

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

MAY 11, 2004

+ + + + +

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

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
RUTHANNE G. MILLER	Vice Chairperson
JOHN A. MANN II	Board Member (NCPC)
DAVID ZAIDAIN	Board Member (NCPC)

ZONING COMMISSION MEMBERS PRESENT:

GREGORY JEFFRIES	Commissioner (ZC)
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OFFICE OF ZONING STAFF PRESENT:

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

OFFICE OF PLANNING STAFF PRESENT:

DAVID McGETTIGAN	Office of Planning
STEVEN MORDFIN	Office of Planning
JOHN MOORE	Office of Planning

D.C. OFFICE OF CORPORATION COUNSEL:

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LORI MONROE, ESQ.  
SHERRY GLAZIER, Corporation Counsel

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

9:53 a.m.

CHAIRPERSON GRIFFIS: On the record. Good morning. This is the morning hearing of the Board of Zoning Adjustment of the District of Columbia. My name is Geoff Griffis. I am Chairperson. Joining me today is Ms. Miller who is the Vice Chair. Representing the National Capitol Planning Commission is Mr. Mann. Representing the Zoning Commission with us this morning, it is my absolute pleasure to welcome to his first hearing, Mr. Jeffries, a new Zoning Commission member.

Copies of today's hearing agenda are available for you. They are located where you entered into the room this morning. Please take one. You can see where you are on the schedule. We will be sticking pretty closely to that. We will be getting through everything, hopefully, by an appropriate lunch period.

There are several important things that I need to make sure everyone clearly understands in my opening. First of all, all hearing before the Board of Zoning Adjustment are recorded. They are now recorded in two fashions. One, we have our court reporter who is creating the official transcript,

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1 meaning everything you say will go into the record.  
2 The second is, it's our pleasure to tell you, we are  
3 being broadcast live on the Office of Zoning's  
4 website.

5 So attendant to both of those we ask  
6 several things. First of all, when coming forward to  
7 speak to the Board, you will need to have filled out  
8 two witness cards. Witness cards are available at the  
9 table where you entered into the room. They are also  
10 available at the table where you will give testimony.

11 Those two cards go to the recorder prior to coming  
12 forward to speak to the Board.

13 Additionally, we would ask that when you  
14 come forward you need to state your name and address  
15 for the record. You only need to do that once. That  
16 way, you can be credited with all the important things  
17 that you are going to tell us this morning. It's very  
18 important to understand that everything that happens  
19 today needs to be on the record so that we can  
20 deliberate on it. So you will need to, of course,  
21 speak into a microphone. The microphone should be on.

22 Now, as a bit of clarity and specificity,  
23 we do get feedback once in a while when all the  
24 microphones are on. So I will direct you if that  
25 happens. But I would ask if you could be cognoscente

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1 of the fact of just turning the microphone off when  
2 you are finished and turning it back on when you need  
3 to speak.

4 The order of procedure for special  
5 exceptions and variances is as follows. First, we  
6 hear from the applicant and any witnesses in their  
7 case presentation. Second, we hear all government  
8 reports attendant to the application. Those include  
9 such reports as the Office of Planning, Department of  
10 Transportation, and anything else attendant to it.

11 Third, we would hear the report from the  
12 Advisory Neighborhood Commission. Fourth would be  
13 persons or parties in support of the application.  
14 Fifth would be persons or parties in opposition to the  
15 application. Sixth, finally, would be closing remarks  
16 by the applicant.

17 Pursuant to 3117.4 and 3117.5, of course,  
18 we have jurisdiction over limiting testimony time in  
19 any case requirement. That is for parties, persons,  
20 anything of that nature. I don't, in my assessment of  
21 this morning's cases, think that we need to establish  
22 times for any of the applicants that are coming  
23 forward. It should be known though if you are here as  
24 a person to give testimony, you are limited to three  
25 minutes. We will give you an idea of when you get

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1 close to that.

2 Cross examination of witnesses, of course,  
3 is permitted by the applicant or parties in a case.  
4 The ANC within which the property is located is  
5 automatically a party in the case and therefore will  
6 be afforded the ability to cross examine any  
7 witnesses.

8 The record will be closed at the  
9 conclusion of each case or hearing before us except  
10 for any material that is specifically requested by the  
11 Board. We will be very specific on what is to be  
12 submitted and when it is to be submitted into the  
13 Office of Zoning. After that is received, it should  
14 be very clear that the record would be closed and no  
15 other information would be accepted into the record.

16 The Sunshine Act requires that all  
17 proceedings of the Board of Zoning Adjustment be held  
18 in the open and before the public. This Board may,  
19 however, consistent with the Sunshine Act and its  
20 rules of procedure, enter into executive session.  
21 Executive session is utilized by this Board for  
22 deliberation on a case and/or reviewing the record.

23 The decision of this Board in contested  
24 cases must be based exclusively on the record that is  
25 established before us today which is why I have such a

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1 lengthy opening and telling you how to address, what  
2 you should address, and when to submit information  
3 because it is very important. We also ask that people  
4 present today not engage Board Members in conversation  
5 today so it does not give the appearance of receiving  
6 information outside of the public record.

7           The Board will now consider any  
8 preliminary matters. Preliminary matters are those  
9 which relate to whether a case will or should be heard  
10 today such as request for postponements, continuances,  
11 or withdrawals or whether proper and adequate notice  
12 has been provided. If you are not prepared to go  
13 forward with a case today or you believe the Board  
14 should not hear a case today, now would be the time to  
15 identify having a preliminary matter.

16           I would ask that anyone that has a  
17 preliminary matter just come forward and have a seat  
18 at the table as an indication of such. Let me also  
19 say a very good morning to our Office of Zoning staff  
20 who is with us today; Ms. Bailey on by very far right,  
21 Mr. Moy, Ms. Monroe representing Corporation Counsel.

22           Let me ask first if they have any preliminary matters  
23 for the Board.

24           MS. BAILEY: Mr. Chairman, Members of the  
25 Board, good morning. Yes, Mr. Chairman, there is a

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1 preliminary matter. It has to do with the first case  
2 of the morning, 17075. There is a request for this  
3 case to be dismissed. Would you like to take that up  
4 at this point, Mr. Chairman?

5 CHAIRPERSON GRIFFIS: I think that would  
6 be fine if you don't have any other preliminary  
7 matters. Would you like to swear people in first?  
8 Then we can take that up.

9 MS. BAILEY: Sure.

10 CHAIRPERSON GRIFFIS: Excellent. Then I  
11 would ask for everyone that is going to testify before  
12 the Board today, if you could please stand and give  
13 your attention to Ms. Bailey.

14 MS. BAILEY: Please raise your right hand.

15 WHEREUPON,

16 MR. GELL, MR. BOWIE AND MR. BJORGE  
17 were called as witnesses and, having been first duly  
18 sworn, were examined and testified as follows:

19 MS. BAILEY: Thank you.

20 CHAIRPERSON GRIFFIS: Good. Thank you  
21 very much. Mr. Gell, a preliminary matter?

22 MR. GELL: Yes, Mr. Chairman, we submitted  
23 a motion to dismiss and in the alternative a request  
24 for withdrawal or a withdrawal statement. We think  
25 that the case really is not properly before the Board.

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1           We believe that the Zoning Administrator,  
2 rather than denying a request for a carry out, should  
3 have told the applicant that he did not need a carry  
4 out C of O. He already had a C of O for a  
5 delicatessen which covers the use that he has there  
6 which is a Chinese carry out. We set that out in our  
7 motion to dismiss.

8           CHAIRPERSON GRIFFIS: Okay. So the basis  
9 for your motion to dismiss from the Board is for lack  
10 of jurisdiction.

11           MR. GELL: I would say lack of rightness.

12           CHAIRPERSON GRIFFIS: Okay. But in the  
13 alternative, we could accept your withdrawal. Who is  
14 with me today? Do you mind introducing yourselves?  
15 If you wouldn't mind just turning on your microphone.

16           MR. BOWIE: Good morning, Mr. Chair,  
17 Members of the Board. My name is Darren Bowie. I'm  
18 here representing the Dupont Circle Advisory  
19 Neighborhood Commission 2B.

20           CHAIRPERSON GRIFFIS: Good.

21           MR. BJORGE: Good morning, Members of the  
22 Board. My name is Mark Bjorge. I have applied for  
23 party status as the neighbor directly to the south of  
24 the property in question. I also have requests from  
25 other neighbors on that block to represent them in

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1 their party status applications.

2 CHAIRPERSON GRIFFIS: Okay. Thank you.  
3 What is your opinion on the motions?

4 MR. BJORGE: One other procedural matter,  
5 Mr. Chair. It's still not clear to me that counsel  
6 represents the owner of the property. The Board may  
7 recall that this issue came up in February which is in  
8 part why this was continued. The letter that counsel  
9 filed with the Board indicated that he was  
10 representing the tenant, Chef's Express. The  
11 applicant should be the owner so if we could just  
12 clarify that first.

13 CHAIRPERSON GRIFFIS: I see. We can do  
14 that second I think depending on what happens with the  
15 first.

16 MR. BJORGE: Okay. I just wanted to raise  
17 that as an issue that's still here at least to me.

18 CHAIRPERSON GRIFFIS: Okay. But do you  
19 oppose the motion to dismiss?

20 MR. BJORGE: Yes, Mr. Chairman and Members  
21 of the Board, we do oppose this. The establishment  
22 was cited by DCRA, it's my understanding, for  
23 operating outside of its C of O, and it was told that  
24 it had to apply for a new C of O for the purpose of a  
25 Chinese carry out. It did that. That application was

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1 denied.

2 The Zoning Office told the applicant to  
3 apply for a variance of special exception to operate  
4 it as a Chinese carry out which is why we're here  
5 today. The reason that the applicant applied for a  
6 variance is because they weren't operating within  
7 their C of O. So I think that should be pretty clear.

8 So I don't think we need to delay this matter  
9 further. The issue of what use is permitted is right  
10 for the Board to address.

11 CHAIRPERSON GRIFFIS: Okay. I have a  
12 difficulty in that we haven't established parties in  
13 this case. Yes, Mr. Gell.

14 MR. GELL: I can speak to the two issue  
15 that were raised. Mr. Gorgone, the owner of the  
16 building, is here. He is supporting his tenant in  
17 this application. He can certainly testify to that.

18 CHAIRPERSON GRIFFIS: Right.

19 MR. GELL: Secondly, I'm not aware of any  
20 citation that Mr. Zhang received. I believe he was  
21 told that he needed that, but this was not, as I can  
22 see, an official act. Therefore, it's appropriate for  
23 us to request that it be dismissed.

24 CHAIRPERSON GRIFFIS: Indeed. I know the  
25 Board is aware of all of these issues. In fact, it

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1 was a cause of some discussion not only for this  
2 hearing but also for the previous hearing. The issue  
3 as I see it at this point, Board Members, is we can  
4 take up a motion to dismiss or quite frankly we can  
5 accept the withdrawal. Let me hear from others if  
6 there are any opinions.

7 VICE CHAIRPERSON MILLER: Mr. Chairman, I  
8 would be inclined to support the withdrawal of the  
9 application at this point. This is here before us  
10 because the applicant brought it for a variance  
11 relief. The applicant is allowed under the  
12 regulations to withdraw at this point. We've hardly  
13 begun the case. It's not an appeal of the C of O. So  
14 I think that would be the way to go on this one.

15 CHAIRPERSON GRIFFIS: Understood. In  
16 fact, there's nothing we can do if an application is  
17 withdrawn. We have no action to take. I think  
18 mounting to an action we would actually deliberate on  
19 the dismissal seems to me mute in the fact that we can  
20 easily accept the withdrawal. The impact on the  
21 application is similar if not close to identical. I  
22 think that's what I would advocate we do at this  
23 point. Anything else?

24 MR. GELL: I would simply say that an  
25 acceptance granting of our motion to dismiss would be

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1 instructive to the Zoning Administrator and would  
2 perhaps deal with the issue there where it should be  
3 dealt with. Simply allowing us to withdraw is not  
4 going to solve that problem. So that's why I would  
5 urge the dismissal.

6 CHAIRPERSON GRIFFIS: Understood. ANC?

7 MR. BOWIE: This isn't going to settle  
8 this issue. Obviously I imagine a remedy now is to  
9 seek revocation of the current C of O for operating  
10 out of that C of O. So I imagine at some point this  
11 will come up again. It would be nice if we could deal  
12 with this now rather than later.

13 CHAIRPERSON GRIFFIS: Right. And I  
14 absolutely agree. I think the Board shares my  
15 agreement that we are scheduled to hear this. We  
16 would rather deal with what we can. Just based on the  
17 statements today, based on what has come before us  
18 before and on the application itself, I'm not sure any  
19 of us have total clarity about what we would do with  
20 this thing.

21 So I don't see how we could proceed. It's  
22 almost where we were before. In terms of Mr. Gell's  
23 statement, I absolutely agree. If we took up the  
24 motion to dismiss, it would essentially do what he is  
25 indicating. Therefore, I do support the withdrawal of

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1 the application. Others?

2 VICE CHAIRPERSON MILLER: I'm in favor of  
3 that provided that's what Mr. Gell has put before us.

4 If we were to go otherwise in a motion to dismiss,  
5 then we would need to grant party status and allow the  
6 ANC and the parties to address that issue. But since  
7 he has presented before us the option of withdrawing  
8 and that's totally within the applicant's control, I  
9 think that's the best way to go if that's what he  
10 chooses to do.

11 CHAIRPERSON GRIFFIS: Well said. Then I  
12 can take it as consensus of the Board, not that any  
13 action is required, that this application has been  
14 withdrawn.

15 (Application withdrawn.)

16 MR. GELL: Thank you.

17 CHAIRPERSON GRIFFIS: Thank you all very  
18 much. We may well see you all again, if not for this,  
19 for something else perhaps. Have an excellent day.  
20 Let's move on to the next case then.

21 MS. BAILEY: Application Number 17157 of  
22 Kirsten Oldenburg, pursuant to 11 DCMR 3104.1, for a  
23 special exception to allow a two-story rear addition  
24 to an existing single-family row dwelling under  
25 section 223, not meeting the lot occupancy

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1 requirements. That's section 403. The property is  
2 located in the R-4 District at premises 423 Twelfth  
3 Street, S.E. That's Square 992, Lot 62.

4 CHAIRPERSON GRIFFIS: All set then?

5 MS. BAILEY: Yes.

6 CHAIRPERSON GRIFFIS: Excellent. A very  
7 good morning to you. If I could just have you  
8 introduce yourselves please.

9 MS. OLDENBURG: Hello. I'm Kirsten  
10 Oldenburg, the owner of the property at 423 Twelfth  
11 Street, S.E.

12 CHAIRPERSON GRIFFIS: Welcome.

13 MR. MARTIN: And I'm Jim Martin, her  
14 architect, 938 S Street, N.W.

15 CHAIRPERSON GRIFFIS: Okay. Just for the  
16 Board's clarification, you are the one we'll give a  
17 hard time to then.

18 MR. MARTIN: Exactly.

19 CHAIRPERSON GRIFFIS: Good. Did you have  
20 a brief opening statement that you wanted to make, or  
21 should we just jump into Board questions?

22 MS. OLDENBURG: You can just jump in if  
23 you like. I can make a statement, but I don't need  
24 to.

25 CHAIRPERSON GRIFFIS: Let me ask you

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1 briefly, are there other graphics that are being  
2 presented today that are outside of that which was put  
3 into the record?

4 MR. MARTIN: No.

5 CHAIRPERSON GRIFFIS: Do you have a better  
6 rear elevation that shows the addition?

7 MS. OLDENBURG: This is from the  
8 architectural plans.

9 CHAIRPERSON GRIFFIS: Okay. Let's go to  
10 that then. If Board is okay, unless they want an  
11 opening statement, I think we can walk through this  
12 pretty quickly. If I could just ask you, on that rear  
13 elevation that's showing, it looks like the graphic is  
14 meant to continue all the way over. But that's the  
15 full property line, property line addition, is that  
16 correct?

17 MR. MARTIN: That's correct.

18 CHAIRPERSON GRIFFIS: For my  
19 clarification, of course, you have a letter of non-  
20 objection or support from the adjacent neighbor of  
21 which the area way is being in-filled on her side.

22 MS. OLDENBURG: Exactly, yes, I do. I  
23 have a letter also from all the other adjacent  
24 property owners as well.

25 CHAIRPERSON GRIFFIS: Okay. When you

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1 presented to the Capitol Hill Restoration Society --  
2 Perhaps I should step back. You presented to the  
3 Capitol Hill Restoration Society, correct?

4 MS. OLDENBURG: Yes, I did. They approved  
5 the request or recommended approval of the request.

6 CHAIRPERSON GRIFFIS: Indeed. Right. And  
7 in our record it's Exhibit Number 20. It was a note  
8 in my reading of it that they had approved a one story  
9 addition. Is this a one story addition?

10 MS. OLDENBURG: No, this is a two story  
11 addition.

12 CHAIRPERSON GRIFFIS: Indeed. So the  
13 graphics that we have, are they similar or different  
14 than what was presented to the Capitol Hill  
15 Restoration Society?

16 MS. OLDENBURG: No, it was exactly the  
17 same as presented to the Capitol Hill Restoration  
18 Society.

19 CHAIRPERSON GRIFFIS: Okay. Looking at  
20 this then, of course, it's your testimony today and  
21 you have not heard any evidence to the fact that this  
22 would impair the light or air to the adjacent  
23 properties.

24 MS. OLDENBURG: No, not on my examination.

25 As I say, from all of the adjacent owners, I have

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1 letters not only from the neighbor who is affected  
2 immediately by the courtyard, half of it being closed,  
3 but also from the owner of the property on the north  
4 side and owners of the property to the west that are  
5 in the courtyard, that are in the Walker Court  
6 location. So the back of their houses basically face  
7 the back of my house. But they have no windows there  
8 so they have no visual impairment.

9 CHAIRPERSON GRIFFIS: Right. The adjacent  
10 property has no windows there. Is that what you are  
11 saying?

12 MS. OLDENBURG: No, I'm saying that across  
13 from the alley on the courtyard --

14 CHAIRPERSON GRIFFIS: Right, on the alley  
15 side which is part of the written submission.

16 MS. OLDENBURG: We back on one another,  
17 right. Exactly. The owner that shares the courtyard  
18 has windows. I have windows in my house. We  
19 currently have windows facing one another. But the  
20 addition on my property will not have any windows so  
21 that that property owner will then have added privacy  
22 because there will be no way to look into her property  
23 on the back side.

24 CHAIRPERSON GRIFFIS: Right. And if I'm  
25 not mistaken, that's what she indicated in her letter.

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1 MS. OLDENBURG: Yes, exactly.

2 CHAIRPERSON GRIFFIS: You are increasing  
3 her privacy.

4 MS. OLDENBURG: Exactly.

5 CHAIRPERSON GRIFFIS: Because you are  
6 closing up your windows.

7 MS. OLDENBURG: Yes.

8 CHAIRPERSON GRIFFIS: Okay. There hasn't  
9 been any other evidence or any other things that you  
10 are aware of that it would somehow unduly impact the  
11 privacy or use of any other the other properties.

12 MS. OLDENBURG: No.

13 CHAIRPERSON GRIFFIS: An interesting point  
14 in this case is that you are actually building new  
15 structure. There's an addition to this, but the lot  
16 occupancy is not changing.

17 MS. OLDENBURG: Right.

18 CHAIRPERSON GRIFFIS: Okay. I think we're  
19 very clear on why that is. The materials in the rear  
20 are being enumerated as brick --

21 MR. MARTIN: That's correct.

22 CHAIRPERSON GRIFFIS: In characterization  
23 of the adjacent houses and the original structure.

24 MR. MARTIN: That's correct.

25 CHAIRPERSON GRIFFIS: Okay. We do have

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1 the lot occupany, of course, as allowable to come in  
2 under 223 for the special exception. Were there any  
3 comments in terms of walking these plans around that  
4 people or any of the adjacent neighbors, not that we  
5 would necessary listen to them but it's good to have  
6 all of that in the record, that talked about anything,  
7 other details in terms of design or in terms of  
8 screening or lighting or anything else of that nature?

9 MS. OLDENBURG: No, the only comments I  
10 got from all of the adjacent owners and others in the  
11 neighborhood that I spoke to is that the design would  
12 enhance the rear. Most of the houses are stuccoed in  
13 the back to avoid having to point the brick as it  
14 wears. So this will replace the brick rear of the  
15 house. People are very pleased with the design as I  
16 showed it around the neighborhood.

17 CHAIRPERSON GRIFFIS: Excellent. Of  
18 course, under 223.4, we have total design  
19 jurisdiction, so we could really get in here.

20 MS. OLDENBURG: Yes.

21 CHAIRPERSON GRIFFIS: That is in fact the  
22 task for the special exception under 223 that we have  
23 just walked through, not to mention your submissions  
24 in the record but also your oral testimony. Let me  
25 open it up to any Board questions that they might have

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1 or clarification that the need. If there are none,  
2 then let's go quickly on to the Office of Planning's  
3 report. A very good morning to you.

4 MR. MORDFIN: Good morning, Chair and  
5 Members of the Board. I'm Stephen Mordfin with the  
6 Office of Planning. The existing lot occupancy is  
7 66.4 percent in excess of the minimum lot occupancy  
8 requirements for the R-4 District. The applicant  
9 proposes to contain this lot occupancy through the  
10 elimination of a small area, not large enough to be  
11 considered a court.

12 As a result, this small area does not  
13 contribute towards lot occupancy. The subject lot is  
14 also 12.73 feet in width, less than the minimum 18  
15 foot requirement and 827.45 feet in area less than the  
16 area 1,800 square feet required. The proposed  
17 application is in conformance with the provisions for  
18 the granting of a special exception in that it is a  
19 use permitted as a matter of right within the R-4  
20 District, a row dwelling.

21 Light and air will not adversely be  
22 affected as the height of the building will not  
23 change. Privacy and use and enjoyment of the  
24 neighboring properties will not be unduly compromised  
25 as the building addition will not have any windows or

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1 doors facing the property to the south, the one most  
2 affected by this application. The dwelling on the  
3 west side of the alley has no windows, doors, or open  
4 space on the side of the dwelling facing the subject  
5 property.

6 The building addition will only be visible  
7 from the alley and will extend no further back on the  
8 subject lot than the existing structure. The  
9 requested lot occupancy is 66.4 percent less than the  
10 maximum 70 percent permitted. Therefore, the Office  
11 of Planning recommends approval of the application as  
12 submitted by the applicant.

13 CHAIRPERSON GRIFFIS: Excellent. Thank  
14 you very much. Questions from the Board? Does the  
15 applicant have any cross examination of the Office of  
16 Planning?

17 MS. OLDENBURG: No.

18 CHAIRPERSON GRIFFIS: Do you have their  
19 report?

20 MS. OLDENBURG: Yes, I had it. I received  
21 a copy from Mr. Mordfin.

22 CHAIRPERSON GRIFFIS: Excellent. Very  
23 well then. Let's move on to other submissions. HPRB  
24 you have already been through and there's conceptual  
25 approval for that. The Capitol Hill Restoration

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1 Society was indicated. Did you present to the ANC-6B?

2 MS. OLDENBURG: Yes, I went to their  
3 Zoning and Planning Committee and then the following  
4 week before the ANC-6B itself. They voted to support  
5 the request on April 13 of this year.

6 CHAIRPERSON GRIFFIS: They did, okay.

7 MS. OLDENBURG: Yes, they did.

8 CHAIRPERSON GRIFFIS: They just didn't  
9 submit anything in.

10 MS. OLDENBURG: I heard that somebody had  
11 called and they had spoken with one of the members,  
12 but --

13 CHAIRPERSON GRIFFIS: I sure hope not.

14 MS. OLDENBURG: No, somebody from the  
15 office had called because they hadn't received  
16 anything I believe.

17 CHAIRPERSON GRIFFIS: I see.

18 MS. OLDENBURG: And one of the ANC members  
19 mentioned it to me.

20 CHAIRPERSON GRIFFIS: Well, of course, in  
21 order to give great weight to the ANC and their  
22 position, we would need a letter into the record.  
23 Obviously it's not detrimental to this case. It's  
24 pretty much straight forward in this special  
25 exception. Did they treat you well when you

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1 presented? You don't need to answer that.

2 MS. OLDENBURG: Yes.

3 CHAIRPERSON GRIFFIS: Okay. Moving on  
4 then, I don't have any other Government reports  
5 attendant to this application unless the applicant is  
6 aware of any other submissions. Any other Government  
7 agencies that may have submitted on this?

