings of that. Other than that then, there is
24 nothing else for us? Any other business for the
25 afternoon? Appreciate everybody's patience with us.

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1 Have a great evening and that would adjourn the
2 Afternoon Session of 30 March 2004.

3 (Whereupon, the Afternoon Session Public
4 Hearing was concluded at 6:50 p.m.)
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