

GOVERNMENT OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

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TUESDAY, MAY 24, 2005

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

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

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

ZONING COMMISSION MEMBERS PRESENT:

KEVIN HILDEBRAND	Commissioner
GREGORY JEFFRIES	Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Deputy Secretary
BEVERLEY BAILEY	Zoning Specialist
JOHN NYARKU	Zoning Specialist

OFFICE OF PLANNING:

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

D.C. OFFICE OF THE ATTORNEY GENERAL:

SHERRY GLAZER, ESQ.
LORI MONROE, ESQ.

This transcript constitutes the minutes from the Public Hearing held on May 24, 2005.

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

10:15 a.m.

CHAIRPERSON GRIFFIS: Good morning, ladies and gentlemen, let me call to order the 24th of May 2005 morning Public Hearing of the Board of Zoning Adjustment of the District of Columbia. My name is Geoff Griffis, Chairperson. Joining me today is the Vice Chair Ms. Miller and our other mayoral and important mayoral appointment Mr. Etherly. Representing the National Capital Planning Commission with us is Mr. Mann and representing the Zoning Commission this morning is Mr. Jeffries.

Copies of today's hearing agenda are available for you. They are located on the wall where you entered in the hearing room. You can pick one up and see where you are on the chronology and what cases we will be calling this morning. There are several very important things that I'll go through in terms of the opening and hope that everyone clearly understands them. If not, I will reiterate them when needed.

First of all, all proceedings before the Board of Zoning Adjustment are recorded. They are recorded in two fashions and most important, of course, is the Court Reporter sitting on the floor to my right who is creating the official transcript. We

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1 are also being broadcast live on the Office of
2 Zoning's website.

3 Attendant to both of those, we ask several
4 things. First, before coming forward to speak to the
5 Board, you will need to fill out two witness cards.
6 Witness cards are available to you, for you at the
7 table where you entered into the hearing room and also
8 the table in front where you will provide testimony.
9 Those two cards go to the recorder prior to coming
10 forward to speak.

11 I would also ask when you make yourself
12 comfortable and are about to address the Board, if you
13 would state your name and your address once.
14 Obviously, we will be able to then be able to record
15 all the information that you will provide us and
16 correctly give you credit for it. I would ask that
17 people turn off all their cell phones and beepers,
18 much like mine, at this time, so we don't disrupt any
19 of the transmissions as we go forward this morning.

20 The order of procedures for special
21 exceptions and variances is as follows: First, we
22 hear from the applicant, their case presentation.
23 Secondly, we will hear from any Government agencies
24 reporting on the application. Third, we will hear
25 from the Advisory Neighborhood Commission. Fourth, we

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1 will hear persons or parties in support of the
2 application. Fifth would be persons or parties in
3 opposition to the application. Sixth, finally, we
4 will hear again from the applicant, their rebuttal
5 testimony, any closing remarks or summations.

6 Cross examination of witnesses is
7 permitted by the applicant and parties in a case. The
8 ANC within which the property is located is
9 automatically a party in the case and, therefore, will
10 be able to conduct cross examination. Nothing
11 prohibits this Board from placing restrictions on the
12 time or subject matter of cross examination, but I
13 will be very specific if that is needed to be directed
14 during each specific case.

15 The record will be closed at the
16 conclusion of the hearing on the case, except for any
17 material that the Board specifically requests and we
18 are very specific on what additional material is to be
19 submitted into the record and when it is to be
20 submitted into the Office of Zoning. It is important
21 to understand that, because we are creating a record
22 before us today, so that anything and everything you
23 want us to deliberate on should be established today
24 in the open and on the record.

25 We will, of course, ask for that

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1 additional information. After that specific material
2 is received, no other information is accepted into the
3 record and the record would be finally closed and that
4 would be the basis of which we would make our
5 decisions. The decision of this Board in contested
6 cases must be based on this record that I have now
7 told you numerous things about.

8 So let's move ahead. Actually, let me
9 address the Sunshine Act while I'm here. Shall I?
10 The Sunshine Act also requires that we hold our
11 proceedings in the open and before the public. This
12 Board does enter into Executive Session, both during
13 or after hearings on a case, and that is for
14 deliberating on cases and/or reviewing the record.
15 This is in accordance with the Sunshine Act. It is
16 also in accordance with our rules, regulations and
17 procedures.