8 MS. OLDENBURG: No, I'm not aware of  
9 anything else.

10 CHAIRPERSON GRIFFIS: Very well. Then we  
11 will make note. Is anyone here attendant to  
12 Application 17157 to give testimony as a person either  
13 in support or in opposition? Not noting anyone  
14 charging the table to give testimony, we can identify  
15 the fact in the record that we do have Exhibit Number  
16 19 which is from Allison Watts, 425 Twelfth Street,  
17 S.E., a letter in support.

18 And then your submission statement which  
19 was Exhibit Number 27 also had letters from the  
20 surrounding neighbors and the adjoining neighbor.  
21 That being said, any other questions from the Board?  
22 Any other clarifications? We will turn to you if you  
23 have any last minute conclusionary remarks if you feel  
24 the need.

25 MS. OLDENBURG: No, I don't have any.

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1 CHAIRPERSON GRIFFIS: Excellent. There it  
2 is. Then I would move approval for Application 17157  
3 for a special exception to allow a two-story rear  
4 addition to an existing single-family row dwelling.  
5 This is, of course, under section 223, which may be in  
6 the deliberation of the motion.

7 I'll give my statements about how  
8 important section 223 is because we have so much time  
9 now in the morning. But that being said, it is, of  
10 course, not meeting the required lot occupancy under  
11 section 403. And this is at the premises of 423  
12 Twelfth Street, S.E. I would ask for a second.

13 MEMBER MANN: Second.

14 CHAIRPERSON GRIFFIS: Thank you very much,  
15 Mr. Mann. I think it's fairly clear walking through  
16 the written and oral testimony this morning that the  
17 test for a special exception under 223 has been met.  
18 Not only is it met with the applicant's submissions,  
19 but it also met with great support from the Office of  
20 Planning.

21 HPRB is actually doing conceptual approval  
22 for the design which relieves us from our grand  
23 responsibility of having design review over your  
24 addition. ANC-6B, of course, was noted orally from  
25 the applicant as having unanimously supported this. I

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1 see no reason not to support this. I would ask  
2 everyone else's similar endeavor. Any further  
3 deliberation, comments from the Board? Ms. Miller?

4 VICE CHAIRPERSON MILLER: No, I support  
5 the application.

6 CHAIRPERSON GRIFFIS: Anything else then?  
7 Any other questions or comments? Very well. I would  
8 ask for all those in favor of the motion signify by  
9 saying aye.

10 (Chorus of ayes.)

11 CHAIRPERSON GRIFFIS: Opposed?  
12 Abstaining?

13 (No response.)

14 CHAIRPERSON GRIFFIS: Why don't we record  
15 the vote?

16 MS. BAILEY: Mr. Chairman, the vote is  
17 recorded as 4-0-1 to approve the application. Mr.  
18 Griffis made the motion. Mr. Mann second. Ms. Miller  
19 and Mr. Jeffries are in support. Mr. Etherly is not  
20 here with us today. Is this a summary order, sir?

21 CHAIRPERSON GRIFFIS: Yes. Excellent.  
22 Thank you very much.

23 MS. OLDENBURG: Thank you.

24 CHAIRPERSON GRIFFIS: When are you going  
25 to start?

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1 MS. OLDENBURG: As soon as we can.

2 CHAIRPERSON GRIFFIS: Excellent. Enjoy.  
3 Hopefully it will be done by the beautiful hot August  
4 days.

5 MS. OLDENBURG: With a new roof by winter  
6 hopefully.

7 CHAIRPERSON GRIFFIS: Yes, indeed. Okay.  
8 Let's move on then. We can call the next case.

9 MS. BAILEY: The last case of the morning  
10 is Application Number 17156 of CRP/MR 1414 22<sup>nd</sup> Street  
11 L.P., pursuant to 11 DCMR 3103.2, for a variance from  
12 the recreational space requirements under section 773,  
13 to convert and renovate an existing six-story office  
14 building with underground parking into a 44 unit  
15 apartment house in the Dupont Circle/C-2-A District at  
16 premises 1414 22<sup>nd</sup> Street, N.W. That's Square 48, Lot  
17 806.

18 CHAIRPERSON GRIFFIS: Thank you, Ms.  
19 Bailey. Board Members, I am recusing myself on this  
20 case as this application comes from the firm of which  
21 I am employed. I will leave Ms. Miller in charge.  
22 Have fun.

23 VICE CHAIRPERSON MILLER: Good morning.  
24 Would you identify yourself for the record please?

25 MR. BRIGGS: Good morning, Ms. Miller and

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1 Members of the Board, my name is David Briggs. I'm  
2 with the law firm of Holland and Knight. I will be  
3 joined by Joshua Olsen, a representative of the  
4 applicant, Jack Mevorah, an architect of the  
5 architecture firm of Hickok, Warner and Cole, and  
6 Stephen Sher, the Director of Zoning and Land Use  
7 Services of Holland and Knight, who I am sure you are  
8 quite familiar with.

9 VICE CHAIRPERSON MILLER: Those are the  
10 individuals following you.

11 MR. BRIGGS: Yes, in order.

12 VICE CHAIRPERSON MILLER: Okay.

13 MR. BRIGGS: Thank you.

14 VICE CHAIRPERSON MILLER: And everyone is  
15 sworn in I assume.

16 MR. BRIGGS: Yes.

17 VICE CHAIRPERSON MILLER: Okay.

18 MR. BRIGGS: And our notes have been  
19 provided to the transcript provider as well, the  
20 cards.

21 VICE CHAIRPERSON MILLER: Okay.

22 MR. BRIGGS: I have a very brief opening  
23 statement. Then we can proceed as the Board desires  
24 with regard to this case. We are here this morning to  
25 request a variance relief from residential recreation

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1 space requirements pursuant to section 3103 and  
2 section 773 of the Zoning Regulations.

3 Your approval today will facilitate  
4 conversion and adaptive reuse of the existing office  
5 building to a multiple dwelling residential building  
6 at the corner of 22<sup>nd</sup> and O having a street address of  
7 1414 22<sup>nd</sup> Street. You may know this building as the  
8 Congressional Quarterly building in the west portion  
9 of the Dupont Circle area.

10 The property is located in a DC/C-2-A Zone  
11 District. We believe that other than this requested  
12 variance the building otherwise complies with the  
13 applicable provisions of the Zoning Regulations  
14 applicable in that zone district. I believe, for the  
15 record, that you have received our pre-hearing  
16 submission as well as our application.

17 The pre-hearing submission was dated April  
18 27 of this year and included multiple attachments  
19 related to the generalized use plan, the zoning map,  
20 also for your information, information that we had  
21 been before the Commission of Fine Arts and received a  
22 no objection since it does fall within the Shipstead-  
23 Luce Area. We also have received - and I believe you  
24 have received as well - a copy of the report of the  
25 Office of Planning dated April 29, 2004 as well as a

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1 letter of support from Advisory Neighborhood  
2 Commission 2-B that was dated April 20, 2004.

3 Also, we have submitted to the file our  
4 Notice of Posting. I do not see a representative of  
5 the ANC here. But I do want to thank the ANC for  
6 their cooperation in this endeavor as well as the  
7 cooperation of the Office of Planning.

8 VICE CHAIRPERSON MILLER: Let me just ask,  
9 is there a representative of the ANC here? Okay. So  
10 for the record, there is not.

11 MR. BRIGGS: We are aware of no opposition  
12 to the application. We think with regard to our case,  
13 when we complete our case, we will show the existing  
14 location of the building, its physical configuration,  
15 and the location of the property and the constraints  
16 imposed upon the property provide the exceptional  
17 conditions required by the Zoning Regulations that  
18 state that a strict application of those regulations  
19 would present a practical difficulty to the applicant  
20 in its adaptive reuse and conversion of the building  
21 from an office use to a residential use.

22 Thus, we believe the variance request that  
23 we are asking for is warranted. There is clearly  
24 substantial, as you will see from our presentation and  
25 our materials, alternate recreation space in the

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1 immediate vicinity which will provide full access,  
2 unrestricted access for future residents of this  
3 property.

4 In addition, we find that the requested  
5 relief will do no harm to the public good or the zone  
6 plan and in fact will advance the stated policy of the  
7 District to bring new residents to the District of  
8 Columbia, taking a building that otherwise could  
9 remain in commercial use and returning it to a  
10 residential component. At this time, we would like  
11 some guidance from you, Ms. Miller and the Members of  
12 the Board, as to whether we just relate on our record  
13 at this point.

14 We would be glad to do an expedited  
15 presentation as well to fill in and then respond to  
16 any questions. Or we can do our full presentation.  
17 Whichever is the Board's desire.

18 VICE CHAIRPERSON MILLER: Well, I think  
19 you should do some of the presentation.

20 MR. BRIGGS: Okay. We will do a very  
21 short presentation.

22 VICE CHAIRPERSON MILLER: So you can  
23 demonstrate --

24 MR. BRIGGS: We will do that in this  
25 presentation. Thank you. With that, I would like to

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1 introduce our first witness, Mr. Joshua Olsen. I will  
2 ask Mr. Olsen to briefly introduce himself, his  
3 position with the applicant and proceed forward with  
4 aspects of his testimony concerning the location,  
5 setting of the property, the existing conditions and  
6 the proposed conversion. Mr. Olsen.

7 MR. OLSEN: Hello. My name is Josh Olsen.  
8 I'm a resident of the District of Columbia, 1202 Q  
9 Street. I'm here on behalf of CRP/MR 1414 22<sup>nd</sup> Street,  
10 the applicant. The applicant is a partnership of  
11 Monument Reality, a D.C.-based real estate development  
12 company, and the Carlisle Group, a D.C.-based  
13 investment group. I will talk briefly about our  
14 intentions for the property and the existing  
15 conditions that make it practically difficult to  
16 fulfill the residential recreation space requirement.

17 VICE CHAIRPERSON MILLER: Mr. Olsen, I'm  
18 not clear what your relation is with the property.  
19 Are you an owner?

20 MR. OLSEN: Yes, I work for the owner of  
21 the property.

22 VICE CHAIRPERSON MILLER: You work for the  
23 owner, okay.

24 MR. OLSEN: Yes. The property is located  
25 between 22<sup>nd</sup> and 23<sup>rd</sup>, O and P Streets, N.W. It's near

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1 the P Street Bridge into Georgetown and directly  
2 across 23<sup>rd</sup> Street from Rock Creek Park. It is  
3 approximately one block from the District's Francis  
4 Tennis Court and Pool complex on N Street.

5 We purchased the building, which had been  
6 dedicated to commercial office use, on December 9 of  
7 last year. At that time, it had been recently vacated  
8 by Congressional Quarterly Publishing Group which had  
9 occupied it for about 30 years. The building contains  
10 approximately 60,000 square feet of space and a two  
11 level below-grade garage.

12 The building represents an exciting  
13 opportunity for us. As office space, it would require  
14 a substantial renovation to get it back to Class A  
15 use. Furthermore, it's not really sited in a place  
16 that is ideal for office use. It's in Dupont Circle  
17 which is a predominantly residential neighborhood  
18 right on the park.

19 Therefore, we feel it's an ideal candidate  
20 for a conversion from office to residential use.  
21 We're planning a fairly small building. It will have  
22 about 36 units. We intend to build larger units with  
23 a predominance of two bedroom.

24 VICE CHAIRPERSON MILLER: Can I interrupt  
25 you right here?

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1 MR. OLSEN: Yes.

2 VICE CHAIRPERSON MILLER: I saw different  
3 numbers in the papers. One number I saw was 44 units.

4 MR. OLSEN: Yes.

5 VICE CHAIRPERSON MILLER: One was 36. So  
6 36 is the number.

7 MR. OLSEN: Yes, 36 is the current number.  
8 That did change from the original submission. But  
9 it's all within the interior of the building, and  
10 therefore doesn't affect our application for a  
11 variance.

12 VICE CHAIRPERSON MILLER: Okay.

13 MR. OLSEN: As David Briggs already stated  
14 and as I believe has been submitted, we have support  
15 from the Office of Planning and the ANC for this  
16 project. That being said, there are some exceptional  
17 conditions imposed by the property that make it  
18 practically impossible to fulfill the residential  
19 recreation space requirement of 20 percent.

20 The first of these is the existing nature  
21 of the building. The building is a cast-in-place,  
22 concrete structure. Part of that structure is a  
23 stairway which provides only a single means of egress  
24 from the basement and roof of the building.

25 Therefore, we are limited by the building

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1 code as to how much assembly space we can provide in  
2 those areas. We're currently proposing to provide the  
3 maximum space allowed under code. Jack Mevorah, the  
4 architect from Hickok, Warner and Cole, can talk about  
5 that in some more detail.

6 The second extraordinary condition posed  
7 by this property is an easement that benefits our  
8 neighbor to the north, a gas station. You can see  
9 that on this plan here. (Indicating.) That purple  
10 shaded area in between our building and the gas  
11 station is the top level of our underground garage.  
12 It's a few feet above grade. But if you were walking  
13 down the sidewalk, you would see it and think that it  
14 was a surface parking lot essentially.

15 Due to an easement entered into in 1994,  
16 long before we had the opportunity to purchase the  
17 building, the owner of the gas station has rights to  
18 park cars on that top level of our garage, the space  
19 between our building and their lot. The only real  
20 right that we have is to a small landscaped easement  
21 that we can place. You can see the portion of that  
22 that we are offering as recreation space between our  
23 property line and that of our neighbor to the north.

24 VICE CHAIRPERSON MILLER: When does the  
25 easement end?

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1 MR. OLSEN: 2072.

2 VICE CHAIRPERSON MILLER: Okay.

3 MR. OLSEN: Apart from the landscaping  
4 easement, we do not control the rest of the area and  
5 therefore cannot use it to meet the residential  
6 recreation space requirement. Given these existing  
7 conditions, it is practically difficult, almost  
8 impossible, to meet the full residential recreation  
9 space requirement.

10 Furthermore, our building is not a few  
11 blocks from a public park or a public facilities.  
12 It's directly across the street from Rock Creek Park  
13 which is one of the largest, if not the largest, open  
14 space in Washington. In addition to Rock Creek Park  
15 itself, I mentioned the Francis Pool and Tennis Court  
16 Complex. The tennis courts themselves are readily  
17 visible from our building. The pool is right around  
18 the corner on N Street.

19 With these amenities so available, there's  
20 no compelling need to provide recreation opportunities  
21 all on our own lot. Indeed, the amenities that are  
22 available, Rock Creek Park, the tennis courts, the  
23 pool, are much greater than anything that we could  
24 provide even if we were to meet the full residential  
25 recreation space requirement which we cannot due to

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1 the existing conditions and easement. I do not  
2 believe that the public good will be at all impaired  
3 by granting the variance.

4 To summarize, given the existing  
5 conditions in this building and given the legal  
6 encumbrance imposed by the easement, fulfilling the  
7 residential recreation space requirement is  
8 practically impossible. We are providing the maximum  
9 amount of space that we can practically provide.  
10 Residents will have easy and obvious access to public  
11 recreation spaces available outside their door. We  
12 are therefore seeking a variance from this Board on  
13 the residential recreation space requirement. Thank  
14 you.

15 VICE CHAIRPERSON MILLER: Mr. Olsen, I  
16 have a question that's not really relevant but I'm  
17 curious. Do you know where Congressional Quarterly  
18 went?

19 MR. OLSEN: They went I believe three  
20 blocks down the street to a new office building.

21 VICE CHAIRPERSON MILLER: Great. So they  
22 did stay in the District.

23 MR. OLSEN: Yes.

24 VICE CHAIRPERSON MILLER: Do we have any  
25 questions? Then we can proceed to the next witness if

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1 you like.

2 MR. BRIGGS: Thank you, Ms. Miller. I  
3 would like to introduce Jack Mevorah of Hickok Warner  
4 to make a presentation on the architecture and get  
5 into some of the details of the practical difficulty  
6 created by reusing this building as a residential  
7 project. Thank you.

8 MR. MEVORAH: Good morning. My name is  
9 Jack Mevorah. I'm with Hickok, Warner and Cole  
10 Architects. I'm an architect and project manager for  
11 this project. Ms. Chair has updated plans to reflect  
12 the reduction in units from 44 to 36.

13 VICE CHAIRPERSON MILLER: Great.

14 MR. MEVORAH: As Mr. Olsen stated, this is  
15 all within the existing blueprint of the building. It  
16 doesn't affect our residential rec requirement or the  
17 size of the building in any way.

18 VICE CHAIRPERSON MILLER: Do you want to  
19 say why you moved from the 44 to the 36?

20 MR. MEVORAH: Sure. That actually may  
21 come out in my testimony. You'll see by the  
22 arrangement of the building how this works.

23 VICE CHAIRPERSON MILLER: Good. Okay.

24 MR. MEVORAH: This is an existing six  
25 story, 60,000 square foot office building with two and

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1 a half levels of parking below it. The applicant  
2 proposes to convert this as a matter of right from the  
3 existing, conforming commercial to conforming  
4 residential. As we have stated, this has now gone  
5 down to 36 units, slightly fewer than we had  
6 originally applied for.

7 On 60,000 square feet, the required rec  
8 space in C-2-A is 20 percent or 12,000 square feet,  
9 6,000 of which needs to be outside of the building.  
10 The property is unique in its existence as a  
11 commercial building, its configuration, its size, the  
12 lot occupancy and its location, all of which present  
13 exceptional situations and conditions to which a  
14 strict interpretation of the zoning regulations would  
15 result in a practical difficulty.

16 As far as lot occupancy, the existing  
17 building - I don't know how to do this - okay. The  
18 existing building, which is the yellow here, occupies  
19 the allowable 60 percent of the site for residential  
20 in this zone. The lot for this property is from south  
21 to north on the yellow and purple here, leaving us no  
22 exterior space to use except for what Josh has already  
23 described. This strip here at the northern edge of  
24 the property between their property and the station is  
25 passive rec space. It is a landscape easement that

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1 the station cannot use for their parking, and we --

2 VICE CHAIR MILLER: Where is that again?

3 MR. MOORE: It's these trees right here  
4 along the northern edge of the property. North is  
5 white on the page, not up the page. We keep our --  
6 but we have made best use of the exterior as best as  
7 we can. Aside from this we've got -- aside from the  
8 terrace we also have the existing roof condition.  
9 This is an existing penthouse. We have modified to  
10 the penthouse to an extent that allows us to put in  
11 750 square feet of rec space. And the reason that we  
12 have done that is because we need a 25 foot minimum in  
13 all directions in order to consider it a compliant rec  
14 space.

15 The distance from the penthouse to the  
16 parapet on the west of the building is only 18-1/2  
17 feet, so we couldn't get compliant rec space anywhere  
18 else. Additionally, I think as Josh mentioned  
19 earlier, there's only one way off the roof right now.

20 There's an existing stair, and the code will only  
21 allow us 50 people with one means of egress, so with  
22 50 people, one person per 15 square feet, which is how  
23 the code defines assembly. That's why we only have  
24 750 square feet on the roof, so the 750 square feet on  
25 the roof, and the I believe it's 365 square feet on

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1 the terrace gives us just about 1,100 square feet of  
2 exterior rec space.

3 Let's see. There's a number 3 there right  
4 in the middle.

5 MR. JEFFRIES: Excuse me. Can you go back  
6 to the rec space on the terrace. Let me see that  
7 again. Okay. Thank you.

8 VICE CHAIR MILLER: And the building  
9 itself goes right up to the property line?

10 MR. MOORE: It does, on three sides.

11 VICE CHAIR MILLER: On three sides, so  
12 there's no landscaping room, is there?

13 MR. MOORE: Not on the property.

14 VICE CHAIR MILLER: Not on the property.

15 MR. MOORE: There is -- this is the west  
16 side which faces Rock Creek. The south side and east  
17 side both have built in cast-in-place concrete  
18 planters. They're on public space. They're not on  
19 the property.

20 VICE CHAIR MILLER: And who puts the  
21 plantings in them? Do you know?

22 MR. MOORE: The owner.

23 VICE CHAIR MILLER: The owner, not the  
24 District.

25 MR. MOORE: The owner has historically

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1 maintained them.

2 VICE CHAIR MILLER: Okay.

3 MR. MOORE: And we will be, if not  
4 maintaining those planters, maintaining some sort of  
5 landscaping.

6 VICE CHAIR MILLER: Okay.

7 MR. MOORE: To return to your question  
8 about the interior and why the unit count had been  
9 reduced.

10 VICE CHAIR MILLER: Right.

11 MR. MOORE: The commercial court, which is  
12 what we refer to the elevators, the stair, the  
13 circulation space is typically larger in a commercial  
14 building than it is in a residential building, and so  
15 what we're left with is a dimension in at least three  
16 of the directions that is fairly large for residential  
17 work. Typically, you only need a depth of about 25 or  
18 30 feet to get a unit in.

19 North and south we have close to 35 feet,  
20 and on the west side we have over 40 feet of depth  
21 from here to here. Now that's large for a residential  
22 unit, but not quite large enough to get in two, like  
23 if we wanted to loop the corridor and get in two  
24 units. And the layout allows us only to get entrances  
25 here, here, here, and here on a four unit floor.

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1           We also managed to get in a six unit floor  
2 where we have another unit in the middle. And again,  
3 right at this edge, we have two entrances. One is  
4 this unit one into this.

5           MR. JEFFRIES: So in terms of extending,  
6 there's really no way to put two additional spines off  
7 that core to give yourself room for additional two  
8 units?

9           MR. MOORE: Right.

10          MR. JEFFRIES: It's just not possible.

11          MR. MOORE: Right. So this fairly tight  
12 floor plate is being utilized to the extent possible  
13 to get in as many units that will make this both  
14 socially and economically viable in that we want to  
15 have enough people in the building that it feels  
16 lively. And also, enough people that the condo fees  
17 aren't excessive to maintain a building of this size.  
18 We don't want two heating units, but we also can't  
19 get in any more.

20          VICE CHAIR MILLER: But at one point you  
21 did have more? You did have --

22          MR. JEFFRIES: I guess I'm not following  
23 that either. So what did this floor look like, a  
24 typical floor, what did it look like with 44 units?

25          MR. MOORE: Actually, you have it, I

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1 believe.

2 MR. JEFFRIES: Because it's hard to make  
3 out from where we're sitting in terms of where the  
4 party walls are.

5 MR. MOORE: Yes, I'm sorry. This is much  
6 heavier than the documents you have in front of you.  
7 If you look at your A7 and A8, that gives you the top  
8 two floors and middle two floors respectively.

9 MR. JEFFRIES: Yes.

10 MR. MOORE: This is what the layout was at  
11 the time. We found this not particularly efficient  
12 use of the space. They were long and skinny units,  
13 and the bedrooms were odd. The living space was odd,  
14 so we went back in and looked at how best to circulate  
15 through the space, get bedrooms on the outside,  
16 because they need the light and air.

17 MR. JEFFRIES: Okay. So you stacked a  
18 wall on top of the stair perpendicular to the stair.  
19 Right?

20 MR. MOORE: Right. This is the sixth  
21 floor, which is the only floor with four units, and  
22 it's divided in quarters.

23 MR. JEFFRIES: Okay.

24 MR. MOORE: This is divided, and this is  
25 divided.

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1 MR. JEFFRIES: So you have like an access.

2 MR. MOORE: You could go forward one. Now  
3 this is the typical floor, two through five.

4 MR. JEFFRIES: Yes.

5 MR. MOORE: And we have a division still  
6 down the middle this way.

7 MR. JEFFRIES: Okay.

8 MR. MOORE: And we have divider there,  
9 divider there, divider there, divider there, so we  
10 have six units on the typical floor.

11 MR. JEFFRIES: Okay. And then the typical  
12 floor based on what we have in our possession here,  
13 one, two, eight units.

14 MR. MOORE: Yes.

15 MR. JEFFRIES: Okay That's the third and  
16 fourth floors.

17 MR. MOORE: Yes. And we've now changed  
18 that so that the sixth floor is the -- actually six  
19 and one, but the sixth floor is atypical. It has four  
20 units. Floors two through five have six units, and  
21 the first floor is now at eight units, and that is  
22 because it is -- obviously, it has not pavet. It has  
23 the garage ramp entrance. It's broken up  
24 significantly more than the upper floors.

25 MR. JEFFRIES: You know what, just looking

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1 at this closely, when you see a reduction in the  
2 number of units from 44 to 36, which is fairly  
3 substantial, and then you're talking about the  
4 sufficiency and rec space, the inclination is could  
5 you possibly get more rec space in based on just the  
6 sheer decrease in the number of units just on the  
7 face.

8 MR. MOORE: Sure.

9 MR. JEFFRIES: And so I'm looking at these  
10 units, and these are considerably larger than what we  
11 have, like 20 percent? I mean, how much larger, like  
12 20 percent?