18 Let me say a very good morning to Ms.
19 Bailey on my very far right with the Office of Zoning,
20 Ms. Monroe with the Office of Attorney General is with
21 us and Mr. Moy is also with the Office of Zoning. A
22 very good morning to both of you.

23 At this time, the Board will consider any
24 preliminary matters. Preliminary matters are those
25 which relate to whether a case will or should be heard

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1 today, requests for postponements, continuances or
2 withdraws or whether proper and adequate notice has
3 been provided. These are elements of preliminary
4 matters. If you have a preliminary matter for us
5 today, if you have a case that you are not prepared to
6 go forward or you believe a case should not proceed
7 today, I would ask that you come forward and have a
8 seat at the table in front of us as indication of a
9 preliminary matter.

10 Let me ask Ms. Bailey if she is aware of
11 any preliminary matters that we should take up, at
12 this time.

13 MS. BAILEY: Mr. Chairman, Members of the
14 Board, and to everyone, good morning. There is, Mr.
15 Chairman, and I'm not sure if you want to deal with it
16 now or after I have called the case, but it's
17 Application No. 17292.

18 CHAIRPERSON GRIFFIS: Let's call the case
19 first. Are there any other preliminary matters that
20 you are aware of?

21 MS. BAILEY: That's it, Mr. Chairman, at
22 this point.

23 CHAIRPERSON GRIFFIS: Very well. Then I
24 would ask that all those thinking of testifying or
25 planning on testifying today if you would, please,

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1 stand and give your attention to Ms. Bailey? She is
2 going to administer the oath.

3 MS. BAILEY: Please, raise your right
4 hand.

5 (Whereupon, the witnesses were sworn.)

6 MS. BAILEY: Thank you.

7 CHAIRPERSON GRIFFIS: Good. Thank you all
8 very much. Ms. Bailey, when you are ready.

9 MS. BAILEY: Application No. 17292 of
10 Geraldine Dalzell-Payne, pursuant to 11 DCMR 3104.1,
11 for a special exception to allow a two-story rear
12 addition to an existing single-family row dwelling
13 under section 223, not meeting the open court
14 requirements at section 406. The property is located
15 in an R-3 District at premises 3707 S Street, N.W.,
16 Square 1308, Lot 57.

17 Mr. Chairman, this application is somewhat
18 in a precarious situation, in that it was initially
19 scheduled for March 15th and it was postponed to
20 today. The applicant has indicated that there is a
21 probability or high possibility that the project can
22 be constructed as a matter-of-right. We have spoken
23 with her on several occasions and have asked for
24 confirmation of this. But as of to date, we do not
25 have that in writing.

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1 CHAIRPERSON GRIFFIS: Good. And I
2 understand that the applicant is not here. Is that
3 correct? Is the applicant of 17292 present today? Is
4 anyone for this case? There it is. Let's start our
5 redesigning now, shall we? I think we could add a
6 couple more floors on, maybe change the exterior? Oh,
7 no, no, no, we can't do that, can we? Ms. Bailey, I
8 don't think there is anything for the Board to do, but
9 to dismiss this case, unless you are aware of anything
10 else for us in terms of official action.

11 Board Members, I put it to you, if you see
12 any other options on this case. Ms. Bailey has laid
13 it out fairly well. We are very familiar with this.
14 Of course, we continued it last. There was some
15 conjecture that this was going to be matter-of-right
16 and, therefore, remove the need for a relief request.
17 We had not seen anything official and the application
18 has not been officially withdrawn, and so it is before
19 us. Is there any comments on that? Any objections to
20 dismissing the application?

21 MR. MOY: Mr. Chair?

22 CHAIRPERSON GRIFFIS: Yes?

23 MR. MOY: If I may, from the staff, for
24 the record that we do have an ANC report, Exhibit No.
25 22 where the ANC has made attempts to have the

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1 applicant share their project with them.

2 CHAIRPERSON GRIFFIS: Right. It's a good
3 point to bring up actually, Exhibit No. 22 and 24. 22
4 is when they actually scheduled that and had postponed
5 it and then they called, it was on the schedule, and
6 the applicant didn't appear. Okay. There it is.
7 Anything else? Is there any objection to dismissing
8 the application? Not any voice to the objection, I
9 take it as a consensus and let's move ahead.