13 MR. MOORE: Right.

14 MR. JEFFRIES: And just from a marketing  
15 point of view, I mean that's going to be a much more  
16 attractive unit.

17 MR. MOORE: Yes. Despite the recent boom  
18 in condominium construction in the District, there  
19 actually has not been many larger sized units offered,  
20 so we believe that this market, which would serve  
21 people moving in from the suburbs, the so-called empty  
22 nesters who may want larger units, as opposed to the -  
23 - there have been lots of one bedrooms offered  
24 recently, would want a larger two bedroom type unit.

25 MR. JEFFRIES: Okay. So market

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1 considerations are really driving some of the  
2 decision, because I'm looking at this typical floor  
3 plan in terms of what was submitted before, and if  
4 you're comfortable with smaller units, I mean it seems  
5 reasonable to me.

6 MR. MOORE: In general this is -- the long  
7 and skinny unit problem is typical of converting  
8 commercial to residential.

9 MR. JEFFRIES: Yes.

10 MR. MOORE: And so it's been a combination  
11 of trying to solve that problem and trying to decide  
12 where the market is.

13 MR. JEFFRIES: Okay.

14 VICE CHAIR MILLER: Could you go back to  
15 the roof and show us where or what's actually  
16 happening in the space that's allocated for the  
17 residential recreation.

18 MR. MOORE: Sure.

19 VICE CHAIR MILLER: I think we just saw by  
20 the boundary of it, but what are the plans for it?

21 MR. MOORE: There isn't much. That is a  
22 roof terrace.

23 VICE CHAIR MILLER: It's a roof terrace?

24 MR. MOORE: Yes.

25 VICE CHAIR MILLER: It's going to be

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1 landscaped, it's going to be what?

2 MR. MOORE: No, I don't know if the intent  
3 would be to have any plantings up there or not  
4 surrounding the perimeter to demarcate it. Certainly  
5 paved, certainly railings, but it is intended for  
6 outdoor recreation space, view of the park, just to  
7 enjoy the outside. This is the west side of the  
8 building over looking Rock Creek Park. It's a very  
9 good image.

10 VICE CHAIR MILLER: There's a beautiful  
11 picture in the file. Is that what you mean?

12 MR. MOORE: Exactly.

13 VICE CHAIR MILLER: Yes. That's a  
14 beautiful picture. I mean, so it's going to be paved.  
15 It's going to be beautiful views. There's not going  
16 to be any plants up there, anything like that?

17 MR. MOORE: Potted, certainly surface.

18 VICE CHAIR MILLER: Okay.

19 MR. JEFFRIES: But what's driving the size  
20 of that is really code.

21 MR. MOORE: Right. Well, there are two  
22 things. There is the code requirement, which says  
23 that we can only have so many people with one egress.  
24 That's certainly the strongest one. The other is the  
25 dimensions of the existing penthouse.

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1 MR. JEFFRIES: Yes.

2 MR. MOORE: All right. We only have  
3 eighteen six.

4 MR. JEFFRIES: Yes.

5 VICE CHAIR MILLER: Okay. Do you want to  
6 show us where the other residential and recreation  
7 space is?

8 MR. MOORE: Sure. Another unique element  
9 of this building is the disproportionately large below  
10 grade parking area. It extends beyond the footprint  
11 of the above grade building as you can see from the  
12 terrace. This is the two below. This is two levels  
13 down from the lobby. We have an area adjacent to the  
14 core. This is where the existing elevators are, and  
15 the existing stair.

16 Again, for the same reason of occupant  
17 load and means of egress, this has been limited to 750  
18 square feet so that we would have at most 50 people in  
19 there at any one time, so they have one means out, and  
20 then out of the building.

21 We have proposed, as you can see in the  
22 sketch that we submitted, that this can be used in two  
23 ways. We have 400 square feet for fitness, and we  
24 have 350 square feet for community/lounge room which  
25 could be used for anything from watching television to

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1 having the condo association meetings. We propose  
2 that they not be used at the same time that the  
3 fitness center and lounge could be there at the same  
4 time if it's being used as a community room. The  
5 density, the occupant load goes up, and so we need to  
6 keep the number of people --

7 VICE CHAIR MILLER: Is it 50 total?

8 MR. MOORE: Fifty total.

9 VICE CHAIR MILLER: Okay.

10 MR. JEFFRIES: So the parking ratio --  
11 what's required?

12 MR. MOORE: Required is one space for two  
13 units. We have in excess of two spaces per unit.

14 MR. JEFFRIES: So you might end up selling  
15 two parking spaces per unit, larger units, empty  
16 nesters.

17 MR. MOORE: Right.

18 MR. JEFFRIES: You might have it --

19 MR. MOORE: I was going to say if I could  
20 speak for Josh, he is the target.

21 MR. JEFFRIES: Okay.

22 VICE CHAIR MILLER: And do you want to  
23 address why -- could you use some of that space for  
24 recreation space instead of parking space? And if so,  
25 why you're not.

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1                   MR. MOORE:   Again -- well, we are using  
2                   some of it.   The reason we can't use more of it is,  
3                   again, because of egress reasons.  You always need two  
4                   means of egress when your space gets above a 50  
5                   occupant load.  Now this is an existing space, and it  
6                   is what it is.  There's nothing that we can or have to  
7                   do about it, but every time we introduce new  
8                   occupiable space, we have to make sure that it's  
9                   compliant with the code.  So if we go larger than the  
10                  750, again just so you know how we get there - if it's  
11                  one person per 15 square feet, 750 square feet gets  
12                  you 50 people.  That's the number of people you're  
13                  allowed to have in a room and provide one way out.  
14                  And right now, that's the only way out of the garage,  
15                  that stair.

16                  VICE CHAIR MILLER:  That stairway.

17                  MR. MOORE:  Right.

18                  VICE CHAIR MILLER:  Where is the ramp for  
19                  the cars to go down?

20                  MR. MOORE:  They go in a circle here, and  
21                  on the first floor, that's the ramp out of the garage  
22                  on the IB level, that is, not the first floor.  They  
23                  go up here and out onto O Street, but they circulate  
24                  within the garage here.

25                  VICE CHAIR MILLER:  Okay.

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1 MR. JEFFRIES: So the first floor, the  
2 first floor is not a typical floor?

3 MR. MOORE: It is not.

4 MR. JEFFRIES: Okay. Could I see the  
5 first floor?

6 MR. MOORE: Certainly.

7 MR. JEFFRIES: And the difficult with  
8 putting rec space, some additional rec space on this  
9 floor, what's the problem there?

10 MR. MOORE: Well, first it's no different  
11 than the upper floors in terms of the space  
12 allocation, and figuring out how to get into the  
13 units.

14 MR. JEFFRIES: Could you expound on that  
15 just a little bit?

16 MR. MOORE: Sure. We have eight units on  
17 this floor. And again, because of the configuration  
18 of lobby, circulation, second means of egress, core  
19 and garage ramp, we're very limited into how we  
20 circulate around this floor and get into the units  
21 that are on it.

22 MR. JEFFRIES: But what if one of the  
23 units disappears and becomes a rec space? It's still  
24 the same circulation around the core.

25 MR. MOORE: Josh, would you like to

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1 respond to that?

2 JOSH: Sure. There's a second argument  
3 that makes it practically difficult to provide  
4 additional residential recreation space beyond the  
5 areas where we are providing it, and providing the  
6 maximum amount that we can provide in those areas; and  
7 that is the economic and social viability of the  
8 condominium. It's already a fairly small building,  
9 only six floors. If we were to provide the total  
10 amount of residential recreation space required, which  
11 is approximately 12,000 square feet, that would be  
12 more than one floor of the building.

13 In addition, given the fact that it's a  
14 small building, as Jack mentioned, each unit owner  
15 bears a certain portion of the cost for maintaining  
16 the building, taking away units increases the relative  
17 share of each remaining unit, while at the same time,  
18 if you are taking away the units to provide space that  
19 needs to be maintained by the condo association, you  
20 are not only reducing the number of people that that  
21 cost is divided between, but also increasing the  
22 amount of space that they would have to maintain.

23 MR. JEFFRIES: And I absolutely -- your  
24 second point, I absolutely am sympathetic to that. I  
25 understand that very well, and I'm not at all even

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1 getting close to making the case that you should try  
2 to find 10 or 11,000 square feet of rec space. But I  
3 guess in terms of being a good sport, the thought of  
4 perhaps getting one of those units, particularly on  
5 the first floor being rec space, just had you really  
6 thought about it. And perhaps even reconfiguring so  
7 that you really don't lose sort of the unit count.  
8 You could perhaps get two or three smaller units than  
9 what you have here, and get some additional rec space.

10 I mean, what's the size of one of those units on the  
11 first floor? Give me a typical size.

12 JOSH: Jack, could you respond to that?

13 MR. MOORE: Sure. These are all one-  
14 bedroom 900 square foot units.

15 MR. JEFFRIES: 900 square feet. Okay.

16 MR. MOORE: And we have -- to respond to  
17 reduction in size, we've been juggling these. They're  
18 part of over here.

19 MR. JEFFRIES: Yes.

20 MR. MOORE: It's very difficult --

21 MR. JEFFRIES: Listen, I'm very sensitive  
22 toward use projects, and quite frankly, I'm quite fond  
23 of them, and so I understand the constraints and so  
24 forth. Just looking at the parking scenario, lots of  
25 parking for these owners, very large units, and I'm

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1 sensitive also to the whole notion of sort of over-  
2 supply of one-bedroom condos. Although that's a  
3 pretty hot area, it's sort of interesting to see how  
4 that would all play out in terms of market conditions.

5 But it just seems to be, without really drilling down  
6 closely, that there might be some room for a little  
7 bit more rec space. That's all. Not getting anywhere  
8 near to the 10,000 number, whatever the deficit is.

9 VICE CHAIR MILLER: This may be a question  
10 for Mr. Sher, but in some instances do they count  
11 lobby space as residential recreation space?

12 MR. SHER: In some places where you have -  
13 - I'm sorry. For the record, my name is Steven E.  
14 Sher, Director of Zoning and Land Use Services with  
15 the law firm of Holland & Knight. In some places  
16 where you have what might be described loosely as an  
17 oversized lobby, where there are seating areas within  
18 a lobby, and path of travel to the elevator and the  
19 desk and so forth occupies a portion of that, and then  
20 the remainder is available for passive recreation.  
21 That space has been counted. We haven't done that  
22 here.

23 VICE CHAIR MILLER: You don't have  
24 oversized lobby.

25 MR. SHER: If we had some area, it

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1 wouldn't be anywhere near enough to not require a  
2 variance anyhow. There might be some space in there  
3 where you could couches or a seating area, but it  
4 still would require a variance, in any event.

5 VICE CHAIR MILLER: Okay. I mean, tell me  
6 -- what it looks like you have here is roof top,  
7 underground. Okay. So roof top is obviously taking  
8 in the views, the sun, whatever. And underground is  
9 the health facility, workout room, meeting room. I  
10 mean, it looks to me -- is that it or there's also  
11 some passive recreation space with landscaping in the  
12 easement area.

13 MR. SHER: Right.

14 VICE CHAIR MILLER: That's the area.  
15 Okay.

16 MR. SHER: Yes, that is true.

17 VICE CHAIR MILLER: And you only have 36  
18 units here, and the roof and the basement accommodate  
19 50 people, so it looks to me like per person there's a  
20 lot of recreation space allocated. I mean, do you  
21 have any kind of comparisons with other buildings as  
22 far as how much space for how many people are in the  
23 building? I know that's not the way the regs are  
24 written, but I just want to address it with respect to  
25 Mr. Jeffries asking can't we get rid of another unit?

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1       Would that serve a purpose here?

2                   MR. JEFFRIES:  And by the way - excuse me.  
3       Before you answer, I just want to get a sense of sort  
4       of thought process in terms of how you arrived at some  
5       of the decisions you made.  I mean, I can be easily  
6       swayed as to what you're saying, so my mind is not  
7       made up.  I look at this, and I look at the typical  
8       floors, and I'm just sort of wondering sort of why  
9       that decision really wasn't made.  And I heard the  
10      discussion around market conditions and so forth, but  
11      I mean, 10,000 or 11,000 -- you know, the 10,046  
12      square feet, I mean that's a large number.  And again,  
13      I know we're on that page, but in terms of spirit of  
14      the regs --

15                   MR. MOORE:  I think it does come down to a  
16      question of ratio, of proportion for this few number  
17      of units, particularly with a building that has public  
18      facilities so close to it, the tennis courts, the  
19      swimming pools, Rock Creek Park.  There was a number  
20      of gyms in DuPont Circle.  And in the spirit of  
21      getting the residents out into the city and using  
22      those facilities, I think trying to reduce or cram in  
23      space just to call it rec space, I think that flies in  
24      the face of the spirit of what's intended here.

25                   They do have -- I know that this doesn't

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1 count toward official rec space, but they do also have  
2 balconies and sun rooms in each unit. Again, within  
3 the building, they have a means of enjoying the  
4 outdoors a little bit and enjoying the building, but I  
5 don't know that trying to squeeze in more is going to  
6 accomplish anything.

7 MR. JEFFRIES: Yes, but we're not in L.A.,  
8 and so we don't have a year long use of outdoor  
9 facilities and so forth, so there could be some use  
10 during some of the winter months here of increased rec  
11 space. And, by the way, I mean one of the things that  
12 I noted here, you're right, there's numerous -- I know  
13 the area well. There's lot of outdoor space and rec  
14 space, and so I'm sensitive to that.

15 VICE CHAIR MILLER: I just would also note  
16 that if the house facility and the basement  
17 accommodates 50 people, that's a lot of people. It  
18 sounds like to me really it's going to accommodate --  
19 50 people are going to be able to workout at the same  
20 time, or is that an exaggeration?

21 MR. MOORE: No, that space as a whole can  
22 accommodate 50 people. The fitness center occupies 8  
23 or 10 people with equipment.

24 MR. JEFFRIES: Yes, by the time you put  
25 the -- because what I saw is it's flex space,

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1 effectively. I mean, it could serve as meeting space  
2 for the condo association, but when those chairs go  
3 away, you can rearrange --

4 MR. MOORE: Well, the intent on the  
5 fitness center anyway was - I don't know if you saw  
6 the proportion there - but the two-thirds, the larger  
7 area is fixed large equipment.

8 MR. JEFFRIES: Oh, so that will be fixed.

9  
10 MR. MOORE: That will stay, and then the  
11 smaller area, the 250 square feet would be the flex  
12 space between lounge and meeting.

13 MR. JEFFRIES: Okay. You might have  
14 aerobic activities.

15 MR. MOORE: Exactly.

16 VICE CHAIR MILLER: So does every unit  
17 have a balcony, or just some of the units?

18 MR. MOORE: No, the first floor units  
19 obviously don't have balconies, although we're  
20 exploring the possibility of providing them outside  
21 terraces that will be up to the District of Columbia,  
22 since it's public space. And then on floors two  
23 through five, all but the one bedroom unit on that  
24 floor, which is in the center of the 22<sup>nd</sup> Street side  
25 of the building, so five out of six units on those

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1 floors will have sun rooms or balconies. And then on  
2 the sixth floor, all the units will have sun rooms or  
3 balconies. I don't know if this is relevant, but  
4 really it's Mr. Jeffries' comment. We're exploring  
5 these combination sun room/balconies for the very  
6 reason that D.C. is not a climate where you can use a  
7 balcony all parts of the year, so the idea is that it  
8 would be a room that could be a sun room during months  
9 that are too humid, too hot, or too cold. You could  
10 put a table out there, have breakfast. But during  
11 those times that you want to have a balcony, the  
12 windows would fold back and it would become a full-  
13 fledged balcony.

14 MR. BIGGS: Ms. Miller, at this point, I'd  
15 like to turn it over to Mr. Sher to provide some of  
16 his expertise on this subject. Thank you. Mr. Sher.

17 MR. SHER: Good morning, Madam Chair and  
18 Members of the Board. I've already introduced myself  
19 so I'll skip that part again.

20 You have in the applicant's pre-hearing  
21 submission my outline of testimony, and a lot of what  
22 is covered in there has already been dealt with, but  
23 let me try and pull this together into some basis to  
24 understand the variance.

25 This is a C-2-A zone. The building was

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1 built in 1972. At that point, the C-2-A zone allowed  
2 a 2.0 FAR for commercial, and a 1.8 FAR for  
3 residential. In the late 1970s, the Zoning Commission  
4 changed around the regulations for the C-2-A zone to  
5 increase the total FAR to 2.5, but to decrease the  
6 commercial FAR to 1.5, so the residential went up, the  
7 commercial went down. And the point of that was to  
8 encourage mixed use to designate residential as a  
9 favored use in commercial zones, even though before  
10 that it had been the other way around.

11 So what you have now is a building that  
12 was built to 2.0 FAR, but it is now non-conforming.  
13 It's now non-conforming as to FAR for commercial FAR  
14 purposes, and it's also non-conforming as to height  
15 because prior to 1978, the height permitted in a C-2-A  
16 zone was 60 feet, to which this building is built.  
17 It's now only 50 feet, so certain changes have  
18 occurred since the building was built.

19 By converting the building to a  
20 residential building; in fact, we eliminate the non-  
21 conformity as to FAR, because the residential FAR is  
22 2.5, we're at 2, so by changing that, we've eliminated  
23 one of those non-conformities, even though we haven't  
24 done anything to the building. So what we have then  
25 is a building that's about 60,000 square feet. We

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1 have 36 residential units.

2           The residential recreation space  
3 requirement is based on the square footage of the  
4 building, rather than the number of units. So whether  
5 we have 36 units, 44 units or 88 units, the  
6 residential recreation space requirement would be the  
7 same, and that is a little less than 12,000 square  
8 feet, as our architects and Mr. Olsen have indicated.

9           We are providing approximately 1,800  
10 square feet, 750 on the roof, 750 on the basement 300  
11 some odd on the outside, and so we need a variance of  
12 about 10,000 square feet.

13           The standards for a variance I think the  
14 Board is aware of. We have to show some exceptional  
15 or extraordinary situation or condition of the  
16 property that has to create a practical difficulty for  
17 the owner, and that the variance can be granted  
18 without substantial detriment to the public good.

19           Well, in addressing those three criteria,  
20 the exceptional or extraordinary situation or  
21 condition of the property includes the building. And  
22 so since we have an existing building, we have the  
23 1994 easement that restricts what we can do with the  
24 surface area that's not occupied by the building, we  
25 have only the one egress there from the roof and the

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1 basement. We are limited in terms of what we can do  
2 other than the areas that are provided for units. So  
3 then you come down to the tradeoff of do you want to  
4 reduce units for recreation space, when the goal of  
5 the C-2-A district is to provide more residents at  
6 this point, and in light of the fact that we've got  
7 all this other recreational opportunities in the area,  
8 both outside in the parks and the swimming pool, and  
9 the tennis courts, and all the other things in and  
10 around the District of Columbia in that particular  
11 DuPont Circle West community.

12 The practical difficulty comes about  
13 because of, again, what can we do with that building  
14 given where it is today? We could conceivably convert  
15 one of those units, or two of those units, or three of  
16 those unit, or four of those units and provide more  
17 residential recreation space. We'd still be here  
18 needing a variance, and we'd still have to meet the  
19 same burden of proof of showing an exceptional  
20 situation, a practical difficulty, and a lack of  
21 adverse impact.

22 In light of all these other recreational  
23 opportunities, it doesn't seem to me to be a practical  
24 tradeoff. Why would you want to reduce the number of  
25 units you have, when you've got all these other things

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1 going on, and we have done a reasonable result with  
2 what's left in the building.

3 The Board has had many of these other  
4 residential recreation space variance cases before  
5 over the last four or five years. The reason you  
6 hadn't seen them before that was, frankly, nobody  
7 built residential in commercial zones from 1978 when  
8 the requirement was first put in, until about 1998, so  
9 the regulation didn't become an issue. Now that  
10 people are wanting to build residential in C-2-A, C-2-  
11 B, and C-2-C zones, and in some cases C-3-C and C-4  
12 zones, this requirement has created an issue for these  
13 kinds of developments.

14 I think the Board has recognized in  
15 granting these previous cases that the concept in 1978  
16 of providing what I'll call internally focused  
17 residential space, frankly is at odds with what the  
18 District would like to see today in terms of getting  
19 people to live in commercial zones, but not only to  
20 live there, to get out of those buildings and out onto  
21 the street. So rather than have everybody go up on  
22 the roof of their building and take the sun, as my  
23 daughter would do if she walked out and the sun was  
24 shining, have some of that in the building, but also  
25 get people out into the neighborhoods, out onto the

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1 streets using the recreational facilities that are  
2 available in the District that might not be available  
3 in other places.

4 VICE CHAIR MILLER: Mr. Sher, can I just  
5 interrupt you for a second? I think it's a laudable  
6 goal to get people out of the buildings and onto the  
7 streets and everything, but I'm wondering, are you  
8 pulling that from some goal of the Mayor's , or do you  
9 just think it's a good public policy?

10 MR. SHER: No, I've actually heard this  
11 Board discuss that in previous cases.

12 VICE CHAIR MILLER: I have too, and I was  
13 just wondering where that was coming from. I mean, I  
14 think it's a good goal. I was just wondering if it  
15 came from anywhere official. Okay. Sorry to  
16 interrupt.

17 MR. JEFFRIES: He sounds pretty official.

18 VICE CHAIR MILLER: I think it came from  
19 our official chair.

20 MR. SHER: So in summary, my conclusions  
21 are that the site is affected by an exceptional  
22 condition by virtue of the existing improvements, the  
23 easement, and the other things that we've already  
24 talked about.

25 The practical difficulty results from the

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1 inability to use all of the space for residential if  
2 we had to provide more residential recreation space,  
3 that there are sufficient recreational opportunities  
4 in the immediate vicinity so there's no detriment to  
5 the public good. And consistent with what it's done  
6 in other cases, the Board should grant this  
7 application.

8 MR. JEFFRIES: Just for the record, I just  
9 want to make certain it's clear since we're being  
10 videotaped here, that my comments about the ground  
11 floor perhaps getting one of those units to be  
12 dedicated to rec space, my proposal did not assume a  
13 reduction in your 36. It was really sort of a thought  
14 about revisiting your design to really maintain your  
15 36, or perhaps go to 37 or 38, whatever the number is.

16 Just, again, trying to keep to the spirit of this  
17 whole notion of rec space, not getting to the 10,000.

18 I mean, that's clearly very excessive, but in terms  
19 of really trying to be thoughtful around this whole  
20 notion of interior rec space. That's the only thing  
21 I'm purporting. I'm not at all saying that there  
22 should be a reduction. I'm very sensitive to your  
23 discussion around a number of units, and condo fees,  
24 and how that impacts the marketability of the actual  
25 complex.

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1                   MR. MANN:        The drawings that were  
2 submitted to the Commission of Fine Arts, is that  
3 similar to the rendering that we see in front of us  
4 here?

5                   MR. MOORE:     Yes.     The elevations are  
6 actually under that rendering on all four sides.  If  
7 you'd like to see them --

8                   MR. MANN:     No, I assume that they're  
9 similar to what was given to us in the information  
10 that was --

11                  MR. MOORE:   That's exactly what was handed  
12 to you, yes.

13                  MR. MANN:     Yes, so the CF is the same  
14 thing that we're looking at today as far as the  
15 elevations of the rendering goes.

16                  MR. MOORE:   Yes.

17                  MR. MANN:     Okay.

18                  VICE CHAIR MILLER:  Mr. Sher, you made  
19 reference to the fact that we're seeing more  
20 applications for variances for residential recreation  
21 requirements related to residential buildings in  
22 commercial areas.  I'm wondering how common or  
23 uncommon is it to have a commercial building converted  
24 to residential use, as opposed to a new residential  
25 building being built in a commercial area.

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1 MR. SHER: I've seen both. There are any  
2 number of loft-type buildings or former industrial  
3 buildings that have been converted to apartments. I  
4 know we've got at least a couple of those on their way  
5 to you, or perhaps have been through you by now, but  
6 there has been a fair amount of new construction of  
7 commercial buildings, some in the downtown east area,  
8 some up along 14<sup>th</sup> Street, a couple up in the Reid-Cook  
9 Adams Morgan area that have all been in commercial  
10 zones where the residential recreation space was an  
11 issue.

12 This particular case, our difficulty is  
13 compounded by the existing building. As I think Jack  
14 said earlier or maybe it was Josh, a residential  
15 building wants to be 65 feet from edge to edge, more  
16 or less, about 30 feet worth of unit, 5 or 6 feet  
17 worth of hallway, and 30 feet worth of unit. This  
18 building is 90 feet edge to edge from 22<sup>nd</sup> to 23<sup>rd</sup>  
19 Street, so that comprised with the core and all the  
20 other things creates an issue here.

21 VICE CHAIR MILLER: Okay. Thank you. Do  
22 we have any other questions of the applicant? Okay.  
23 Then we'll turn to Office of Planning.

24 MR. McGETTIGAN: Thank you, Madam Chair.  
25 My name is David McGettigan from the Office of

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1 Planning. We've had a pretty extensive discussion, so  
2 I'm not sure what in my report I can go over for you.

3 The only things that I wanted to go over again are  
4 the quality of the space.

5 We have on the roof, of course it's going  
6 to be a very nice space with the views, and I think  
7 that's going to be well-used by the tenants and the  
8 condo owners. And there was some concern about the  
9 safety and security of the basement, sub-basement  
10 space, but the applicant has said that they will be  
11 providing some 24-hour camera monitoring of the space.

12 Also, the doors will be secure. The parking garage  
13 is going to be a secure private garage, and are  
14 looking into having some visibility windows in the  
15 space, so you can see out into the garage and improve  
16 that security.

17 I think we've looked at the array of  
18 options they have for providing recreation space, and  
19 they have done what they can with only one means of  
20 egress, which limits how much space they can provide  
21 on the roof, how much space they can provide in the  
22 sub-basement. And there's virtually no area on the  
23 surface that they can provide, so we believe this  
24 meets the test, and we're recommending approval of the  
25 application. I'll take any questions.

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1                   VICE CHAIR MILLER: Do you think that -- I  
2 think you may have said this, but I just want to  
3 clarify it, that the amount of recreational space  
4 that's being provided is sufficient for the number of  
5 units in this building.

6                   MR. McGETTIGAN: Yes. I talked with Mr.  
7 Olsen about what he thought the occupancy of the  
8 building was. From past experience, said about one  
9 and a half people per unit, so that would be about 54  
10 people, 50 to 70 people. Probably would have adequate  
11 space with the roof terrace and the basement.

12                   VICE CHAIR MILLER: And it appears what's  
13 left then, it would be a tradeoff between dwelling  
14 units and recreational space. Do you think that the  
15 residential units are more important than the  
16 recreational space with respect to the comprehensive  
17 plan, or the Mayor's goal of bringing more residents  
18 to the City?

19                   MR. McGETTIGAN: Yes. I think the  
20 comprehensive plan states that one of the goals for  
21 this area is to decrease commercial uses, and increase  
22 housing. I think the more people, the livelier  
23 streets, is all goals that can be found as a theme  
24 through many of the elements of the comprehensive  
25 plan, as well as our transit oriented development

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1 policies.

2 VICE CHAIR MILLER: And did Office of  
3 Planning actually look into the economics of the  
4 tradeoff of dwelling units for recreation space or  
5 not?

6 MR. McGETTIGAN: No, we did not go into a  
7 specific analysis of that.

8 VICE CHAIR MILLER: Okay. And I saw this  
9 in the papers and I just want to be sure - yes, where  
10 they address off-street parking, on-street parking.  
11 Is there a need for the parking garage in this area?

12 MR. McGETTIGAN: Yes. I believe part of  
13 the support from the community is that they'll be  
14 preserving that underground parking space, and if  
15 there are any spaces left over, I believe the  
16 applicant has told me that they will be renting out  
17 those too, or selling those to neighbors who might  
18 wish to use them.

19 VICE CHAIR MILLER: Okay. Do the Board  
20 Members have any questions? Okay. Applicant have any  
21 questions for Office of Planning?

22 MR. MOORE: None at this time.

23 VICE CHAIR MILLER: I'm sorry. Do you  
24 have a copy of the Office of Planning report?

25 MR. BIGGS: Yes, we did, as we noted in

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1 our opening statement, we did have that. We did  
2 review. We have had several meetings with the Office  
3 of Planning to review this entire application several  
4 times.

5 VICE CHAIR MILLER: Okay. And I don't  
6 believe there's anyone here from the ANC. Is that  
7 correct? Okay. The ANC has submitted a report --  
8 ANC-2B has submitted a report in which they indicate  
9 they were unanimously in support of this application.

10 Are there any parties of persons in  
11 support of the application in the audience that wish  
12 to come forward? Not seeing any, are there any  
13 parties or persons in opposition? Do Board Members  
14 have any other questions for the applicant? Office of  
15 Planning, do you have any closing remarks?

16 MR. BIGGS: Just very briefly, Ms. Miller.  
17 I think the record shows that we have a practical  
18 difficulty both with regard to easement, with regard  
19 to the staircase configuration, with regard to the  
20 existing building, and that the importance of doing an  
21 adaptive reuse of an existing project has both  
22 environmental, as well as other benefits to the  
23 District of Columbia. And bringing new residents to  
24 DuPont Circle is very important. The critical thing  
25 is created viable residential recreation space, and we

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1 believe within the building as it's constructed and  
2 developed, that we have maximized the amount that is  
3 viable, especially in light of all the surrounding  
4 recreation opportunities that are available.

5 We believe that on the basis of the case,  
6 both in our written materials, the support of the ANC  
7 and the Office of Planning, the testimony here today  
8 and the response to your questions, that we have met  
9 the burden of proof required to find practical  
10 difficulty and that a variance is warranted with  
11 regard to the relief requested, and that relief will  
12 not have any material impact on either the zone plan  
13 or the public good with regard to that.

14 With that we would close our case, and  
15 certainly request a bench decision today if that's  
16 within your desires at this point. Thank you.

17 VICE CHAIR MILLER: Thank you. I'm just  
18 going to confer with my colleagues for a minute.  
19 Okay. We've decided that we are ready to go forward  
20 with a bench decision. So at this point I'm going to  
21 put forward a motion, and we'll have a discussion on  
22 this motion. I'm going to move to approve application  
23 number 17156 of CRP/MR 1414 22<sup>nd</sup> Street, L.P. pursuant  
24 to 11 DCMR Section 3103.2 for a variance in  
25 recreational space requirements under Section 773 to

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1 convert and renovate an existing six-story office  
2 building with underground parking into a 36 unit  
3 apartment house at premises 1414 22<sup>nd</sup> Street, N.W.  
4 And do I have a second?

5 MR. JEFFRIES: Second.

6 VICE CHAIR MILLER: I think based on the  
7 evidence that we've heard today and the evidence  
8 that's in the record that there is a compelling case  
9 here, if I've ever seen one, for a variance from the  
10 residential recreation requirements under Section 773.

11 Section 773 requires that 20 percent of the gross  
12 floor area of the building devoted to residential use  
13 in the D.C./C2-C district be devoted to recreation  
14 space.

15 Applicant appears to be only providing 3.1  
16 percent, but they have shown that they have used all  
17 that they can within their given constraints. This is  
18 an extremely high percentage of recreational space for  
19 this particular building, which is a conversion from  
20 commercial use to residential use, and I think the  
21 evidence shows that the variance will not cause any  
22 detriment to the public good or impair the intent,  
23 purpose, or integrity of the zone plan, but to the  
24 contrary. So taking the test of the variance one by  
25 one, it says uniqueness of the property. There's

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1 clearly uniqueness here that leads to practical  
2 difficulty.

3           The building is currently configured for  
4 commercial use. When we look at the outdoor  
5 recreation space requirements, 773.8 says that 50  
6 percent of the recreation space be outdoors. Well,  
7 this property has 60 percent of the lot is occupied by  
8 the building. The 40 percent next door is subject to  
9 an easement that they cannot use at all, except for a  
10 small sliver for landscaping. The roof is limited by  
11 the fact that it only has one stairway accessing it,  
12 and the building code limits the number of persons  
13 allowed on the roof; and, thereby, the space that can  
14 be dedicated to recreation to 750 square feet.

15           Also, they're constrained by the location  
16 and size of the penthouse. The interior is similarly  
17 constrained by the existing configuration of the  
18 building. The size of the building core is larger  
19 than would be required for residential use of the  
20 building, limiting the number of units that can be  
21 created for this building, and also, the space that  
22 could be allocated for use. So they've gone down to  
23 the basement level and used the maximum space that  
24 they can down there, subject to the building code  
25 requirements.

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1           We have nothing in the record to show any  
2 substantial detriment to the public by granting this  
3 variance. And, in fact, it's to the contrary; the  
4 variance is in furtherance of the comprehensive plan.

5       There's no detriment because there's a great amount  
6 of recreation space in the vicinity. They're across  
7 the street from Rock Creek Park. They're across from  
8 a public swimming pool and tennis court, and we've  
9 also heard testimony from the Office of Planning that  
10 even in the parking garage where they seem to have the  
11 most open space, that parking is more important to the  
12 neighborhood than additional recreation space would  
13 be. Plus, we've heard evidence that they couldn't  
14 convert that to recreation space anyway because  
15 they're limited by the building code and the one form  
16 of egress.

17           Then we went to the issue of whether or  
18 not they should eliminate a dwelling unit or two to  
19 provide more recreation space, and I would suggest  
20 that it's -- and Office of Planning has also stated  
21 that the goal of more residential units is greater  
22 than any benefit that could be provided by additional  
23 recreation space for 36 units, which already have  
24 recreational space on the roof and in the basement.

25           The Ward 2 element objective is to promote

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1 the retention and expansion of current residential  
2 uses, and discourage expansion of commercial use in  
3 the DuPont Circle area. And this furthers that goal,  
4 it furthers the Mayor's goal of adding more residents  
5 to the City. This application is supported by the  
6 Fine Arts Commission, and supported by ANC-2B, and so  
7 I would recommend, therefore, that we grant this  
8 application, and open this up for any comments from  
9 Board Members.

10 MR. JEFFRIES: I would also like to echo  
11 much of what Vice Chairman Miller just said. I do  
12 believe that the application really reflects the goals  
13 of the comprehensive plan. And I do agree about the  
14 practical difficulty and constraints borne in adaptive  
15 reuse projects, and this was a clear example of that.

16 So I clearly understand the relief needed for rec  
17 space for the Reg 773.

18 I am a good proponent of increasing  
19 housing for the District of Columbia, particularly as  
20 it relates to economic development and retail  
21 development, so I'm strongly supportive, and I'm going  
22 to tie that again back to the whole notion that even  
23 in putting an additional interior rec space, but not  
24 reducing the number of units still gets you sort of  
25 the place of really making certain that you have as

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1 much housing as possible.

2 And then finally, I'd really like to  
3 comment on just the numerous rec space. I think you're  
4 absolutely correct. I mean, the area is full of lots  
5 of outdoors activities and so forth, and I think the  
6 building where it sits will really compliment --  
7 having additional residents will really compliment all  
8 of that that's currently there, so I do support the  
9 application.

10 VICE CHAIR MILLER: Mr. Jeffries, I just  
11 want to make sure I understand you and you understand,  
12 that when we approve this application, we'll be  
13 approving the plans as they are.

14 MR. JEFFRIES: Yes.

15 VICE CHAIR MILLER: So for the 36 units.

16 MR. JEFFRIES: Absolutely. I understand  
17 that clearly.

18 VICE CHAIR MILLER: Okay. And I certainly  
19 believe with respect to all the recreational space  
20 that is being provided for the small number of units,  
21 that it's within the spirit of the regulations. And I  
22 understand the regulations are being re-examined  
23 because of the different situations where it doesn't  
24 seem to work. And I think this is a fabulous project.

25 MR. JEFFRIES: I'm from Chicago, and

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1 there's three or four good months where you can't be  
2 outdoors, and so to the extent that -- I'm sensitive  
3 to that, but clearly, I mean you have a longer summer  
4 and spring here than Chicago, so I'm sensitive to  
5 that, and I'm fine.

6 VICE CHAIR MILLER: I certainly would  
7 encourage your passive recreational space, beautiful  
8 landscaping which you indicate you intend to do in  
9 pots or whatever. Okay. Any other comments? Then  
10 I'll call the vote. All those in favor say aye. All  
11 those opposed. All those abstaining.

12 (Vote taken.)

13 VICE CHAIR MILLER: Okay. Mr. Moy. Oh,  
14 Beverly. I'm sorry. Ms. Bailey.

15 MS. BAILEY: Mr. Mann, did you second the  
16 motion?

17 MR. MANN: I did second the motion.

18 MS. BAILEY: Thank you. The motion is to  
19 approve the application. Ms. Miller made the motion,  
20 Mr. Mann second, Mr. Jeffries is in support. Mr.  
21 Griffis recused from hearing the case, and Mr. Etherly  
22 is not here today. The vote is 3-0-2. Summary order,  
23 Madam Chair?

24 VICE CHAIR MILLER: Yes.

25 MS. BAILEY: Thank you.

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1 MR. GRIFFIS: Thank you very much.

2 VICE CHAIR MILLER: Thank you.

3 MS. BAILEY: Mr. Biggs, I believe we have  
4 most of your graphics, except for the rendering that's  
5 in the middle of the current rendering. Do we have  
6 that?

7 MR. BIGGS: It should have been submitted.  
8 We will confirm that.

9 MS. BAILEY: Okay, sir.

10 MR. BIGGS: I believe that is in the  
11 package that was delivered in our supplemental, but I  
12 will confirm that before I leave.

13 MS. BAILEY: Please.

14 VICE CHAIR MILLER: Ms. Bailey, do we have  
15 anything else on the morning agenda?

16 MS. BAILEY: No, Madam Vice Chair. This  
17 is it for the morning.

18 VICE CHAIR MILLER: Okay. Then the  
19 morning meeting is adjourned.

20 (Whereupon, the proceedings in the above-  
21 entitled matter went off the record at 11:29 a.m. and  
22 went back on the record at 1:22 p.m.)

23 CHAIRMAN GRIFFIS: Good afternoon, ladies  
24 and gentlemen. I call to order the 11<sup>th</sup> of May, 2004  
25 afternoon hearing of the Zoning Board of Adjustment

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1 for the District of Columbia. My name is Geoff  
2 Griffis. I am Chairperson. Joining me today is Ms.  
3 Miller, Vice Chair, and representing the National  
4 Capitol Planning Commission is Mr. Mann.

5 Copies of today's hearing agenda are  
6 available for you. They are located at the wall where  
7 you entered into the hearing room. You can pick one  
8 up to make sure you are on the schedule, and where you  
9 are on the schedule.

10 Several very quick things. Of course,  
11 those who have been here before will know this, but  
12 those who have not, this will be news to you. We do,  
13 of course, record all hearings and procedures before  
14 the Board of Zoning Adjustment in two fashions; one is  
15 the court reporter is sitting to my right, and we also  
16 have now the ability to have live broadcast on the  
17 Office of Zoning's website. So accordingly, we ask  
18 several things of you. First of all, please refrain  
19 from any disruptive actions or noises in the hearing  
20 room while we conduct our business. And secondly, I  
21 would ask that when coming forward to speak to the  
22 Board, that you fill out two witness cards. Witness  
23 cards are available where you entered into, also on  
24 the table in front of us. They go to the reporter who  
25 is sitting to my right.

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1                   Additionally, we would ask that when you  
2 come forward to speak and address the Board, that you  
3 provide your name and address for the record so that  
4 you can be given credit for the statement that you  
5 will be making.

6                   On the order of procedure for special  
7 exceptions and variances, I'm actually going to  
8 dispense with today, because I don't know that we're  
9 going to need it, and we do have a continuation of a  
10 case that we are well within to. If needed, I will  
11 make sure that everyone is clear on what order of  
12 procedure will be.

13                   Cross examination, just for reference and  
14 refreshing of people's recollection, cross examination  
15 is permitted by the applicant and parties within a  
16 case. The ANC within which the property is located is  
17 automatically a party in the case, and we may well get  
18 into some cross examination today, depending on how  
19 things roll.

20                   The record will be closed, and this is  
21 very important. Of course, the record will be closed  
22 at the conclusion of any hearing on a case except for  
23 any material that the Board specifically requests.  
24 And we will be very specific on what is to be  
25 submitted, and when it is to be submitted into the

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1 Office of Zoning. After that material is received, of  
2 course, the record would then be finally closed, and  
3 no other information will be accepted into the record.

4 The Sunshine Act requires that this Board  
5 conduct all hearings and procedures before the public  
6 and in the open. This Board may, however, enter into  
7 executive session during or after a hearing on a  
8 case, and that would be for purposes of reviewing the  
9 record or deliberating on a case.

10 The decision of this Board in contested  
11 case, of which all cases before us are, must be based  
12 exclusively on the record. Therefore, we ask that  
13 people present today not engage Board Members in any  
14 type of conversation so that we do not give the  
15 appearance of receiving information outside of the  
16 official record. We will make every effort to  
17 conclude our hearings today by 6:00. I will obviously  
18 update the schedule if we're not even coming close to  
19 that.

20 At this time, the Board will consider any  
21 preliminary matters. Preliminary matters are those  
22 which relate to whether a case will or should be heard  
23 today; such as requests for postponements,  
24 withdrawals, or whether proper and adequate notice has  
25 been provided. If you are not prepared to go forward

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1 with a case today, or you believe that the Board  
2 should not proceed with a case today, I would ask that  
3 you come forward and have a seat at the table as an  
4 indication of having a preliminary matter.

5 Let me say very good afternoon to Ms.  
6 Bailey from the Office of Zoning on my very far right,  
7 Mr. Moy on my closer right, Ms. Glazer from the Office  
8 of Corporation Counsel. Ms. Bailey, preliminary  
9 matters for the Board at this time?

10 MS. BAILEY: Yes, Mr. Chairman. To  
11 everyone, good afternoon. There are two cases that  
12 are requesting postponement. The first is Sidwell  
13 Friends School, Application number 17149. They  
14 requested a postponement until June 15<sup>th</sup>, 2004.

15 CHAIRMAN GRIFFIS: Is anyone here  
16 representing Sidwell Friends application?  
17 Interesting. Maybe I should turn the mic off and  
18 talk. Okay. We do have, in fact, a written  
19 submission requesting that, and I think the Board can  
20 pick it up. It was, in fact, in coordination with the  
21 aspect that they had not been able to meet with the  
22 adjacent ANC. They had met with the ANC within which  
23 the property is located, but feel it is advantageous  
24 to meet with the adjacent. And it seems like there is  
25 no opposition to that. Board Members, any opposition

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1 to postponing or continuing this case, 17149 until  
2 June 15, 2004?

3 VICE CHAIR MILLER: Mr. Chairman.

4 CHAIRMAN GRIFFIS: Yes.

5 VICE CHAIR MILLER: I would just like to  
6 note for the record that I will be recusing myself  
7 from the case and dealing with that case on the  
8 merits, since I have a daughter at that school.  
9 However, I will participate in this decision so that  
10 we have a quorum. I don't think any of the parties  
11 would object to that.

12 CHAIRMAN GRIFFIS: Well, as they're not  
13 here, how could they?

14 VICE CHAIR MILLER: Unless Board Members  
15 object, which I don't anticipate either.

16 CHAIRMAN GRIFFIS: Boy, that would really  
17 throw a monkeywrench into it. Very well. I don't see  
18 any problems in putting it on the 15<sup>th</sup> then, so why  
19 don't we move it to that. Unless you want to do the  
20 22<sup>nd</sup> - no, go ahead, Ms. Bailey.

21 MS. BAILEY: I just wanted to note, sir,  
22 that it would be the first case in the afternoon on  
23 the 15<sup>th</sup>, so that's at 1:00.

24 CHAIRMAN GRIFFIS: Right.

25 MS. BAILEY: There's a second request --

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1 were we finished with that one, sir?

2 CHAIRMAN GRIFFIS: Yes, I believe so.

3 MS. BAILEY: Okay. There is a second  
4 request, Mr. Chairman, for Application 17110,  
5 Millennium Art Center. There was a request for that  
6 to be postponed, as well.

7 CHAIRMAN GRIFFIS: Is there a  
8 representative for the Millennium Art Center?

9 MS. GIORDANO: Good afternoon. Cynthia  
10 Giordano, Arnold & Porter law firm, for the record,  
11 representing Millennium Art Center. We have submitted  
12 a letter requesting this postponement. The ownership  
13 of this property and the use of the property has been  
14 subject of a dispute between the City and Millennium  
15 Art Center, and we have a settlement agreement in that  
16 dispute. I can't really discuss the contents of it,  
17 but it's scheduled to be considered by the court next  
18 week. And if it is approved by the court, we'll be  
19 withdrawing this case. So for now, I can only ask for  
20 a postponement.

21 CHAIRMAN GRIFFIS: Indeed, and we received  
22 that letter. And your letter states the fact that  
23 depending on what happens with the courts, it may  
24 resolve the zoning issue.

25 MS. GIORDANO: Yes.

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1 CHAIRMAN GRIFFIS: How could that be?

2 MS. GIORDANO: Basically, the Millennium  
3 Art Center would no longer be occupying the space.

4 CHAIRMAN GRIFFIS: Indeed. So, in fact,  
5 if -- I understand now. That is very clear. I don't  
6 see any way you could proceed today. I think what's  
7 before us is to grant the continuance and set it for a  
8 date in the distant future, or actually dismiss the  
9 case. I think there is probably not value in  
10 dismissing it, and having it have to go through  
11 whatever sort of hurdles it has to to come back to us.

12 I think it's fairly straightforward. This is the  
13 second continue, so these are not new issues, and I  
14 think the Board is well aware of what the difficulties  
15 are involved in this as it relates to us, anyway.

16 Do you have a date? What we were  
17 anticipating is probably mid to late September.

18 MS. GIORDANO: Right. That would give you  
19 plenty of time for me to use that slot. Hopefully,  
20 I'll be able to withdraw this case next week after the  
21 court approves the settlement agreement.

22 CHAIRMAN GRIFFIS: I see. Okay. Yes,  
23 because frankly, we wouldn't have time to schedule it  
24 up until really until the end of July, and it doesn't  
25 make a whole lot of sense.

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1           Okay. Then we'll do that. We'll set it  
2 for the 21<sup>st</sup>. Mr. Moy, is that what --

3           MR. MOY: That's correct, September 21<sup>st</sup>.

4           CHAIRMAN GRIFFIS: In the afternoon?  
5 That's fine. So we'll set it for the 21<sup>st</sup> of  
6 September, afternoon.

7           MS. GIORDANO: Thank you.

8           CHAIRMAN GRIFFIS: Good. Thank you very  
9 much. Are we done? Anything else, Ms. Bailey?

10          MS. BAILEY: No, Mr. Chairman. Did Mr.  
11 Zaidain join us? I can't see --

12          CHAIRMAN GRIFFIS: No.

13          MS. BAILEY: Okay. That's why I was  
14 talking.

15          MS. BAILEY: That's it for me, sir.

16          CHAIRMAN GRIFFIS: Indeed. Any other  
17 preliminary matters with anybody here? Is anyone here  
18 going to give testimony this afternoon that was not  
19 previously sworn in? Well, then I'm not sure what  
20 else to do until our Board Member comes to make a  
21 quorum, but we're going to have to delay for a few  
22 minutes.

23                 As you know, the NCPC representing is Mr.  
24 Zaidain. Mr. Zaidain will be hearing this case,  
25 deliberating and deciding on it. He had called and

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1 was on his way, so we fully anticipate him being here  
2 within a matter of moments. So, Mr. Mann, you could  
3 regale us with some NCPC stories in the meantime, or  
4 we'll just wait for him to get here. So we'll take a  
5 quick break, and I assure you that as soon as he's in  
6 the room we will come back out.

7 (Whereupon, the proceedings in the above-  
8 entitled matter went off the record at 1:32 p.m. and  
9 went back on the record at 1:39 p.m.)

10 CHAIRMAN GRIFFIS: Very well, let's  
11 resume. Mr. Zaidain representing the National Capital  
12 Planning Commission and a very good afternoon to him.

13 We do not have Mr. Etherly with us this afternoon  
14 because of a dire family emergency, which we obviously  
15 keep him in our thoughts. And with that, let's move  
16 ahead.

17 Now my understanding the last we left off,  
18 we were to resume with any sort of rebuttal witnesses  
19 and testimony. It's my understanding that there is  
20 none, there is, what should I understand?

21 MS. DOUGHTY: That's correct. There are  
22 no rebuttal witnesses, but there is one item that we  
23 wish to enter into the record. It's directly  
24 rebuttal-related.

25 CHAIRMAN GRIFFIS: Written rebuttal

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1 testimony. Is that what it is?

2 MS. DOUGHTY: Yes.

3 CHAIRMAN GRIFFIS: And it's from?

4 MS. DOUGHTY: It is a copy of the --

5 CHAIRMAN GRIFFIS: Email from who?

6 MS. DOUGHTY: The email from Stephanie  
7 Mencimer to Denzil Nobile dated August 21<sup>st</sup>, 2003  
8 registering a complaint.