10 MS. BAILEY: The next Application is No.
11 17323, 2105 10th Street, N.W., LLC, pursuant to 11
12 DCMR 3104.1, for a special exception from the roof
13 structure setback provisions at section 411, under
14 subsection 770.6, and pursuant to 11 DCMR 3103.2, a
15 variance from the residential recreation space
16 requirements under section 773, a variance from the
17 rear yard requirements under section 774, and a
18 variance from the slope of parking ramp requirements
19 under subsection 2117.8, to allow the construction of
20 a residential condominium building in the Arts/C-2-B
21 District. The property is located at 2105 10th
22 Street, N.W., Square 358, Lots 5, 6 and 802.

23 CHAIRPERSON GRIFFIS: Good morning.

24 MS. GIORDANO: Morning.

25 CHAIRPERSON GRIFFIS: Whenever you are

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1 ready.

2 MS. GIORDANO: Good morning, my name is
3 Cynthia Giordano with the Law Firm of Arnold and
4 Porter representing the applicant. On my right is
5 Bill Bonstra, the project architect, and on my left is
6 Nate Gross from our office, a city planner. We have
7 a short presentation. I don't know if the Board wants
8 a long or short presentation this morning. We have a
9 positive ANC report, positive OP report and unless
10 there are any major issues that the Board has, we can
11 truncate our presentation.

12 This project is sort of the end of a
13 multi-year effort. The project basically has been
14 through the Historic Preservation Review Board process
15 and received conceptual approval. A Mayor's agent
16 hearing on the subdivision of the vacant lot adjacent
17 into the landmark property and that subdivision
18 approval has been received. The project began really
19 with the landmarking of this church, which was not the
20 applicant's initial plan, but was the desire of the
21 community and that has driven a lot of the need for
22 the variances that we are requesting the special
23 exception today.

24 We're requesting three minor variances and
25 a special exception from the roof structure setback

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1 requirements. And we can just go ahead and proceed
2 with the architectural presentation. Mr. Gross is
3 also going to add a few points about the residential
4 recreation space variance and the underlying policy
5 issues with respect to that variance.

6 CHAIRPERSON GRIFFIS: Excellent. A couple
7 of quick questions. First of all, what section do we
8 find minor variances in? Okay. And the other is the
9 parking count. What is the parking required?

10 MS. GIORDANO: The parking, there is no
11 parking required.

12 CHAIRPERSON GRIFFIS: Because?

13 MS. GIORDANO: Because of the historic --
14 this is an addition to a historic building.

15 CHAIRPERSON GRIFFIS: I see. And so a lot
16 of the filings --

17 MS. GIORDANO: And the waiver applies.

18 CHAIRPERSON GRIFFIS: -- that are
19 nonconforming is just for our own understanding?

20 MS. GIORDANO: Yes.

21 CHAIRPERSON GRIFFIS: Okay. There it is.
22 I don't have any other initial questions. I think we
23 can let them move ahead. Good. Let's do.

24 MR. BONSTRA: My name is Bill Bonstra.
25 I'm a principal with Bonstra and Harris Sign

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1 Architects. We are the architects for this 2105
2 project. I wanted to start just briefly and talk a
3 little bit about some of the changes that we've made
4 for the -- pursuant to our HPRB approval, because the
5 significant change actually does impact the
6 residential recreation and the area of roof.

7 CHAIRPERSON GRIFFIS: I'm sorry to
8 interrupt you, Mr. Bonstra, but you have conceptual
9 approval of HPRB and so you're going back for final
10 approval. Is that correct?

11 MR. BONSTRA: Yes.

12 MS. GIORDANO: It was delegated. Sorry.

13 CHAIRPERSON GRIFFIS: Delegated the staff.

14 MS. GIORDANO: Delegated to staff
15 actually.

16 CHAIRPERSON GRIFFIS: Okay. So your
17 review is done?

18 MR. BONSTRA: Yes.

19 CHAIRPERSON GRIFFIS: Okay.

20 MR. BONSTRA: This perspective illustrates
21 a view from the northwest here. This is the site,
22 project site. There is a 10 foot wide alley here.
23 This is the existing landmark building and this is the
24 addition to that landmark building. As Cynthia said,
25 this will be a single lot of record.

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1 CHAIRPERSON GRIFFIS: Where is 10th
2 Street?

3 MR. BONSTRA: 10th Street is right here.
4 V Street is here. This is north, north is up.

5 CHAIRPERSON GRIFFIS: Good.

6 MR. BONSTRA: Okay. Pursuant to our HPRB
7 approval, the significant change that we made from the
8 initial scheme was actually setting back the top level
9 a considerable distance from the face of the building.
10 What this did was, in fact, reduce the roof area,
11 which obviously caused some constraints in terms of
12 the penthouse. Beyond the fact that we have pitched
13 roofs on the church and we don't have any -- we don't
14 have the ability really to use that roof, the needs
15 for the complete structure in terms of mechanical is
16 taken care of on the roof of the new -- on the
17 addition.