9 CHAIRMAN GRIFFIS: August 25<sup>th</sup>?

10 MS. DOUGHTY: Yes.

11 CHAIRMAN GRIFFIS: Indeed.

12 MS. BAILEY: Mr. Chairman, excuse me. If  
13 I could just briefly interrupt, and I would just like  
14 to say this is Appeal number 17092 of Steven Mencimer  
15 and others.

16 CHAIRMAN GRIFFIS: Thank you very much.  
17 We're now official and live. That being said, you  
18 just want to submit it. The parties involved have all  
19 been provided a copy. Is that correct?

20 MS. DOUGHTY: Yes.

21 CHAIRMAN GRIFFIS: Okay. Has there been  
22 sufficient time to review this?

23 MR. DONOHUE: No. We just received it,  
24 Mr. Chair.

25 CHAIRMAN GRIFFIS: I'll talk very slowly.

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1       How much time do you need? Have you read it? You've  
2 just been handed it.

3                   MR. DONOHUE: Two minutes.

4                   CHAIRMAN GRIFFIS: Indeed. All right.  
5 We'll read it ourselves.

6                   MR. DONOHUE: Has this been submitted to  
7 the official record? I don't see any exhibit number  
8 on this.

9                   CHAIRMAN GRIFFIS: Just.

10                  MR. DONOHUE: Just. Okay.

11                  (Whereupon a short recess was taken at  
12 1:44 p.m.)

13                  CHAIRPERSON GRIFFIS: Thank you.

14                  Everybody okay with that? Plenty of time?

15                  It was kind of a relaxing moment there in the hearing  
16 room.

17                  Who has responses, any sort of objections  
18 -- let's call it limited cross -- of the letter that  
19 has now been submitted? DCRA?

20                  MR. RUSHKOFF: Well, I think the letter  
21 speaks for itself, so I will not be cross examining  
22 it. I take it that this is an effort to rebut the  
23 testimony by Ms. Ogunneye to the effect that DCRA had  
24 not received complaints.

25                  CHAIRPERSON GRIFFIS: I see.

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1 MR. RUSHKOFF: And so this would be an  
2 example of a complaint received. And then we've taken  
3 the position that whether or not DCRA received  
4 complaints is not relevant, because it came -- would  
5 have come after the decision that was appealed from,  
6 and it's not actually relevant to whether or not it's  
7 a matter of right use. So we would object to it on  
8 relevancy grounds.

9 CHAIRPERSON GRIFFIS: Okay. Mid City?

10 MS. FERSLER: We support the admission of  
11 this exhibit, and we think it is relevant. Ms.  
12 Ogunneye has made it relevant by her own testimony.

13 She testified, number one, that she --  
14 well, there was conflicting testimony, but she --  
15 there are some aspects of her testimony that suggested  
16 that -- that the fact that she did not receive  
17 complaints between the issuance of the temporary C of  
18 O and the issuance of the permanent C of O was  
19 somewhat relevant to her decision.

20 And I agree that appellants have an  
21 obligation, since that testimony was conflicting, to  
22 submit at least factual evidence rebutting the factual  
23 portion of her testimony, which is that, in fact,  
24 complaints were made.

25 Now, whether it's legally of relevance is

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1 a matter for you to decide. But the fact is they have  
2 to make their record that complaints were made, and  
3 this does that.

4 CHAIRPERSON GRIFFIS: Understood.

5 Mr. Donohue?

6 MR. DONOHUE: Mr. Chairman, I'm going to  
7 object to its admission for a couple of reasons. One,  
8 I think there's a hearsay problem. I don't believe  
9 Mr. Noble is here, and I don't think I've met Ms.  
10 Mencimer, so I don't know. But if the sender is not  
11 here and the receiver is not here, we have a hearsay  
12 problem, because the document doesn't in fact speak  
13 for itself. We don't know if it was ever sent. We  
14 don't know the dates. We don't know a lot.

15 The second grounds for objection is that  
16 it raises questions of, arguably, a nuisance,  
17 potentially a misdemeanor. There's references here to  
18 the MPD. I'm quite sure the Board doesn't have  
19 jurisdictions over police matters, so I think there's  
20 a relevancy objection as well.

21 CHAIRPERSON GRIFFIS: We could look into  
22 the police matters. Ms. Mencimer, how did you get  
23 this? How is it being submitted? Mr. Wimple?

24 MR. WIMPLE: As to the issue of  
25 authentication, we do have the sender here if you want

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1 -- if we want to go through that rigmarole and  
2 authenticate it that way.

3 CHAIRPERSON GRIFFIS: It's not rigmarole.

4 It would be easy for her to come up and just indicate  
5 that she sent this to the sender on August 25, 2003.  
6 And then it's in the record, and then we don't have  
7 to --

8 MR. WIMPLE: Good.

9 MS. MENCIMER: I'm Stephanie Mencimer, and  
10 I sent the e-mail. And to the best of my knowledge it  
11 was received by the recipient that --

12 CHAIRPERSON GRIFFIS: And what is your  
13 address, please?

14 MS. MENCIMER: 1414 Q Street, N.W.

15 CHAIRPERSON GRIFFIS: Okay. And you sent  
16 it to Mr. Noble, and that was on the 25th of August  
17 2003?

18 MS. MENCIMER: Yes.

19 CHAIRPERSON GRIFFIS: Did you get any  
20 response from it?

21 MS. MENCIMER: I do not recall.

22 CHAIRPERSON GRIFFIS: Okay.

23 MR. DONOHUE: Mr. Chairman, has the  
24 witness -- has she been sworn?

25 CHAIRPERSON GRIFFIS: Yes. We're going to

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1 have to do this all over again. If you would not  
2 mind, give your attention to Ms. Bailey. Is there  
3 anyone else that might even be -- not have been sworn  
4 in before? You don't need to get so close. Just  
5 stand where you are.

6 MS. BAILEY: Do you solemnly swear or  
7 affirm that the testimony that you will be giving will  
8 be the truth, the whole truth, and nothing but the  
9 truth?

10 MS. MENCIMER: I do.

11 MS. BAILEY: Okay.

12 CHAIRPERSON GRIFFIS: Were your previous  
13 statements truthful?

14 MS. MENCIMER: Yes.

15 CHAIRPERSON GRIFFIS: Okay. Cross? Mr.  
16 Donohue? You probably should stay at the table, Ms.  
17 Mencimer, as this is your document.

18 MS. MENCIMER: Okay.

19 MR. DONOHUE: Ms. Mencimer, I guess a very  
20 simple question. You filed the initial appeal of this  
21 case, at least you're one of the primary named  
22 appellants in this case -- and I'm trying to find the  
23 date that the initial appeal was filed. September of  
24 '03. Right, thank you, September 22nd.

25 And this was an e-mail message from you to

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1 the Acting Zoning Administrator dated August 25, 2003.

2 And I believe your testimony was you don't know  
3 whether you got a response?

4 MS. MENCIMER: I don't recall. I'm sorry  
5 I wasn't prepared to respond to this today. This is  
6 out of the blue. I can check and find out, but I --

7 CHAIRPERSON GRIFFIS: Tell us what you  
8 know today.

9 MS. MENCIMER: I just -- I don't want to  
10 give you an incorrect answer.

11 CHAIRPERSON GRIFFIS: You don't recall.

12 Next question? Nothing?

13 MR. DONOHUE: I have no further questions.

14 CHAIRPERSON GRIFFIS: Okay. No further  
15 questions. Thank you very much. We appreciate it.

16 Board members?

17 VICE CHAIRPERSON MILLER: I just wanted to  
18 get it straight. You don't recall if you received a  
19 response, or you don't recall when you received a  
20 response? If?

21 MS. MENCIMER: If.

22 VICE CHAIRPERSON MILLER: Okay.

23 MS. MENCIMER: I'm not sure. There were  
24 many, many flurries of e-mails around this time  
25 period, so I -- I can't recall if I got something

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1 specifically back from Denzel Noble. We did get some  
2 responses from Tracey Lewis, I believe, about that  
3 time. But, again, I don't have the paperwork in front  
4 of me, so I don't want to give you something that -- I  
5 don't want to say something that will turn out to be  
6 wrong in the future.

7 VICE CHAIRPERSON MILLER: Okay. I  
8 understand that.

9 MS. MENCIMER: I do know that I did --  
10 that the e-mail went through. That -- I can tell you  
11 it didn't bounce back. We had the right address. So  
12 to the best of my knowledge, Mr. Noble should have  
13 received this.

14 VICE CHAIRPERSON MILLER: But did somebody  
15 else respond on this behalf to this e-mail?

16 MS. MENCIMER: Like I said, I can't  
17 recall.

18 VICE CHAIRPERSON MILLER: Okay.

19 CHAIRPERSON GRIFFIS: Just a very simple  
20 question. We're trying to get a full understanding,  
21 with this being submitted. Do you recall ever getting  
22 communications from DCRA on this issue?

23 VICE CHAIRPERSON MILLER: Oh, yes. I  
24 actually got --

25 CHAIRPERSON GRIFFIS: So you had numerous

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1 perhaps, you might say.

2 VICE CHAIRPERSON MILLER: Numerous. In  
3 fact, from Dave Clark himself.

4 CHAIRPERSON GRIFFIS: Okay. Even if you  
5 sent this one off and you never heard from them again.

6 VICE CHAIRPERSON MILLER: No, no. We  
7 heard -- we got e-mails from Dave Clark.

8 CHAIRPERSON GRIFFIS: Good.

9 VICE CHAIRPERSON MILLER: I had  
10 conversations with Bruce Mosley, who was our -- our  
11 Neighborhood Stabilization person.

12 CHAIRPERSON GRIFFIS: Indeed. That makes  
13 a lot more sense for the record that's before us.  
14 Okay.

15 Any other further questions, followup?  
16 Okay. Excellent. Thank you very much.

17 Now, what we have essentially is some  
18 objections, Board members, to even taking this in. We  
19 have the hearsay, which I think we've dispensed with  
20 at this point. Let me hear from Board members in  
21 terms of their position on this.

22 I don't have any great difficulty. I  
23 think there are aspects of this that are not relevant  
24 to this case, nor in the jurisdiction of the Board.  
25 And the Board is well aware of what they are and what

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1 they are not, and we can certainly not deliberate on  
2 those aspects. But let me hear from others.

3 BOARD MEMBER ZAIDAIN: Mr. Chairman, I  
4 just want to say --

5 CHAIRPERSON GRIFFIS: Yes.

6 BOARD MEMBER ZAIDAIN: -- I don't object  
7 to accepting this into the record. This being an  
8 appeal case, it's almost a matter of -- well, it is a  
9 matter of law in the issues that we're dealing with.  
10 I think we can take this for what it is and note that  
11 it was a complaint that was submitted, but I think,  
12 you know, it doesn't -- for me it doesn't really add a  
13 lot to the cases before us. We're deciphering whether  
14 or not DCRA issued the correct C of O in the appeal  
15 before us, so I have no objection.

16 CHAIRPERSON GRIFFIS: Good. Thank you.

17 Ms. Miller?

18 VICE CHAIRPERSON MILLER: I have no  
19 objection to taking in this letter. I think it goes  
20 to impact of this facility, and I think that one of  
21 the questions we're dealing with is whether or not  
22 DCRA should consider whether the impact of this type  
23 of facility is similar or dissimilar to the other uses  
24 under the regulations. It was comparing the two, so I  
25 think it's relevant.

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1 CHAIRPERSON GRIFFIS: Very well. There's  
2 a consensus, so then we can take this in as rebuttal  
3 testimony. We have had the person who authored the  
4 e-mail here for cross examination.

5 Was there anyone else -- if I didn't make  
6 it clear, the opportunity to cross examine? DCRA, did  
7 you --

8 MS. FERSLER: I have none.

9 CHAIRPERSON GRIFFIS: Everyone is okay?  
10 Okay.

11 That being said, we can go towards closing  
12 this. There are several things that I want to  
13 establish before we get to that, and then we also have  
14 two issues before us that we should dispense with.  
15 And let me open it up to the Board for a brief  
16 discussion on that.

17 We have a motion from -- from the property  
18 owner to remove the letter from Ms. Fersler regarding  
19 the Clean Hands Act. And the second is the adoption  
20 of the letters, either in support or in opposition.  
21 We do keep the record open in order for the parties --  
22 appellant and appellees, all participants in this --  
23 to bundle essentially the letters that would be  
24 supportive of their case.

25 We have had a submission to that. I

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1 believe it's the consensus of the Board -- I'll hear  
2 any opposition if it is not -- that we would accept  
3 that in as part of the case presentation. Therefore,  
4 by implication, any letter that was not joined into a  
5 participants' case filing would be removed from the  
6 record. Is that clear to everybody? Is that clear?  
7 Okay.

8 In which case let me hear if there's any  
9 objection. If there's no objection, then that is the  
10 way we will proceed.

11 The motion to remove the letter is Exhibit  
12 Number 69 concerning the Clean Hands Act. It is a  
13 letter that does not actually act -- ask the Board for  
14 any action but is copied into the record. It raises  
15 some level of concern for the Board just in terms of  
16 its relevancy.

17 Let me hear from others. Ms. Miller?

18 VICE CHAIRPERSON MILLER: I would concur  
19 with you that I don't see the relevance in this. And  
20 I believe when it was presented to us it was almost  
21 presented as an FYI, not asking us to really consider  
22 it with respect to the merits of the case. So I think  
23 it could be stricken from the record. And if we do  
24 so, then we would also strike Exhibit 84 asking us to  
25 strike it and addressing why it should be stricken.

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1 CHAIRPERSON GRIFFIS: Others? Anything  
2 else?

3 Okay. I tend to -- I agree with Board  
4 members, and we will remove the letter -- Exhibit 84  
5 and Exhibit 69.

6 That being said, let's go to closings.  
7 What I'd like to propose is an order for closing,  
8 unless others have orders for the closing, which I'm  
9 perfectly open to. But trying to be organized, I  
10 would propose this -- that Mid City would close first,  
11 we'd hear from the property owners second, we'd then  
12 hear from DCRA, and then we'll hear from the  
13 Appellant. Is there another order that you wanted to  
14 hold to? Okay.

15 Now, also time. How much time does each  
16 need? The Appellant, how much time is needed for  
17 closing?

18 MS. FERSLER: No more than 10 to 15  
19 minutes.

20 CHAIRPERSON GRIFFIS: Is anyone else  
21 involved in this going to exceed that? 10, 15 minutes  
22 is pretty much what we're looking at?

23 MR. RUSHKOFF: I think that's fine, Mr.  
24 Chair.

25 CHAIRPERSON GRIFFIS: Yes? Okay.

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1           Then, let's move ahead, unless there's any  
2 other procedural questions, anything else I can answer  
3 right now. Very well.

4           MS. FERSLER: My name is Andrea Fersler.  
5 I represent Mid City Development Company, the  
6 intervenor here.

7           The issue is whether the Zoning  
8 Administrator properly and correctly determined that a  
9 dog boarding facility is similar to other matter of  
10 right uses in a C-3 zone. As Mid City's expert,  
11 Armando Lorenzo testified that the proper way to  
12 determine whether an unestablished use is similar to  
13 an established comparable use is to compare their  
14 external impacts on the use and enjoyment of  
15 neighboring property.

16           And yet according to Ms. Ogunneye, who  
17 testified on behalf of the Zoning Administrator, she  
18 feels -- felt that dog boarding is similar to  
19 veterinary hospitals -- a matter of right use --  
20 because dogs stay overnight at both facilities. She  
21 admits she did not make any inquiry into whether the  
22 external impacts of dog boarding uses were similar to  
23 veterinary hospitals or other matter of right uses in  
24 that zone.

25           One could well ask why pick out overnight

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1 sleeping. As Mr. Lorenzo pointed out, people sleep  
2 overnight in hotels and jails, and yet the zoning  
3 regulations -- quite correctly -- treat those two uses  
4 differently, because they have different impacts on  
5 the use and enjoyment of neighboring properties.

6 While that's an absurd example, it  
7 illustrates why in determining whether an  
8 unestablished use is similar to an established use.  
9 The comparison should be on the common characteristics  
10 that are relevant to their impact on the use and  
11 enjoyment of neighboring properties -- that is to say,  
12 the common characteristic that differentiate matter of  
13 right uses in the C-3 zone with restricted or  
14 prohibited uses.

15 And the fact that dogs stay overnight,  
16 while it is indeed a similarity between veterinary  
17 hospitals and dog boarding facilities, it is not a  
18 similarity that is relevant for zoning purposes.

19 The un rebutted evidence submitted by the  
20 appellants overwhelmingly demonstrates that the  
21 external effects of dog boarding on neighboring  
22 properties are not similar to the effects of any  
23 matter of right uses in the C-3 zone.

24 For example, their Exhibit 44 shows that a  
25 dog boarding facility is an inherently noisy facility

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1 that's likely to emit noise levels greater than  
2 factories, helicopters, and riveters. And, in fact,  
3 only an amplified rock music performance has a higher  
4 typical noise level.

5 Veterinary hospitals, by contrast, would  
6 involve much lower noise levels, as dogs staying  
7 overnight are likely to be sedated or recovering from  
8 surgery, and are not normally kept outdoors.

9 Ms. Ogunneye also suggested that since dog  
10 boarding might be a permissible accessory use for a  
11 pet shop or veterinary hospital, then unrestricted dog  
12 boarding must be permissible as a principal use as  
13 well. We disagree with this logic. Because accessory  
14 uses must be incidental and subordinate to the  
15 principal use, this necessarily entails some  
16 limitation on the scale and the size of the ancillary  
17 activity and, therefore, on the external effects of  
18 the ancillary activity on neighboring properties.

19 To put it another way, a pet shop or  
20 veterinary hospital could not board an unlimited  
21 number of dogs as an accessory use. However, as the  
22 Zoning Administrator concedes, if dog boarding is  
23 matter of right as a principal use, the Zoning  
24 Administrator has no authority to limit either the  
25 number of dogs or otherwise condition that use.

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1           In other words, if dog boarding -- if a  
2 dog boarding business for five dogs is allowed, so is  
3 outdoor dog boarding of 60 dogs.

4           Finally, we address a consistent theme  
5 sounded by DCRA's counsel that D.C.'s animal control  
6 ordinance, which can be found at 24 DCMR Part 900, is  
7 sufficient to control the external effects associated  
8 with dog kennels, and that this Board is entitled to  
9 presume that facilities will operate in accordance  
10 with law.

11           Let's look first at how D.C.'s animal  
12 control ordinance deals with noise. These regulations  
13 say that dog owners or keepers are not allowed to  
14 allow dog barking to disturb the peace. But is it  
15 enforced? Is it effective in controlling noise  
16 emanating from this facility, for example?

17           Evidently not. The record shows that  
18 neighbors have made numerous calls and lodged numerous  
19 complaints with the police, the Mayor's liaison, and  
20 DCRA, and that each of these entities pointed the  
21 finger at the other, and the end result was no action.

22           D.C.'s animal control ordinance is plainly  
23 designed to address the sorts of impacts on nearby  
24 properties associated with individual dog ownership.  
25 It requires that dogs be licensed, that they be on

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1 leashes, and it requires scooping. But it does not  
2 deal with the impact of a large number of dogs  
3 maintained on private property.

4 For example, the animal control ordinance  
5 does not place any controls on how dog keepers deal  
6 with animal waste on their own property or restrict  
7 the unsanitary disposal of dog waste. Quite simply,  
8 this law was not intended to address a situation in  
9 which large numbers of dogs are maintained on private  
10 property.

11 And I direct the Board's attention to the  
12 Appellant's prehearing submission, Attachment 12,  
13 identifying numerous incidents in which the operators  
14 of Wag Time disposed of dog wastes in an unsanitary  
15 fashion, and complaints lodged by neighbors about the  
16 odors. And as one of these attachments shows, the  
17 odor of ammonia was so strong that Wag Time itself  
18 called the Fire Department, which upon inspection  
19 concluded that the source of this odor was likely dog  
20 urine.

21 I also direct your attention to an e-mail  
22 from Peggy Keller with the Department of Health, which  
23 is appended to DCRA's supplemental submission, which  
24 confirms that there are no regulations that establish  
25 sanitary or health standards for what she calls doggie

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1 day care facilities.

2 By contrast, pet shops and veterinary  
3 hospitals are subject to detailed regulatory  
4 standards, copies of which have been provided to this  
5 Board, which requires that these facilities be  
6 operated in a safe and sanitary fashion, and control  
7 the odors and other objectionable external effects.

8 These regulations do not apply to kennels,  
9 which is further evidence that a dog boarding facility  
10 will have a greater negative impact on the use  
11 enjoyment of surrounding property than hospitals or  
12 pet shops.

13 Most tellingly, Wag Time itself  
14 acknowledges that its operations had external effects,  
15 when together with the Zoning Administrator they came  
16 up with a series of operational restrictions aimed at  
17 limiting these external effects as a condition of  
18 getting their six-month temporary certificate of  
19 occupancy, even though Ms. Ogunneye also conceded that  
20 it is virtually unprecedented to place use  
21 restrictions as a condition on a C of O and that they  
22 lacked authority to do so without the owner's consent.

23 We, therefore, have this bizarre situation  
24 here that the Zoning Administrator ignored the  
25 significant differences in external effects in

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1 assessing whether dog boarding was similar to  
2 veterinary hospitals or other matter of right uses in  
3 that zone district, while acknowledging that these  
4 external -- while acknowledging the existence of these  
5 external effects in considering whether or not to  
6 issue the C of O.

7 For all of these reasons, Mid City  
8 Development Company believes that the Zoning  
9 Administrator erred in deciding that unrestricted dog  
10 boarding was matter of right in the C-3 zone and urges  
11 this Board to sustain this appeal.

12 CHAIRPERSON GRIFFIS: Thank you very much.

13 Next?

14 MR. DONOHUE: Mr. Chairman, I have a  
15 written submission that I'd like to put into the  
16 record, and I would like to summarize. I'll probably  
17 need about two or three minutes.

18 CHAIRPERSON GRIFFIS: Perfect.

19 Sir, just a quick followup question for  
20 Ms. Fersler.

21 VICE CHAIRPERSON MILLER: Ms. Fersler, did  
22 you say that it was unprecedented for DCRA to put use  
23 conditions on a C of O without the owner's consent?

24 MS. FERSLER: Well, that was the testimony  
25 of Mr. Lorenzo, that in his long experience as the

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1 Zoning Administrator that it was unprecedented for use  
2 restrictions as opposed to restrictions dealing with,  
3 you know, building code issues.

4 VICE CHAIRPERSON MILLER: So you weren't  
5 making a distinction between owners and tenants?

6 MS. FERSLER: No.

7 VICE CHAIRPERSON MILLER: Okay. That's  
8 what I was wondering about. Also, I just want to make  
9 sure I know -- when you were referring to the animal  
10 control ordinance, or something like that, is that  
11 Exhibit 81 that's in the record? Chapter 29, Animal  
12 Facilities?

13 MS. FERSLER: No.

14 VICE CHAIRPERSON MILLER: No.

15 MS. FERSLER: No. It's 24 DCMR Part 900.  
16 And we -- it was referenced in DCRA's brief. I think  
17 it was a prehearing submission that they made.

18 VICE CHAIRPERSON MILLER: Okay. Thank  
19 you.

20 CHAIRPERSON GRIFFIS: Very well.

21 MR. RUSHKOFF: I have from DCRA copies of  
22 the -- this animal control regulation that I could  
23 distribute now if that would help.

24 CHAIRPERSON GRIFFIS: Okay.

25 MR. RUSHKOFF: I'll submit those as an

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1 exhibit. It's the animal control regulations, one  
2 page, and then actually attached to it is the noise  
3 control regulation that we cited in our memo earlier.

4 CHAIRPERSON GRIFFIS: Excellent. Is it --  
5 what's the chapter that you're submitting?

6 MR. RUSHKOFF: Chapter 9, Animal Control.

7 CHAIRPERSON GRIFFIS: Chapter 9, Animal  
8 Control. Okay.

9 MR. RUSHKOFF: Title 24, Chapter 9.

10 CHAIRPERSON GRIFFIS: Just for clarity --  
11 I'm looking at Exhibit 81, and it's the D.C. Register,  
12 the Notice of Final Rulemaking, Chapter 29, Animal  
13 Facilities. Who submitted that for the record?

14 MS. FERSLER: Mid City --

15 CHAIRPERSON GRIFFIS: Okay.

16 MS. FERSLER: -- submitted that, and then  
17 Animal City as a veterinary hospital, and a couple of  
18 other types -- similar types, includes veterinary  
19 hospitals.

20 CHAIRPERSON GRIFFIS: Right. Okay, that's  
21 clear. Thank you.

22 Very well. Whenever you're ready.

23 MR. DONOHUE: Thank you, Mr. Chairman. Ed  
24 Donohue. I'm with the law firm Cole, Raywid &  
25 Braverman on behalf of Wag Time, the tenants and

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1 occupants and owners of Wag Time.

2 As I said, I did prepare a written  
3 statement, because, frankly, on looking back, there is  
4 just an awful lot of testimony and an awful lot of  
5 documents in the record. And as I tried to boil  
6 things down in my own mind, it really became very  
7 simple, so I'm going to summarize in just two or three  
8 minutes.

9 The letter I'm referring to is a letter  
10 dated May 11th and submitted to you now. And I think  
11 at the outset I'd like to remind the Board that it's  
12 important for the Board to recall what is not at issue  
13 here today. And there's a few things, and they're  
14 called out on page 2.

15 There was a great deal of discussion about  
16 the -- I'll call them the "proffered conditions."  
17 It's a term of art, and it's, frankly, a common  
18 practice in the State of Virginia, not so common in  
19 other places. But a proffered condition is a self-  
20 imposed condition, not a proposed use or a proposed  
21 rezoning, that type of thing.

22 The question of whether that was an  
23 appropriate exercise is an interesting one, but that  
24 certificate of occupancy has expired of its own terms.

25 The conditions that were proposed by the Wag Time

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1 folks and imposed by the Zoning Administrator, by his  
2 letter of July 2003, is no longer at issue because the  
3 certificate of occupancy issued January 28th, if  
4 memory serves, of this year does not have conditions  
5 imposed. The other certificate of occupancy has, in  
6 fact, expired.

7 I thought that the dialogue between Mr.  
8 Lowrenco and others about the appropriateness of this  
9 use was interesting and perhaps informative to the  
10 Board. But Mr. Lowrenco, you may recall, did also  
11 admit that there were other instances where conditions  
12 were imposed -- for example, where a final signoff on  
13 a safety check had not in fact occurred, but  
14 certificate of occupancies were issued.

15 So it's not unprecedented. And contrary  
16 to what Ms. Fersler says, it was not imposed by the  
17 DCRA. These were proposed by Wag Time. And if you'll  
18 recall, they had to do with things like hours of  
19 operation, number of dogs, that kind of thing. In any  
20 event, as I say, that C of O has expired.

21 The other question I think is -- is really  
22 not properly before the Board is -- well, first of  
23 all, daytime operations, retail, dog grooming,  
24 etcetera -- by their own admissions, appellants don't  
25 challenge that. It is literally just this issue of

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1 overtime stays.

2           So Mr. Noble's designee, Ms. Ogunneye,  
3 felt that the more similar use was a veterinary  
4 hospital. Appellants have challenged whether a pet  
5 store is the more appropriate or a kennel, which I'll  
6 remind you is not a defined term in the zoning  
7 regulations, is a better term.

8           She made her judgment, and she testified  
9 at length and was cross examined. She made her  
10 judgment that the uses were so similar that she felt  
11 that the certificate of occupancy ought to be issued.

12          Mr. Noble followed up with a letter to one of the  
13 appellants that said, "The District has no legal basis  
14 for withholding a certificate of occupancy." That's  
15 the Acting Zoning Administrator's opinion after  
16 careful consideration, and, as he put it, indepth  
17 review of the Wag Time operations.

18           I'll remind you that in the case of  
19 Kalorama Citizens versus the D.C. Board of Zoning  
20 Adjustment the court said, "It's the applicant's duty  
21 to inform the Zoning Administrator of the intended use  
22 of the property, and that the use must simply meet all  
23 of the requirements or come within all of the  
24 limitations of the zoning regulations governing that  
25 use."

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1           In the Zoning Administrator's opinion,  
2 that is, in fact, what is the case. And I would  
3 submit to you that that was true on July 30, 2003,  
4 when Mr. Noble wrote his letter, and it's also true  
5 today.

6           I'd also like to call your attention --  
7 I've attached these cases, by the way -- call your  
8 attention to Barker versus Aetna Life Insurance, that  
9 said that the decision to issue a certificate of  
10 occupancy enjoys "a presumption of validity." I think  
11 that's true here as well.

12           I'll remind the Board, although it's  
13 perhaps obvious, Mr. Lowrenco was paid for his  
14 opinion. He was asked to come in and give, frankly, a  
15 different opinion than the Zoning Administrator's, and  
16 he did his job. He explained to the Board that he  
17 perhaps could have come to a different conclusion, but  
18 the presumption of validity lies in the Zoning  
19 Administrator's letter and the Zoning Administrator's  
20 decision.

21           I'd also like to remind the Board --  
22 you'll recall that there was a number of discussions  
23 about veterinary hospitals -- dogs are recuperating,  
24 dogs are stored indoors, there will be fewer dogs.  
25 This is pure conjecture. By their own admission --

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1 and, in fact, by Mr. Lowrenco's admission -- there are  
2 no limitations except for the zoning envelope, if you  
3 will.

4 There are no limitations on the permissive  
5 use of a veterinary hospital in the C-2 district. So,  
6 of course, in the C-3 district as it is here.

7 Likewise, a pet store. No limitations on  
8 number of dogs, no limitations on outdoor exercise, no  
9 limitations on what's being called sedations in the  
10 case of a veterinary hospital.

11 Finally, Mr. Chair, I think it's  
12 abundantly clear that the Zoning Commission, as  
13 opposed to the Board of Zoning Adjustment, knows how  
14 to place conditions on uses where it finds that that's  
15 appropriate. I'll call your attention to bowling  
16 alleys set forth in 721. Ms. Miller has called this  
17 to our attention in a couple of cases. That it shall  
18 be soundproofed -- 721.2.

19 Fast food restaurants -- there is a number  
20 of restrictions placed on fast food restaurants,  
21 specifically on drive-thru, specifically on drive-thru  
22 when in close proximity to residential zone districts.

23 The Zoning Commission did not place  
24 conditions on the uses deemed to be similar here. It  
25 did not place limitations in terms of hours of

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1 operation or proximity to residential or the size of  
2 the veterinary hospital or the pet store.

3 And I think that the difficulty that the  
4 appellants have is -- is that's a very plain case.  
5 There are no limitations placed on the uses that are  
6 so similar that the DCRA deemed it to be, frankly,  
7 beyond their purview to deny a certificate of  
8 occupancy.

9 And with that, I'm going to close, Mr.  
10 Chair. The letter I think is self-explanatory.

11 CHAIRPERSON GRIFFIS: Good. Thank you.  
12 You touched on -- there's two cases attached to the  
13 letter, is that correct?

14 MR. DONOHUE: Yes, sir.

15 CHAIRPERSON GRIFFIS: Okay. The Aetna  
16 and --

17 MR. DONOHUE: Kalorama and Barker.

18 CHAIRPERSON GRIFFIS: Excellent. Okay.

19 Any clarification questions on the  
20 closing? Very well. Thank you very much.

21 Let's go to DCRA.

22 MR. RUSHKOFF: Okay. Just to sum up the  
23 Zoning Administrator's decision, he determined dog  
24 boarding to be an other service or retail use similar  
25 to that permitted in a C-2 district. Now, the C-3

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1 district allows any matter of right use from the C-2  
2 district. Therefore, this use was approved for the C-  
3 3 district.

4 Now, if we go through the zoning  
5 regulations, starting in the residential area and  
6 working our way to less and less restrictive zones,  
7 all the way up to manufacturing, the C-2 district is  
8 the one that introduces commercial establishments  
9 related to animals. And in Ms. Ogunneye's testimony I  
10 think she made it quite clear that that's what struck  
11 her as she was doing her analysis of the regulations.

12 As you move to less restrictive, those  
13 animal-related uses are then incorporated by reference  
14 in the provisions that state that the matter of right  
15 uses from the next most restrictive district are  
16 incorporated by reference.

17 Now, when you get to the C-2 district, you  
18 find that veterinary hospitals and pet shops are  
19 allowed as a matter of right. By contrast, if you  
20 look at the CR, mixed use district, there's an express  
21 prohibition on animal hospitals or veterinarians. If  
22 you look at the R-4 district, it allows -- it says it  
23 allows a hospital, sanitarium, or clinic for humans.  
24 And in her testimony Ms. Ogunneye considered that  
25 significant.

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1                   Now, after that, there's nothing more  
2 about commercial establishments related to animals  
3 being allowed in any zone. All we have is what we  
4 find in the C-2 description. So, therefore, if we  
5 don't allow it in C-2, dog boarding would only be  
6 allowed in the M, general industry, district. And  
7 there I -- assuming I'm reading the regs right, I  
8 believe it would be allowed as a matter of right,  
9 subject to standards of external effects. And that's  
10 the only place it could go in the city.

11                   Now, I think there was a reference by Mr.  
12 Lorenzo to obtaining a variance. There you would have  
13 to show some extraordinary or exceptional situation or  
14 condition on a specific piece of property, and then  
15 meet a standard of exceptional and undue hardship.  
16 It's hard to see how a variance could possibly be  
17 established for a new dog boarding facility that's  
18 proposed here.

19                   I would also note that we're dealing with  
20 a 1,248 square foot facility, a very small facility.  
21 And I think it's unlikely that one could show that --  
22 you know, substantial hardship in the sense that the  
23 facility could simply, I assume, be sold and used for  
24 something else.

25                   There are a lot of practical difficulties

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1 in trying to measure proposed uses against the listed  
2 uses that we find to determine similarity. I think  
3 the biggest one is that there's a very, very wide  
4 range of external effects for each listed use.

5 I mean, even residential use -- if you  
6 think about it, there are problem properties in the  
7 District that you may have read about or probably have  
8 heard about here, where technically the property is  
9 being used in a residential manner, but it's  
10 extraordinarily disturbing to the neighbors -- for  
11 example, people whose hobby it is to repair or  
12 reconstruct vehicles in their backyard. I mean,  
13 that's extraordinarily disturbing to the neighbors,  
14 but technically is a residential use if it's not being  
15 done for a commercial purpose.

16 So in coming up with these -- with what's  
17 an allowable use, or what's a similar use, I don't  
18 think you try to figure out what the typical or  
19 average use is.

20 So, for example, let's say you're  
21 comparing something to a veterinary hospital. I'm not  
22 sure it's really relevant how the average veterinary  
23 hospital is operated, and then comparing it to a  
24 proposed use.

25 I think what you want to look at is how --

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1 basically, how bad an impact a veterinary hospital  
2 could have if it's being operated right up to the  
3 limits of the law, because I think that that -- in  
4 making the decision to allow a veterinary hospital to  
5 be located in a C-2 district, I think the assumption  
6 has to be that the veterinary hospital will not be  
7 average but will be worse than average, and that we  
8 can tolerate a worse-than-average veterinary hospital  
9 in a C-2 district, and, therefore, by inference in a  
10 C-3 district.

11 Now, there is some limit in the sense that  
12 what we have proposed is that one look at the limits  
13 of lawful operation, so that, for example, it's  
14 theoretically possible for a property to be used in a  
15 way that's contrary to law and unlawfully disruptive  
16 to the surrounding properties. And we would not  
17 consider that to be the standard against where --  
18 against which we're measuring.

19 So, in other words, we would -- in looking  
20 at the veterinary hospital, we would assume lawful  
21 operation of the veterinary hospital, subject to  
22 whatever rules apply to those institutions. And also,  
23 in considering a dog boarding facility, we have  
24 assumed that that, too, would be judged in accordance  
25 with whatever legal rules, such as animal control or

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1 noise regulations, would apply to that facility.

2 So basically the standard is, how bad can  
3 it be within the limits of lawful operation? And we  
4 would apply that evenly, both to the listed use and to  
5 the proposed use.

6 Now, I believe that Mr. Lowrenco at least  
7 sometimes agrees with this approach, because -- and  
8 now quoting from page 4 of his written testimony, he  
9 said, "Both a pet shop and a veterinary hospital are  
10 licensed facilities under District of Columbia law  
11 that are subject to periodic inspections and license  
12 renewal and are held to detailed public health  
13 sanitary standards and standards for animal health and  
14 welfare."

15 And when we look at dog boarding  
16 facilities, those are subject to animal control  
17 regulations that apply specifically to dogs. And I --  
18 a few minutes ago I circulated 24 DCMR Section 900.1,  
19 which provides that no person shall own or keep a dog  
20 that by barking or in any other manner disturbs the  
21 quiet of any neighborhood or any person.

22 If you look down to Section 900.9, you'll  
23 see that's punishable not just by a fine but also by  
24 imprisonment for up to 10 days. On that same page,  
25 there are also provisions that address a couple of the

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1 issues that were raised in the letters that I think  
2 have been adopted by appellant as part of its case.

3 Section 900.7 deals with the requirement  
4 to remove dog excrement from curbs, gutters, alleys,  
5 streets. 900.8 talks about not permitting excrement  
6 to remain on private property without the owner's  
7 consent.

8 Now, dog boarding facilities are also  
9 subject to the maximum sound levels that are set forth  
10 in the District's environmental regulations, and the  
11 applicable regulations are pages 2 and 3 of the  
12 document that I just circulated.

13 Normally, in a commercial zone like a C-2  
14 zone, the noise limitations are 65 decibels in the  
15 daytime, 60 decibels nighttime. In this case, we've  
16 got a property that's adjacent to a residential zone,  
17 which would reduce the limits to 60 decibels daytime,  
18 55 decibels nighttime.

19 There are provisions for seeking a  
20 variance, which involves weighing undue hardship to  
21 the applicant against the impact to the community.  
22 And it would -- you know, hypothetically, the way I  
23 think this is supposed to work is that rather than  
24 ignoring these regulations what DCRA can do is issue  
25 the certificate of occupancy.

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1           And then if it turns out that Wag Time  
2 feels that it's unable to comply with the District's  
3 noise regulations, it would then have to go and seek a  
4 variance, and it would be very unlikely to get one,  
5 given that it's surrounded by large buildings, and  
6 presumably a violation of the noise regulations would  
7 disturb a lot of people.

8           And when you balance that hardship to the  
9 community against the hardship to Wag Time of not  
10 being able to operate with, say, dogs in the yard, it  
11 seems to me that the hardship would definitely tilt in  
12 favor of the community. So the smaller the facility,  
13 and the bigger the surrounding residential uses, the  
14 less likely it is that the applicant will get a  
15 variance.

16           Now here we've spent some time talking  
17 about the conditions that were included in the Zoning  
18 Administrator's letter to Wag Time's attorneys. Now,  
19 I agree with Wag Time's attorney that this is a moot  
20 issue at this point.

21           We were not going to take the position --  
22 and we haven't taken the position -- that there is  
23 anything moot about the original decision to issue the  
24 certificate of occupancy. And we certainly wanted the  
25 case to continue up to the new certificate of

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1 occupancy that was issued in January, so that the  
2 Board could consider that in a timely way.

3 But the conditions in that original letter  
4 are no longer there in the current certificate of  
5 occupancy, and, therefore, that issue doesn't have to  
6 be resolved. If the Board decides to resolve it, or  
7 to address it, I would point out that dog boarding is  
8 not a listed use in the regulations.

9 So the question that I would ask is: if  
10 you were to say, for example, something like -- in the  
11 certificate of occupancy, if you were to say that this  
12 allows dog boarding with, say, outside use limited by  
13 number of dogs and time of day, my question is: are  
14 you really imposing a condition, or are you simply  
15 defining the use?

16 And by analogy, I was looking just now at  
17 Title 11, and under the C-2 district one of the matter  
18 of right uses is fast food restaurant. Now suppose --  
19 just imagine that if it wasn't listed, but imagine  
20 there was a basis for determining that it was similar  
21 to some other use listed there.

22 Now, if the Zoning Administrator were then  
23 to describe the use the way the fast food restaurant  
24 use is described here, he would include that the -- it  
25 says here condition 3 is that any refuse dumpsters

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1 shall be housed in a three-sided brick enclosure equal  
2 in height to the dumpster, or six feet high, whichever  
3 is greater.

4           The objection would be made that this is  
5 imposing a condition on the use, and we would argue,  
6 well, here that's really just a description of the use  
7 of the matter of right use. So, normally, if you have  
8 a listed use, you have something like auction house.  
9 Okay? So it's not proper to impose conditions on an  
10 auction house.

11           But if you're dealing with similar uses,  
12 if you were in the process of defining what the use  
13 is, out of an abundance of caution you may describe  
14 the use more narrowly than some of the other uses are  
15 described in the regulations. And by describing it  
16 narrowly the words you use to narrow it could be  
17 described as a condition, or it could simply be  
18 described as the use itself.

19           Another example would be soundproof  
20 bowling alley. I mean, is a soundproof bowling alley  
21 a use? Or is soundproofing a condition on the use of  
22 bowling alley? If, in the regulations, it says  
23 bowling alley, I don't think it's right for the Zoning  
24 Administrator, certainly not on the zoning initiative,  
25 to impose a soundproofing requirement. But if you're

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1 dealing with a similar use doctrine, it's probably  
2 okay to say that this use assumes soundproofing.

3 And then, finally, there has been some I  
4 think maybe concern expressed about the fact that the  
5 certificate of occupancy was issued on a temporary  
6 basis, and Ms. Ogunneye testified that that would  
7 provide an opportunity to receive complaints.

8 Again, I guess I would urge caution in  
9 discouraging that practice, because from the point of  
10 view of DCRA we've got an extremely resource-strapped  
11 agency that receives many proposed uses, often from  
12 entities as small as this one. And it seems to me  
13 that we would want to leave them with some discretion  
14 not to have to do a full-blown investigation of every  
15 conceivable use and compare it to dozens of  
16 establishments to establish what the range of similar  
17 use might be.

18 It makes a certain amount of sense to say,  
19 "Well, let's do the best we can in making a decision."

20 And then, at this point, let's limit -- let's issue  
21 a certificate of occupancy for a six-month period,  
22 because that might be the most efficient way of  
23 learning more about that particular use rather than  
24 just making a decision forever based on, you know, as  
25 much work as you're able to do and as much information

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1 as you're able to gather.

2 But, you know, basically to sum up, I  
3 think if you put yourself in DCRA's position, and you  
4 go through the zoning regulations, it is striking the  
5 way, when you reach the C-2 district, these various  
6 animal-related commercial uses show up.

7 And I think that it's -- one can easily  
8 infer that, you know, were someone to think about dog  
9 boarding it would -- it would -- that use would come  
10 up along with these other animal-related uses. And,  
11 you know, otherwise, that, you know, this use is  
12 simply not addressed at all.

13 And I think -- also, I think it's  
14 important to be cautious about putting too much weight  
15 on the evidence that has come out regarding how this  
16 particular establishment may have behaved or how they  
17 are viewed by this particular community, because I  
18 think that -- I think that -- well, really, a couple  
19 of things.

20 I don't think we want a matter of right  
21 use determination to be -- you know, for all time to  
22 be influenced too much by the experience with one  
23 particular establishment -- an establishment which I  
24 believe appellant would argue has been operating in  
25 violation of various ordinances, and presumably is

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1 subject to a civil action that could be brought,  
2 assuming we accept appellant's version of the way  
3 they're operating.

4 I think -- and I guess a more fundamental  
5 concern that I have is that if -- if we take the  
6 position that because this particular use is not in  
7 the regulations, and because it's very difficult to  
8 establish similarity of use to a certainty, we will  
9 simply not allow the use.

10 I think that really will impose a serious  
11 cost on the establishment of new businesses in the  
12 District, and ultimately affect community life. I  
13 mean, this is an example of a business that wants to  
14 set itself up in a community business center. It  
15 serves people in the area.

16 If we make it too arduous, too difficult,  
17 if we require a variance, or if we require, for  
18 example, this storeowner to go and try to change the  
19 zoning regulation in some way to allow this use, I  
20 think that we are going to be overly discouraging the  
21 starting of new businesses that serve District  
22 residents.

23 And that concludes my statement.

24 CHAIRPERSON GRIFFIS: Thank you very much.

25 If I understand your last statement, you are

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1 directing us not to make this a popularity contest,  
2 but a legal decision, is that correct?

3 MR. RUSHKOFF: That sounds even better  
4 than the way I said it.

5 CHAIRPERSON GRIFFIS: Indeed. Which, of  
6 course, is what we -- obviously we'll always do, and  
7 that's what makes appeals very difficult. Obviously,  
8 the passions are high. But I think that we are  
9 distilling it down to make that decision at that  
10 point.

11 You bring up an interesting aspect also in  
12 the conclusion that this may preclude other  
13 businesses, and I take that to mean other businesses  
14 that don't fall directly into those enumerated in the  
15 zoning regulations, and may, in fact, critically  
16 curtail kind of the smaller mid-sized businesses from  
17 establishing.

18 Do you have any example that you're aware  
19 of of where that has happened previously? I mean,  
20 certainly, like a bakery is something we all love in  
21 our neighborhoods. That's fits well within the  
22 regulations.

23 MR. RUSHKOFF: No. Actually, I don't have  
24 a specific example.

25 CHAIRPERSON GRIFFIS: Okay.

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1 MR. RUSHKOFF: Actually, I thought this --  
2 this particular example I thought was -- was a very  
3 good example, because it's a very small business that  
4 cannot really -- at least I'm guessing -- they are  
5 really not in a position where they can afford to make  
6 new law, that this is the kind of business that would  
7 really have benefitted perhaps from a special  
8 exception.

9 If, for example, there was something that  
10 allows you to get a special exception for a dog  
11 boarding facility, that might have been the best  
12 solution, because at least there would be a procedure  
13 set up. But here when Mr. Lowrenco says, "Well, they  
14 needed to get a variance," I mean, that's  
15 extraordinarily difficult.

16 The other option would be, I suppose, to  
17 go to the Zoning Commission and try to lobby for some  
18 change to the law to create a special exception  
19 option. But here, from DCRA's point of view, it has  
20 an applicant from someone who really doesn't have a  
21 ready option.

22 DCRA is trying to do the best it can with  
23 the regulatory scheme in front of it, and, you know,  
24 is trying to put it where -- you know, where the  
25 regulations come closest to describing the kind of

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1 operation that it has.

2 CHAIRPERSON GRIFFIS: Okay. Thank you.

3 Ms. Miller, questions?

4 VICE CHAIRPERSON MILLER: I have several  
5 questions. But since we're on this topic of what to  
6 do if it doesn't fall within the defined -- well, that  
7 is the topic, defined definition. But you're probably  
8 familiar with the Chagnon case, and I'm wondering if  
9 you could address how your argument fits with that.

10 I mean, there's one -- I'm just going to  
11 pull out one sentence in the case, and that's, you  
12 know -- it may be out of context, but it says here,  
13 where they overturned the BZA, it says, "Although the  
14 BZA and the Zoning Administrator contend that in the  
15 interest of efficient administration they may  
16 interpret defined uses in the zoning regulations to  
17 encompass other uses that are functionally comparable,  
18 even if they are outside the definition, they cite no  
19 authority for that position, and we cannot agree with  
20 it."

21 It sounds like you're asking us to do  
22 something similar, so --

23 MR. RUSHKOFF: Well, I hope not. I mean,  
24 I hope what I'm saying is that as to -- if you're  
25 trying to fit something into a defined use, I think

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1 what they're warning against is taking the defined  
2 uses and stretching them beyond the definition there.

3 And I think what I'm saying is that -- and  
4 I don't think there is good authority on how to  
5 interpret the similar use provisions, because I  
6 believe I would have found it if it existed, and I  
7 didn't find it. But I'm willing to be -- you know, if  
8 someone else has found it, I'd love to read it.

9 But if we're interpreting the similar use  
10 provision, I'm saying there an overly harsh technical  
11 application, where something has to be similar on all  
12 four corners, I think is going to have the effect of  
13 not allowing new businesses to take advantage of that  
14 similar use provision.

15 I think it would be very difficult, for  
16 example, for a little shop to establish what the range  
17 of external effects are for a particular use here, and  
18 to show that it, you know, say is average within that  
19 range or, you know, halfway between average and the  
20 worst side of the range. I just think that that would  
21 be very difficult to do. So --

22 VICE CHAIRPERSON MILLER: Let me ask you  
23 this. I think in your last pleading on page 3 you  
24 made a reference to regulations that had been drafted  
25 regarding this doggie day care that have not been

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1 approved by the Council yet.

2 MR. RUSHKOFF: Yes. That was a quotation  
3 from the Health Department. Yes, I don't know what  
4 the status of those are right now. I don't.

5 VICE CHAIRPERSON MILLER: Do you know what  
6 the content was, what they recommended?

7 MR. RUSHKOFF: I don't. But if I remember  
8 the quote correctly, at least that official believed  
9 that this facility would comply with those  
10 regulations.

11 VICE CHAIRPERSON MILLER: Right.

12 MR. RUSHKOFF: I believe that's what she  
13 said.

14 VICE CHAIRPERSON MILLER: That was my  
15 impression.

16 MR. RUSHKOFF: But I don't --

17 VICE CHAIRPERSON MILLER: But you have no  
18 idea where they are in the system, and you're not  
19 familiar with --

20 MR. RUSHKOFF: No.

21 VICE CHAIRPERSON MILLER: -- them?

22 MR. RUSHKOFF: Is that something we should  
23 try to find out? Or that's --

24 VICE CHAIRPERSON MILLER: I don't know.

25 MR. RUSHKOFF: Okay.

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1 (Laughter.)

2 VICE CHAIRPERSON MILLER: I just was  
3 curious. Just wanted to follow through where that  
4 stood at least. Has there ever been an instance that  
5 you're familiar with where DCRA has imposed use  
6 conditions on a C of O? I'm not talking about the  
7 safety conditions that were referred to or pending  
8 completion of safety conditions, but use conditions  
9 like this.

10 MR. RUSHKOFF: No, I'm not.

11 VICE CHAIRPERSON MILLER: Okay. I'm going  
12 on memory, and you can correct me if I'm wrong. I  
13 thought there might have been an opportunity provided  
14 to DCRA to rebut Mr. Lowrenco's testimony. Am I  
15 correct on that, that I guess -- and you haven't done  
16 -- you didn't submit anything after Mr. Lowrenco's  
17 testimony.

18 MR. RUSHKOFF: I'm just thinking about  
19 this.

20 VICE CHAIRPERSON MILLER: There wasn't a  
21 requirement to, but I --

22 MR. RUSHKOFF: I think we had done --

23 VICE CHAIRPERSON MILLER: -- thought we  
24 talked about it.

25 MR. RUSHKOFF: I believe we went first,

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1 but I don't think we asked for an opportunity to rebut  
2 the -- to rebut his testimony. Is that --

3 VICE CHAIRPERSON MILLER: I'm probably  
4 mistaken. I might be mixing it up. Okay.

5 What's wrong with putting this type of  
6 facility in a manufacturing zone?

7 MR. RUSHKOFF: Well, one is -- I guess  
8 we're not taking the position that you can't put it in  
9 a manufacturing zone. I guess there are a couple of  
10 concerns. One concern is that manufacturing zones are  
11 not supposed to be fit for human beings, and I assume  
12 are not supposed to be fit for dogs.

13 And I believe that there's language in the  
14 regs cautioning that if you put uses -- cautioned  
15 against putting things in manufacturing zones that  
16 might later inhibit the development of the  
17 manufacturing zone, because when we get a  
18 manufacturing zone it's supposed to develop in the  
19 direction of optimizing manufacturing, which may not  
20 be compatible with residential-type uses.

21 So if you were to start putting too many  
22 soft uses in a manufacturing zone, you might later  
23 inadvertently create reasons not to allow the full  
24 development of that zone.

25 Another might be that I would guess that a

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1 manufacturing zone may not be convenient to the  
2 community, so that if a person is, for example,  
3 dropping an animal off frequently, it may be difficult  
4 to take public transportation or to drive off to a  
5 manufacturing zone, that a lot of people may -- if  
6 this, for example, turned out to be a successful  
7 business -- and let's say they -- that the noise and  
8 smell and defecation issues were brought under  
9 control, so that the community was happy, in theory  
10 something -- a business like this could sprout up in  
11 various community business centers, and people in the  
12 city who own dogs would be able to drop their dogs  
13 off, you know, in the morning and pick them up in the  
14 afternoon -- that that, you know, provides a real  
15 benefit for the community.

16 So I guess it could be a quality of life  
17 concern if we said it, that it only went in a  
18 manufacturing area. I mean, I think from the point of  
19 view of DCRA, it would have been obviously much better  
20 -- we're not really arguing that it should be, say,  
21 matter of right rather than special exception. We're  
22 simply looking at the regs as we have them and say,  
23 you know, given what we have, it made sense to treat  
24 it as a matter of right use in this zone.

25 You know, if we were the Zoning

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1 Commission, we might say it would be better if this  
2 were a special exception in a C-2 district. But  
3 that's not the regulation that we have.

4 VICE CHAIRPERSON MILLER: Okay. With  
5 respect to the question of mootness and the temporary  
6 certificate of occupancy that had the conditions,  
7 isn't it -- well, wouldn't you say that for legal  
8 reasons sometimes it may not be moot in that we're  
9 dealing with a condition that could -- circumstance  
10 that could repeat itself, whether -- and that  
11 circumstance would be whether or not it's appropriate  
12 for the Zoning Administrator to issue a certificate of  
13 occupancy with conditions.

14 MR. RUSHKOFF: Yes. That is something  
15 that could recur. It --

16 VICE CHAIRPERSON MILLER: And let me  
17 explain -- weren't you also saying that maybe you  
18 thought that was a good practice because of their  
19 being short-handed?

20 MR. RUSHKOFF: Well, that was the six-  
21 month idea.

22 VICE CHAIRPERSON MILLER: Oh, the  
23 temporary --

24 MR. RUSHKOFF: Yes. The temporary idea I  
25 thought might make a certain amount of sense, rather

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1 than feeling we have to. I was just concerned that if  
2 the Board were to issue a decision, or even a footnote  
3 -- let's say if we said that -- you know, even if the  
4 Board said, "This is dicta, but we just want the  
5 Zoning Administrator to know our view on this," I'm  
6 concerned that if there were a blanket rule against  
7 temporary certificate of occupancy that a tool that  
8 might prove to be useful would be off limits, that it  
9 wouldn't be possible to issue a temporary one, gain  
10 information -- more information right there as to how  
11 this type of facility operates, and then be able to  
12 use that information in deciding whether to issue  
13 another certificate of occupancy.

14 VICE CHAIRPERSON MILLER: So you're not --

15 MR. RUSHKOFF: But I think the Board  
16 itself has said -- I know in a recent decision said  
17 that sometimes the experience after the organization  
18 or the establishment opens is sometimes useful to the  
19 Board in looking back at the original decision to  
20 issue the permit. Likewise, I think that type of  
21 information could be useful to DCRA.

22 I think the other part related to the  
23 condition -- about imposing conditions and whether --  
24 I mean, that's one where I think -- I don't think it's  
25 -- I guess I agree it could occur. If it did occur

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1 again, I'm not sure -- unless it were also another  
2 temporary certificate of occupancy, I think it would  
3 be reviewable.

4 I mean, if DCRA would have imposed  
5 conditions, for example, on a permanent certificate of  
6 occupancy, that would certainly be reviewable by the  
7 Board. And it wouldn't escape review, because there  
8 wouldn't be any lapsing of the certificate of  
9 occupancy.

10 I mean, here we have conditions on the  
11 certificate -- or, arguably, conditions. And we also  
12 have a temporary certificate, so there is the  
13 potential for it to evade review. I mean, I don't  
14 think there's harm. I mean, I think maybe I'm overly  
15 technical in -- you know, in raising the mootness  
16 point, because certainly the Board is free to comment  
17 whether or not it's actually an issued teed up for a  
18 decision.

19 The Board is, of course, free to comment  
20 on practices, and I know the Zoning Administrator has  
21 welcomed guidance from the Board. So there certainly  
22 isn't any harm in expressing, you know, a view on  
23 that. I just don't think that the Board has to reach  
24 that issue to resolve this appeal. I think in terms  
25 of resolving the appeal we've just gotten our

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1 certificate of occupancy, and that's all the Board has  
2 to do.

3 VICE CHAIRPERSON MILLER: Is a facility  
4 like Wag Time covered under Chapter 29 of the animal  
5 facilities regulations that were submitted in the  
6 record? Specifically, 29-01.1, that talks about  
7 having a licensed veterinarian. No?

8 MR. RUSHKOFF: I think the answer is no.  
9 But why don't I -- if the answer turns out to be yes,  
10 I'll submit something saying so. So I'll say the  
11 answer is no, and I'll check.

12 VICE CHAIRPERSON MILLER: Okay.

13 MR. RUSHKOFF: This is -- could you give  
14 me the chapter again? I'll make sure I get that  
15 right. That's the --

16 VICE CHAIRPERSON MILLER: Chapter 29,  
17 Animal Facilities.

18 MR. RUSHKOFF: Okay. And does it apply to  
19 a dog boarding/grooming facility, was the question.

20 VICE CHAIRPERSON MILLER: Well, yes.

21 MR. RUSHKOFF: And my answer is no.

22 VICE CHAIRPERSON MILLER: The one before  
23 us, like the one before us.

24 MR. RUSHKOFF: Right.

25 VICE CHAIRPERSON MILLER: Okay.

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1 MR. RUSHKOFF: Okay. It's been --  
2 Appellant has graciously handed me the definition of  
3 "animal facility" from that regulation, and it says --  
4 it talks about a facility where veterinary medicine is  
5 practiced. So I believe this facility did not  
6 practice veterinary medicine.

7 VICE CHAIRPERSON MILLER: Okay.

8 CHAIRPERSON GRIFFIS: The Appellant  
9 provided that for you?

10 MR. RUSHKOFF: Yes.

11 CHAIRPERSON GRIFFIS: Is it your opinion  
12 that this is covered under Chapter 29?

13 MS. FERSLER: In fact, it was Mid City.  
14 I'm sorry. He did not see who was --

15 CHAIRPERSON GRIFFIS: Oh, I'm sorry.

16 MS. FERSLER: -- who was providing it.

17 CHAIRPERSON GRIFFIS: Okay. And so what  
18 is the question -- the answer? Mid City provided that  
19 definition.

20 MR. RUSHKOFF: Yes. Mid City provided it.

21 I think their position would be that those  
22 regulations don't apply, because I know that -- I  
23 think Mr. Lowrenco made a big point that he felt it  
24 was significant that those --

25 CHAIRPERSON GRIFFIS: Ms. Fersler, is that

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1 correct?

2 MS. FERSLER: Is what correct?

3 CHAIRPERSON GRIFFIS: Does this fall under  
4 the jurisdiction of 29 in the regulations, Chapter 29  
5 that was submitted?

6 MS. FERSLER: I think it was my testimony  
7 that it did not, that --

8 CHAIRPERSON GRIFFIS: Good. Thank you.

9 MS. FERSLER: -- dog boarding facilities  
10 were not animal --

11 CHAIRPERSON GRIFFIS: I just didn't want  
12 him to say it. I wanted you to say it. That's  
13 perfect. Let's move on.

14 Next question?

15 VICE CHAIRPERSON MILLER: Mr. Rushkoff, in  
16 your opinion, when assessing whether a use -- an  
17 undefined use is similar to the defined uses in a  
18 regulation, is impact on the community relevant?

19 MR. RUSHKOFF: Yes.

20 VICE CHAIRPERSON MILLER: And how was that  
21 considered in this case?

22 MR. RUSHKOFF: I think in this case it was  
23 -- I think it was implicitly considered. I think in  
24 the -- I mean, I don't think that there was a finding  
25 made as to impact on the community.

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1           But I think that if you look -- I think  
2 the whole reason that -- that Ms. Ogunneye was looking  
3 at animal uses was that I think there was a -- at  
4 least an intuitive understanding that animals had  
5 impacts that -- on the surrounding area, and,  
6 therefore, she was looking to see at what point, in  
7 what district, in what zone, do animal effects  
8 suddenly become part of community life. And she  
9 determined that it was in the C-2 zone that that  
10 happens.

11           You know, because we don't have written  
12 decisions, you know, other than e-mails and -- from  
13 DCRA, we don't have the kind of discussion that one  
14 would have if there was, you know, a written decision  
15 by the Zoning Administrator, but I think that -- from  
16 the record, I think one has to infer that the concern  
17 was, you know, impact on the community.

18           VICE CHAIRPERSON MILLER: Could you just  
19 clarify one other thing you said in your closing? I  
20 just want to make sure I understand the point. You  
21 were talking about when assessing some standard you  
22 look at how bad the impacts are if operated up to the  
23 limits of the law.

24           MR. RUSHKOFF: How bad can it be within  
25 the limits of the law?

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1 VICE CHAIRPERSON MILLER: What is that --  
2 what standard is that for?

3 MR. RUSHKOFF: What is that standard for?

4 VICE CHAIRPERSON MILLER: Yes.

5 MR. RUSHKOFF: It seemed to me that there  
6 was a lot of discussion about how -- what DCRA should  
7 have done here was somehow measured the impact of the  
8 listed use, like measured the impact of a veterinary  
9 hospital or measured the impacts of a pet store, and  
10 then measured the impact of a dog boarding facility.

11 And as a practical matter, you really  
12 can't do that. For example, if you are going to  
13 measure -- look at this hypothetically. If you're  
14 going to measure a veterinary hospital, I assume that  
15 there are little ones with very small impact. There  
16 are big ones with a really big impact, and the same  
17 thing for pet shops.

18 And with dog boarding facilities, if you  
19 go out to, say, upper Montgomery County or something,  
20 you might find a huge one that's almost like a cattle  
21 farm or something with an extraordinary impact. And  
22 you might also find a dog boarding facility.

23 Perhaps there are some informally run in  
24 people's homes that have -- you know, there may be  
25 some illegal ones that are being run in people's homes

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1 where people take on several dogs, and it has such a  
2 low impact that -- in a residential area that  
3 neighbors aren't even aware that it's being run.

4 So what I'm trying to say is: how do you  
5 -- how do you compare similar use when both what  
6 you're trying to compare and the listed use that  
7 you're comparing it to both have a wide range of -- of  
8 collateral impact.

9 And I think the answer is that I think you  
10 have to -- for example, if you're looking at a  
11 veterinary hospital, you would have to look at a  
12 veterinary hospital that's -- I don't know exactly  
13 what the building size restrictions are, but you have  
14 to assume a large one, and you would have to assume  
15 that they are disposing of waste in a lawful manner,  
16 not an unlawful manner, and that they're doing  
17 whatever they're supposed to do in accordance with the  
18 law, because if you don't assume that, if you assuming  
19 that they're operating illegally, when there's no  
20 limit to -- to what the adverse impact could be. I  
21 mean, so -- and the same thing with a dog boarding  
22 facility.

23 VICE CHAIRPERSON MILLER: Well, did they  
24 do that?

25 MR. RUSHKOFF: Did --

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1                   VICE CHAIRPERSON MILLER: I didn't hear  
2 that in the testimony, that they imagined or looked at  
3 the worst operating facilities.

4                   MR. RUSHKOFF: Right.

5                   VICE CHAIRPERSON MILLER: Did they do  
6 that?

7                   MR. RUSHKOFF: I don't think they did  
8 that, no. And I guess what I'm suggesting to the  
9 Board is I know the Board is -- in going over this is  
10 going to be doing its own analysis. And I'm  
11 suggesting that the Board consider the legal  
12 restrictions that are applicable to a dog boarding  
13 facility, including the dog regulations.

14                   It was argued by Mr. Lowrenco that those  
15 should not be considered. He did argue, of course,  
16 that you should consider, when looking at a veterinary  
17 hospital, all of the various regulatory controls over  
18 the operation over the practice of veterinary science,  
19 or whatever.

20                   But when it comes to the dog boarding  
21 facility, he was outraged that corporation counsel  
22 would even look at what noise regulations are or --  
23 and noise regulations he has a point in terms of their  
24 generality, but here we have regulations specifically  
25 addressing the issue of dogs and the noise they make

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1 and their -- and dog waste. And he says that it's  
2 ridiculous to assume that those would be complied  
3 with.

4 VICE CHAIRPERSON MILLER: Let me ask you  
5 this. Don't we also have to consider what they  
6 actually weighed and considered in making the  
7 determination about similarity? What DCRA actually  
8 looked at?

9 MR. RUSHKOFF: Yes.

10 VICE CHAIRPERSON MILLER: Thought about?

11 MR. RUSHKOFF: Yes. I mean, I think here  
12 -- I mean, I think that the -- you know, the analysis,  
13 you know, didn't get into all of that. But I think  
14 that we have to anticipate that the Board is not going  
15 to stop with the analysis that was done by DCRA, but  
16 is going to go on and consider the record here. And  
17 in looking at the record and the various information  
18 that was submitted, I'm suggesting a way of analyzing  
19 that information.

20 VICE CHAIRPERSON MILLER: Okay. Thank  
21 you. I'm finished.

22 CHAIRPERSON GRIFFIS: Last followup  
23 question, then. You've indicated you would advise the  
24 Board not to pick up the issue or be definitive about  
25 the temporary certificate of occupancy. Is that

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1 correct?

2 MR. RUSHKOFF: Well, I guess not  
3 definitive in the sense of saying never issue a  
4 temporary --

5 CHAIRPERSON GRIFFIS: Right.

6 MR. RUSHKOFF: -- certificate of  
7 occupancy.

8 CHAIRPERSON GRIFFIS: Right. I think the  
9 flip side to that is -- well, a question to you, where  
10 is the jurisdiction to issue a temporary certificate  
11 of occupancy?

12 MR. RUSHKOFF: You know, that's a good  
13 question. I don't know. I mean, I don't know if  
14 there is jurisdiction to issue a temporary certificate  
15 of occupancy, if it's a matter of DCRA imposing it on  
16 the applicant.

17 I mean, I have assumed that if -- if DCRA  
18 is entitled to give a package to someone, the package  
19 includes a certificate of occupancy for the indefinite  
20 future, that with, you know, one assumption here is  
21 that in order to try to resolve these things that --  
22 or in order to try to be able to move forward on an  
23 application that DCRA has the discretion, with the  
24 consent of the applicant, to -- to in effect withhold  
25 a piece of what DCRA is authorized to give.

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1           That's why we had thought that conditions  
2 were lawful as long as they were with the, you know,  
3 genuine consent or especially if they were proposed by  
4 the applicant. It's one thing as a matter of policy  
5 for DCRA --

6           CHAIRPERSON GRIFFIS: Understood.

7           MR. RUSHKOFF: -- to propose them, but --

8           CHAIRPERSON GRIFFIS: Understood.

9           MR. RUSHKOFF: So here temporary is a  
10 subset of indefinite. And, therefore, I think there's  
11 authority to do it. I don't know whether there's  
12 authority to do it as a matter of imposing that  
13 condition on an applicant that doesn't suggest it.

14          CHAIRPERSON GRIFFIS: I see. Okay. Very  
15 well. Anything else? Very well. Thank you very  
16 much.

17          That leaves us the Appellant. Are you  
18 ready to go ahead? Do you want a couple minutes to  
19 get it together after hearing all the closings.

20          MR. WIMPLE: That might be a good idea,  
21 because I want to be constructive.

22          CHAIRPERSON GRIFFIS: Okay. We're going  
23 to take a 10-minute recess.

24          (Whereupon, the proceedings in the  
25 foregoing matter went off the record at

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1 2:55 p.m. and went back on the record at  
2 3:15 p.m.)

3 CHAIRPERSON GRIFFIS: Very well. Are you  
4 ready?

5 MR. WIMPLE: Yes.

6 CHAIRPERSON GRIFFIS: Good.

7 MR. WIMPLE: My name is Eric Wimple. I  
8 live at 1414 Q.

9 The recent dialogue we found fascinating,  
10 and I just wanted to address some of these points  
11 really quickly before I just launch into what I had  
12 prepared. First of all, the Appellants consider this  
13 temporary C of O only a matter for your consideration  
14 insofar as it shows that we believe the Zoning  
15 Administrator put these conditions on the temporary C  
16 of O, because they had some -- we feel it amounts to a  
17 concession or admission that, in fact, this particular  
18 use was not similar to matter of right uses in this  
19 zone.

20 So why else would they put these  
21 conditions on? We feel that that's why the temporary  
22 certificate of occupancy is important and should  
23 indeed be a factor in the Board's decision.

24 Number two, Mr. Rushkoff just referred to  
25 something. He said that the standard for -- a

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1 standard for perhaps determining similarity of uses  
2 would be, how bad can it be? You have to look at the  
3 limits of lawful operation, and we would submit that  
4 in the case of an animal facility, which is defined in  
5 the regulations that we've gone over and that are part  
6 of the record, those limits of lawful operation are  
7 carefully articulated and outlined in the regulations.

8 So at least for a veterinary facility or  
9 an animal facility, under the regulations those limits  
10 of lawful operation are pretty carefully spelled out.

11 They don't happen to be for a dog boarding operation.

12 Another point I just wanted to point out  
13 is that the DCRA testimony, Mr. Rushkoff today, and  
14 elsewhere, they said that they were basically  
15 struggling to define a use that's not listed in the  
16 regulations, and, you know, trying to figure this out,  
17 and so on and so forth.

18 Well, if it's that hard to come up with  
19 definitions and parallels, and so on and so forth, it  
20 seems as though DCRA is irrigating to itself a  
21 decision that is properly the jurisdiction of the  
22 Zoning Commission. So that's another point we'd like  
23 to make.

24 And the other thing that is brought up  
25 today, too, that we find -- residents, appellants,

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1 find particularly galling is this notion that it is --  
2 that the use of the temporary C of O was "a tool to  
3 allow the Zoning Administrator to determine how this  
4 type of facility operates."

5 Well, that amounts to making residents  
6 into guinea pigs for zoning experiments. And we don't  
7 think that's a very good way to operate a city.

8 And just one point -- the counsel for Wag  
9 Time points out in their presentation that this appeal  
10 is not about whether the Wag Time daytime operations  
11 are permitted uses. To the extent that Wag Time's  
12 daytime operations are dog day care, which involves  
13 leaving dogs at the facilities and boarding them for  
14 essentially a day, yes, we do care tremendously about  
15 daytime operations.

16 And one last point of law or  
17 clarification. Neither party has presented any  
18 evidence -- fact, data whatsoever -- about the  
19 inconvenience or the infeasibility of locating dog  
20 boarding facilities in, say, an M zone or other zone  
21 that would be more intense than a C-3-A.

22 So just dispense with those matters,  
23 Mr. --

24 CHAIRPERSON GRIFFIS: I don't understand  
25 that last point.

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1 MR. WIMPLE: Well, there's --

2 CHAIRPERSON GRIFFIS: There's no facts or  
3 evidence regarding the inconvenience of a day care  
4 located in a manufacturing zone?

5 MR. WIMPLE: Right. There was some  
6 discussion about how this would not be -- you know,  
7 that dog -- day care facilities should be located in a  
8 C-3, because they're near to residents, neighboring  
9 residents, and so on and so forth, and that,  
10 therefore, the M zone would not be a good place or a  
11 reasonable place for them. And there has been no  
12 facts or any evidence submitted to support that  
13 contention.

14 CHAIRPERSON GRIFFIS: I see. Okay.

15 MR. WIMPLE: That's all.

16 CHAIRPERSON GRIFFIS: Okay.

17 MR. WIMPLE: Those things dispensed with,  
18 I did want to make sort of a personal point to the  
19 Board, and that is thank you so much for listening to  
20 us. We came in here with, well, no experience  
21 whatsoever in presenting before you guys. And we made  
22 a number of -- I particularly made a number of real  
23 dumb questions on cross examination.

24 Thank you for your patience in hearing us,  
25 and I will just proceed.

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1           The thing that we did decide, though, and  
2 I think that we did have enough knowledge -- we did  
3 decide very early that this case was a zoning matter,  
4 and that's why we brought it to your attention. In  
5 our prehearing submission, as you noted, and as Mr.  
6 Donohue also noted, too, we took sort of a shotgun  
7 approach and we had a lot of arguments in there.

8           But one argument in that submission I  
9 believe has survived all of the hours of testimony,  
10 and that is that the Zoning Administrator did indeed  
11 err in finding that a 24-hour dog boarding kennel is  
12 similar to a veterinary facility or to a pet shop. I  
13 believe we've established that pretty clearly.

14           In our first day of testimony, we made the  
15 essential case. Namely, Ms. Cara McCabe, who is a  
16 former veterinary technician, testified that a vet  
17 hospital would generally have no more than three to  
18 five caged and sedated or post-operative dogs  
19 overnight at any one time, and that in this state dogs  
20 do not generally make noise.

21           She also said that dogs at a veterinary  
22 hospital during the day are leashed and accompanied by  
23 an owner or caregiver, and that also limits or  
24 precludes noise whatsoever. She also testified that  
25 as indoor facilities, veterinary hospitals do not

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1 generate dog noise or dog waste that impacts the  
2 surrounding area.

3 We also had a pet shop operator, who is  
4 named Mr. Baker, who testified that pet shops  
5 typically sell puppies and not full-grown mature dogs.

6 We brought in Ms. Ruth Burman, who was an expert in  
7 the area of kennels, and she testified that kennels  
8 cannot be safely or satisfactorily located in close  
9 proximity to residents on account of noise, waste, and  
10 the whole nine yards.

11 Based on their experience, we show that  
12 veterinary hospitals and pet shops are not similar in  
13 any way that bears on zoning regulations to boarding  
14 kennels.

15 On the issue of noise, we have presented  
16 testimony -- research testimony that showed that dogs  
17 barking is akin to the noise generated by a commercial  
18 piggery, and we discussed how bad piggeries get, and  
19 significantly higher than noise levels associated with  
20 anything that goes on in the C-3-A zone by matter of  
21 right, and also with, say, offices, stores, commercial  
22 garages, classrooms, factories, car, motorbike, and  
23 truck traffic. It's just way beyond any of that.

24 Let me just for the sake of clarity just  
25 point out exactly the very areas in which this

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1 dissimilarity is most strong. From the number of dogs  
2 in the facility, veterinary versus boarding, to  
3 whether the dogs are fully grown adult dogs or  
4 puppies, to whether the dogs are in a healthy or sick  
5 condition while they are onsite, to the duration of  
6 their stays, to the use of outdoor dog runs, all the  
7 way through the noise and odor associated with the  
8 facilities and the uses -- on all of these fronts,  
9 veterinary facilities and pet shops differ markedly  
10 from dog boarding facilities, as I say, in any way  
11 that impacts upon what's before us today, which are  
12 zoning considerations.

13           And then that brings us sort of like --  
14 okay, so we believe and we -- we know that we've made  
15 the determination in the case that these things are  
16 not similar, that they're dissimilar. And I just  
17 wanted to say that whatever sort of deliberations you  
18 make you certainly can't rely on the government's  
19 witness -- Faye Ogunneye -- to make any sort of  
20 determination of similarity whatsoever.

21           And why? Because she did not make an  
22 assessment of the noise characteristics of veterinary  
23 hospitals and boarding kennels. She did not make an  
24 assessment of the number of dogs that would typically  
25 be at a veterinary hospital and the number of dogs

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1 that would be at a kennel. She did not assess the  
2 intensity of the dog kennel use or its impacts  
3 relative to a veterinary hospital or a pet shop.

4 She ignored the fact that veterinary  
5 hospitals and pet shops are subject to licensing  
6 requirements in the District of Columbia, despite the  
7 fact that licensed uses have long been upheld by this  
8 Board and the courts as being different to unlicensed  
9 uses. And, remarkably, Ms. Ogunneye stated that she  
10 did not even think about the dog boarding use from the  
11 perspective that it is a dog kennel.

12 It had been stated to us that DCRA and Ms.  
13 Ogunneye had done an indepth review. Well, I think  
14 we've established that they not only did not do an  
15 indepth review, but they did no review at all. There  
16 was a signature on a document, and it went out.

17 The point stands: the Zoning  
18 Administrator failed to establish that dog boarding is  
19 similar to a pet shop or to a veterinary hospital.  
20 The government's case, as Mr. Lowrenco pointed out,  
21 amounted to no more than, "A dog slept here, so these  
22 uses are similar."

23 This logic is so flawed that it could be  
24 -- it could be taken in just about any direction,  
25 completely outside of zoning. It's like birds sleep

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1 in trees, and birds sleep in pet shops and veterinary  
2 hospitals. So let's just all put them all in one  
3 pile. So, I mean, that factor does not make a tree  
4 similar to a pet shop or a veterinary hospital.

5 Counsel for Wag Time has sort of seized on  
6 this flawed logic and attempted to argue that there  
7 are no limits on the terms "veterinary hospital" and  
8 "pet shop." Fortunately, there are limits on these  
9 uses that I just discussed in those points before.

10 Also, the pet shop is not the same as a  
11 zoo, and it -- the zoning regulations refer to pet  
12 shops and veterinary hospitals. What they're  
13 referring to is typically understood to be a pet shop  
14 or a veterinary hospital. And ordinary people can  
15 also distinguish the differences between these uses,  
16 and the courts have upheld the distinction.

17 In our preliminary arguments, on page 17,  
18 we took a quote from the Wisconsin Court of Appeals  
19 that stated the matter really well. And that is that  
20 a reasonably perceptible distinction exists which  
21 eliminates the need for persons of ordinary  
22 intelligence to guess as to the difference between a  
23 pet shop and a kennel.

24 Corporation counsel has suggested that the  
25 Zoning Administrator is entitled to assume that all

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1 uses operate lawfully. Well, so what? The subtext of  
2 both Mr. Rushkoff and Mr. Donohue's line of argument  
3 is that the zoning regulations are fundamentally  
4 irrelevant, and that we should -- that anything is  
5 fine as long as they comply with the laws and  
6 regulations of the District of Columbia.

7 And all uses must operate lawfully. There  
8 are no limits on uses unless all uses are essentially  
9 similar. But we really reject this logic. The  
10 purpose and intent of the zoning laws is to place  
11 harmonious and compatible uses side by side, so that  
12 the police and other enforcement agencies are not  
13 constantly responding to complaints, and so that  
14 residents and businesses can carry out their lives in  
15 harmony and peaceful coexistence.

16 The result of the Zoning Administrator's  
17 decision has not been harmonious and peaceful  
18 coexistence. By our count -- and there could be many  
19 we don't know of -- there were upwards of 30  
20 complaints lodged over eight months pertaining to this  
21 dog boarding kennel, complaints to Clark Ray,  
22 complaints to our Neighborhood Stabilization Officer,  
23 complaints to the police, complaints of every possible  
24 sort you can imagine.

25 The complaints of noise and stench

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1 continue to this day, and neighboring property owners  
2 are prevented from fully using and enjoying their  
3 properties.

4           Clearly, dog boarding kennels are not  
5 compatible and harmonious uses for properties in mixed  
6 use districts where businesses and residential homes  
7 exist side by side.

8           Also implicit in the government's case is  
9 that -- and Mr. Rushkoff referred to this a little bit  
10 just a little while ago -- that somehow that this is  
11 -- that this is a case about a facility with  
12 particular management practices. He referred to a  
13 civil action that could be brought, and thus trying to  
14 distance it from a zoning case.

15           We could not disagree more strongly. Wag  
16 Time is merely an illustrative example of dog boarding  
17 kennels -- a case in point that demonstrates the  
18 incompatibility of kennel uses with adjacent  
19 residences and businesses in a mixed use C-3 zone. It  
20 also demonstrates the striking dissimilarity of  
21 kennels to veterinary hospitals and pet shops.

22           Regardless of how this particular facility  
23 operates, and the sort of -- whatever Mr. Rushkoff was  
24 referring to -- every day it takes in up to 25 dogs,  
25 between 15 or 10 or 20 and 25 dogs, all of which run

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1 back and forth inside and outside. Like the  
2 population of any boarding kennel, the dogs are  
3 vigorous and happy and ready to play.

4 And what does that mean? It means that  
5 they bark. It means that when -- when I try to go on  
6 my back patio and talk to somebody, it means they bark  
7 and I can't hear myself talking. It means that when  
8 they're out there on the patio -- on their backyard,  
9 they defecate and they urinate, and it creates a  
10 terrible stench.

11 And I'm talking about a kennel. I'm  
12 talking about the way a kennel operates. And so we  
13 can't open our windows. We can't open our windows  
14 because of noise, and we can't open our windows  
15 because of the stench. And this is the way a kennel  
16 operates -- cheek and jowl -- with nearby residents.  
17 You can't even open your windows in the springtime.

18 And if you don't smell the urine and the  
19 feces, you smell the chemicals that are used to clean  
20 them up. That's what kennels do. Once the dogs emit  
21 their waste, they use chemicals to clean them up.

22 Regardless of the management, you would  
23 have the same problem at any dog boarding facility  
24 that could possibly locate in such a zone. It would  
25 not be any different. So whatever DCRA says about

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1 zoning experience, I would like to see that put to  
2 rest, because any dog boarding facility in such a zone  
3 is going to do exactly what it's doing to the  
4 residents who have appealed in this case.

5 This is a zoning question that this Board  
6 can and should resolve by overturning the Zoning  
7 Administrator's decision and its erroneous issuance of  
8 a certificate of occupancy in this case.

9 Thanks so much for your time.

10 CHAIRPERSON GRIFFIS: Thank you very much.

11 Clarification questions? Ms. Miller?

12 VICE CHAIRPERSON MILLER: You said there  
13 were 38 complaints lodged. Were any of these  
14 complaints lodged during the period of the temporary C  
15 of O?

16 MR. WIMPLE: Yes. I would say, I don't  
17 know, perhaps between 60 and 80 percent of them. You  
18 see, the thing is -- and this is something I should  
19 have pointed out in my comments, you know, Ms.  
20 Ogunneye said that they hadn't received any  
21 complaints. Not only is that wrong, but they never  
22 notified us of the conditions on the certificate of  
23 occupancy.

24 So like if they were trying to experiment  
25 and see how this thing had an impact on the community,

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1 they never told us about the conditions, so that we  
2 would like work with them. But, of course, the  
3 facility had been such a nuisance that we complained  
4 anyway.

5 You know, when the dogs are barking -- I  
6 mean, this is a 24-hour dog facility. We know that,  
7 because whether we go out of our door at 3:00 a.m. or  
8 at noon, they're barking, and they're doing all the  
9 things they do. So we have made many, many complaints  
10 during the temporary period, even though we didn't  
11 know that they were sort of like "experimenting" with  
12 this.

13 VICE CHAIRPERSON MILLER: And a record of  
14 some of these complaints -- they're in our record?

15 MR. WIMPLE: Well, we filed one, but we  
16 have so much paperwork on the complaints it's -- it's  
17 just insane. I mean, she has pointed out -- yes, we  
18 hear the dogs inside the house. The dogs -- the only  
19 way we can get away from the dog noise is to go all  
20 the way to the front, but now they're put a fence out  
21 front, so we're not safe from the dog noise at any  
22 spot in our house.

23 VICE CHAIRPERSON MILLER: Do we have in  
24 our record the response to those complaints?

25 MR. WIMPLE: What's that?

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1 VICE CHAIRPERSON MILLER: Were there  
2 responses to the complaints that are in our record?

3 MR. WIMPLE: The responses that -- well,  
4 the stuff -- we've kept a log of all of our  
5 complaints, and we've talked about how the complaint  
6 was not resolved in every case. The police said they  
7 didn't have jurisdiction to deal with the complaints,  
8 and DCRA said it didn't have jurisdiction to deal with  
9 the complaints, so we were left somewhere in the  
10 middle.

11 MR. RUSHKOFF: I just want to object for  
12 the record. I think the complaints in the record are  
13 letters to the BZA. I'm not sure -- I think the first  
14 complaint letter we have in the record is the one we  
15 received today, the e-mail. And in Appellant's  
16 opening statement they said that this case was not  
17 about complaints.

18 They said that it was about the more  
19 theoretical issue of whether this was a matter of  
20 right use. And to be raising in their closing  
21 statement the issue of how many complaints there were  
22 and what their responses were is just completely  
23 unfair to DCRA.

24 VICE CHAIRPERSON MILLER: Mr. Rushkoff, I  
25 just think it's relevant because you made the argument

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1 that there was a temporary C of O with conditions,  
2 because it was to try to figure out if this use was  
3 appropriate, because it wasn't specifically defined in  
4 the regulations.

5 And so it seems to me important if this is  
6 an experimental period to see whether it is a similar  
7 use or not, to determine if there were complaints  
8 showing that it did expand.

9 CHAIRPERSON GRIFFIS: Well, it goes  
10 further than that, too. The Zoning Administrator  
11 would have to do some sort of assessment, and  
12 obviously on one side we're being told that the ZA did  
13 not assessment and no indepth look. And now the other  
14 -- there's the logical process of which the Zoning  
15 Administrator arrived at their decision. So it's out  
16 there.

17 I think the clear, quick question Ms.  
18 Miller has: was there official complaints lodged with  
19 DCRA and are --

20 MR. WIMPLE: Yes.

21 CHAIRPERSON GRIFFIS: -- they on the  
22 record?

23 MR. WIMPLE: They're on the record, and  
24 also we have attachment --

25 CHAIRPERSON GRIFFIS: No, no. Don't say

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1 "and." So where are they, and what form do they have?

2 MR. WIMPLE: We have -- as I said, we have  
3 them in our prehearing submission.

4 CHAIRPERSON GRIFFIS: I was just looking  
5 at that. That looks like if I'm -- maybe I'm  
6 mistaken. It looks like the website posting by  
7 neighbors on like a List Serve.

8 MR. WIMPLE: True. But they also document  
9 --

10 CHAIRPERSON GRIFFIS: So did this go to  
11 DCRA?

12 MR. WIMPLE: We sent everything I believe  
13 to DCRA. And also, this document --

14 CHAIRPERSON GRIFFIS: Good. I'm just  
15 trying to get absolutely clarity, because --

16 MR. WIMPLE: Yes.

17 CHAIRPERSON GRIFFIS: -- when we end  
18 today, we have what's in front of us.

19 MR. WIMPLE: Right. I understand.

20 CHAIRPERSON GRIFFIS: And if I have List  
21 Serve notes, that is not to me complaints to DCRA.

22 MR. WIMPLE: Okay.

23 CHAIRPERSON GRIFFIS: That's neighbors  
24 chatting, which is always productive perhaps.  
25 However, when you say that you actually made

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1 complaints -- and then Ms. Miller's followup is, do we  
2 have the responses to those complaints on the record,  
3 or in the record even?

4 MS. DOUGHTY: We could very easily provide  
5 you with a summary.

6 CHAIRPERSON GRIFFIS: So the answer is no.

7 MS. DOUGHTY: The answer is that it is in  
8 there. You know, but you do have to read through the  
9 -- if you want to call it List Serve.

10 CHAIRPERSON GRIFFIS: Neighborhood  
11 Coalition Web Log.

12 MS. DOUGHTY: Well, think about this for a  
13 minute. A dog starts barking. What do you do?

14 CHAIRPERSON GRIFFIS: No, no, no. I --

15 MS. DOUGHTY: You pick up the telephone.

16 CHAIRPERSON GRIFFIS: -- don't need to  
17 think about that.

18 MS. DOUGHTY: No, right.

19 CHAIRPERSON GRIFFIS: Because it's not  
20 pertinent for me to think about that. What's  
21 pertinent is the answer to Ms. Miller's question. It  
22 just -- it's simple. And that is: were direct  
23 complaints made? And then the timing. I think she is  
24 also trying to get to the timing of --

25 MR. WIMPLE: I understand.

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1 CHAIRPERSON GRIFFIS: -- if you're saying  
2 there is an assessment going on with a temporary  
3 provision, well, we need to know what -- what was  
4 happening.

5 MR. WIMPLE: The point is that we have  
6 documented everything. There's not much in the area  
7 of responses to be documented, because the city has  
8 not responded in almost all of the instances. That's  
9 the point.

10 CHAIRPERSON GRIFFIS: So we have  
11 everything we need in the record right now.  
12 Interesting.

13 Yes?

14 MR. DONOHUE: I'll just point out -- and  
15 maybe you noticed this -- but on the List Serve we  
16 don't even have identified who -- we have Resident A,  
17 Resident B, Resident D. And I think Mr. Rushkoff has  
18 correctly pointed out that the one complaint that we  
19 have of record is the one that was introduced today.  
20 This is the third full day of hearings on this matter.

21 CHAIRPERSON GRIFFIS: To answer the first  
22 part, yes, I notice almost everything. I think  
23 everything, but I did notice that. It's an  
24 interesting point, which goes to the mere fact of what  
25 I was pushing you for is that I'm not really sure how

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1 much pertinence it will have for us to look at these.

2 Ms. Miller, followup?

3 VICE CHAIRPERSON MILLER: Well, just I  
4 think you said that 60 percent of 38 complaints were  
5 lodged during the period of the temporary C of O. But  
6 we don't see -- we don't know where they are in our  
7 record -- whether you have hard copies of those  
8 complaints that were sent to DCRA, not what was on the  
9 List Serve.

10 MS. FERSLER: Can I be heard on this  
11 point?

12 CHAIRPERSON GRIFFIS: If you have an  
13 answer for it.

14 MS. FERSLER: Yes, I do. Let me make a  
15 stab, and then Mr. Wimple can make a stab.

16 Okay. First of all, the fact that this  
17 was not part of anybody's opening case is  
18 understandable, because it came up on rebuttal.

19 CHAIRPERSON GRIFFIS: I know. We're not  
20 going there. We just want to know where it is.

21 MS. FERSLER: The second point that I  
22 wanted to make is if you go through Attachments 11 and  
23 12, what it documents is the telephone calls that are  
24 made to the Metropolitan Police Department and the  
25 response and the date and time of the response.

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1 That's how complaints are made is individual people  
2 picking up the telephone and calling the police,  
3 calling the Mayor's liaison, calling DCRA, e-mailing.

4 And that's well documented in this document.

5 So I think it's here. There's dates,  
6 there's times, there's specificity.

7 CHAIRPERSON GRIFFIS: Which number shows  
8 evidence of calling DCRA?

9 MS. FERSLER: Friday, August 8th, noise.  
10 Noise -- let's see. Yes, here it is. Call to the  
11 Neighborhood Stabilization Office on Friday, October  
12 10th. There was a --

13 CHAIRPERSON GRIFFIS: What number is that?

14 MS. FERSLER: Call to -- number 23, a call  
15 to Peggy Keller at the Department of Health. Number  
16 25, a call to DCRA, who said -- and a call to the  
17 police.

18 CHAIRPERSON GRIFFIS: No, number 25  
19 doesn't say -- so far you haven't seen anyone that has  
20 called DCRA.

21 MS. FERSLER: Barked all day long. The  
22 resident spoke to Bruce Mosley, Special Assistant,  
23 Neighborhood Stabilization Office.

24 CHAIRPERSON GRIFFIS: And Mr. Mosley said  
25 that this is a DCRA issue.

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1 MS. FERSLER: Okay.

2 CHAIRPERSON GRIFFIS: Next one.

3 MS. FERSLER: And then call to Clark Ray,  
4 call to Dave Clark, DCRA.

5 CHAIRPERSON GRIFFIS: What number is that?

6 MS. FERSLER: 28. 30, call to the police,  
7 police never came. Call to the landlord. That's 29.

8 MR. WIMPLE: I mean, I guess the point is  
9 that -- I guess the point is that not all of them are  
10 written.

11 CHAIRPERSON GRIFFIS: Right.

12 MR. WIMPLE: I mean, written complaints.  
13 I mean --

14 CHAIRPERSON GRIFFIS: Let me try and just  
15 be clear. I'm not asserting that you guys didn't  
16 complain or you didn't take action.

17 MR. WIMPLE: I know.

18 CHAIRPERSON GRIFFIS: It's clear that  
19 that's --

20 MR. WIMPLE: No. I know what you're --

21 CHAIRPERSON GRIFFIS: -- showing. And Ms.  
22 Miller is focusing on a very narrow point, and that is  
23 here we had this time of which is -- it may be an  
24 issue for the Board, it may not. What we need is  
25 everything, and then we'll figure out what we do with

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1 it.

2 But say, for instance, we wanted to look  
3 at the fact of what -- this time period within which  
4 the C of O was supposedly being tested. Well, it is  
5 -- it would be interesting, based on your own  
6 statements, to see how many complaints went in to  
7 DCRA, not MPD, not Department of Health, necessarily  
8 -- something that we would know that the Zoning  
9 Administrator would have had knowledge of and would  
10 have been able to assess.

11 And so far even running through this --  
12 and I don't mean to put you on the spot like, you  
13 know, show me, but -- believe me -- I've read all of  
14 this, so I know what's here and what isn't.

15 The best these do is indicate that somehow  
16 someone is contacting DCRA or someone is indicating  
17 that this is a DCRA issue. So is there additional  
18 information?

19 MS. DOUGHTY: We have a specific summary  
20 of that issue that we can submit to the Board.

21 CHAIRPERSON GRIFFIS: Of -- let me see --

22 MS. DOUGHTY: Of exactly how many  
23 complaints have been made to DCRA between the time  
24 that the business began its operations and the time  
25 that the temporary C of O expired.

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1 (Pause.)

2 CHAIRPERSON GRIFFIS: Okay.

3 VICE CHAIRPERSON MILLER: I have another  
4 question.

5 CHAIRPERSON GRIFFIS: I know you do, but  
6 let's satisfy the --

7 (Laughter.)

8 With the rigorous investigation and  
9 questioning from Ms. Miller, which we absolutely  
10 appreciate, I don't think we're going to need to have  
11 submitted in the summary. I think we have what we  
12 need to in evidence, and I think we have a full  
13 understanding of that issue.

14 Next question, Ms. Miller?

15 VICE CHAIRPERSON MILLER: I just want to  
16 followup on a statement you made that there was some  
17 document that showed that there was no review at all,  
18 that there was just a signature on a document. And  
19 I'm wondering what document you're referring to -- you  
20 were referring to.

21 MR. WIMPLE: I'm just talking about the C  
22 of O. That was probably a mistake on my part, to go a  
23 little bit figurative. We established in our cross  
24 examination of Ms. Ogunneye that there was -- she --  
25 we established all of the things she didn't do in

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1 looking into the C of O.

2 And when we asked her what she did do, she  
3 said she just looks at the regulations. And so I  
4 guess I was just trying to point out there that she  
5 did no review whatsoever in my view. So that -- you  
6 can write that off as opinion.

7 VICE CHAIRPERSON MILLER: Okay. Thank  
8 you.

9 CHAIRPERSON GRIFFIS: Thank you all very  
10 much.

11 Let's go through the final procedures in  
12 this. We're going to ask -- we're going to set this  
13 for a decisionmaking, and we would like -- Ms. Bailey,  
14 you don't have any record of anything additional that  
15 we want submitted into the record, is that right?

16 MS. BAILEY: No, sir, I don't.

17 CHAIRPERSON GRIFFIS: Excellent. So the  
18 last thing we need, then, is findings of fact and  
19 conclusions of law, in which case what we will do is  
20 give an opportunity for you to have the transcript  
21 from today provided, which means we need to set this  
22 up a couple of weeks before that is actually  
23 available, which would put us to our first  
24 decisionmaking in July, which is the 6th.

25 MS. BAILEY: I just want to remind you,

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1 Mr. Chairman, that July 4th is that Sunday, so Monday  
2 I'm assuming -- we normally celebrate that Monday when  
3 the holiday falls on a Sunday. So --

4 CHAIRPERSON GRIFFIS: Okay.

5 MS. BAILEY: -- I just wanted to remind  
6 you.

7 CHAIRPERSON GRIFFIS: Are you saying we'd  
8 better show up on time, or we may not be meeting that  
9 day?

10 (Laughter.)

11 MS. BAILEY: Neither. Just a friendly  
12 reminder, Mr. Chairman.

13 CHAIRPERSON GRIFFIS: Indeed. Okay. Yes,  
14 and it also is appropriate, then -- right, indeed.  
15 Okay. So let's set that for the 6th. It will  
16 obviously be called in the morning.

17 The time for, of course, evidence and  
18 testimony is now over with the end of this afternoon's  
19 proceeding. The decisionmaking, of course, is when  
20 the Board will deliberate on the record its entire  
21 case and then render a decision. You are all welcome  
22 to be here, of course. However, we won't be hearing  
23 from anybody that would be here.

24 That being said, schedule for submissions  
25 of findings.

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1 MS. BAILEY: June 25th. I'm sorry,  
2 June 22nd. Excuse me.

3 CHAIRPERSON GRIFFIS: June 22nd, which is  
4 which day of the week?

5 MS. BAILEY: That's on a Tuesday.

6 CHAIRPERSON GRIFFIS: Indeed. Tuesday by  
7 3:00 on the 22nd of June. Does anyone have any  
8 problems in meeting that schedule that we should know  
9 about? Is everyone clear on what is being requested  
10 in terms of the findings? I imagine most of you have  
11 all been through this before.

12 If not, there is obviously -- the Office  
13 of Zoning is an excellent resource to get direction on  
14 the outline and what is done in the past. Of course,  
15 we do have a full library of previous public record  
16 documents, which one could see as examples of findings  
17 and conclusions.

18 Okay. Is there anything else I can  
19 answer, then? Nothing to clear up?

20 Very well, then. I thank you all for  
21 sticking to this and making this an entire and full  
22 record for the Board. And we do, in fact, look  
23 forward to rendering a judicial decision in this  
24 matter.

25 If there's nothing more left in the

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1 afternoon -- Ms. Bailey, anything?

2 MS. BAILEY: No, sir.

3 CHAIRPERSON GRIFFIS: Very well, then.

4 This will conclude the afternoon session of 11 May  
5 2004. Thank you all.

6 (Whereupon, at 3:46 p.m., the proceedings  
7 in the foregoing matter were adjourned.)

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