18 These are some photographs of the
19 building. I think we can see the roof plane.
20 Significance also in this situation with the main
21 building entry here, we have a nonconforming rear yard
22 that is nonconforming because of the existing church.
23 As Cynthia said, the church really is the hardship
24 that we are dealing with and the cause for our request
25 for the relief.

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1 So as I think 15 feet, a 15 foot rear yard
2 here, that would be a nonconforming, existing
3 nonconformity. We are not increasing the
4 nonconformity with our new structure. As the report
5 says, we are below the FAR. We are, in fact, at the
6 lot occupancy, building height, some of the main
7 zoning issues. We are in conformance with.

8 CHAIRPERSON GRIFFIS: You addressed in the
9 written submission using the side yard as the rear
10 yard off of 10th, directly behind 10th and why you
11 couldn't do that?

12 MR. BONSTRA: Here?

13 CHAIRPERSON GRIFFIS: Yes.

14 MR. BONSTRA: Well, we don't believe that
15 any gap in the street plane is embraced by the
16 planners, by the Office of Planning. And, you know,
17 we believe this being an in-fill building on the
18 street, we needed to maintain that street wall here
19 and we feel the same way here.

20 CHAIRPERSON GRIFFIS: Right.

21 MR. BONSTRA: So a side yard is not
22 required, but if the entry were here, then it would
23 have begged us to put a rear yard there and we would
24 have an unsightly gap in the street wall. So we feel
25 like this is certainly the best way to front the

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1 street and allow relief from the urban buildings in
2 the area.

3 CHAIRPERSON GRIFFIS: And you picked the
4 height of the building off of 10th or V?

5 MR. BONSTRA: The height of the building
6 is off 10th Street. On a corner lot we understand
7 that we can, in fact, take our building height off the
8 other street. And we are below the maximum building
9 height. Our penthouse, as well, is below the maximum
10 allowable, which is 18 feet 6 inches.

11 UNIDENTIFIED SPEAKER: Is that a question?

12 CHAIRPERSON GRIFFIS: Okay. Let's move
13 ahead.

14 MR. BONSTRA: Let me just put up the
15 plans. These were the plan drawings that were
16 submitted in your package. The site plan here, I
17 don't know what plan number, I'm sorry, I don't have
18 that. This is the parking ramp that we are asking for
19 relief of the slope requirement. It comes off the 10
20 foot alley. We do have some parking spaces. Okay.
21 We do have some nonconforming spaces here and I should
22 say that from a market perspective, we want to have as
23 much parking as we can.

24 The ramp, because of its configuration and
25 access from the alley, rather than from the street,

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1 which we felt was important to keep the garage access
2 in the rear, we have a sloping condition, which is
3 greater than what's allowable. But 20 percent, in our
4 experience, is not that steep a ramp. That access is
5 at parking level here, which is shown. Again, the
6 rear yard setback would be through here and we're not
7 encroaching on that.

8 The residential recreation relief that we
9 are asking for stems from the setback here and our
10 desire to put that recreation space on the top floor
11 of the building or on the roof of the floor below,
12 rather than on the roof, and that has an adjacent
13 public space which would be a pantry or what have you.
14 And we believe that that's a much more positive
15 approach to residential recreation area than putting
16 it on the roof.

17 Again, the roof has gotten smaller because
18 of that setback requirement. And when they refer to
19 roof in the zoning, we understand that is the main
20 roof. And this main roof is actually not the full
21 building size. So this is the penthouse. The other
22 penthouse issues that we are asking for a special
23 exception for is the requirement for a 1 to 1 setback
24 off the rear wall. We are in conformance at the front
25 of the building. In our attempts to keep the

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1 penthouse as low as possible, which was encouraged by
2 HPRB, we have the main edge of the penthouse at 12
3 feet above the roof, less than what's allowable.

4 However, we do have an elevator overhead
5 issue, which we would like to bring up an additional
6 3.5 feet in order to handle our machinery. And we
7 would do that rather than raise the whole penthouse to
8 the same higher level. We want to keep everything
9 down. We also feel that this is setback from the
10 street and not seen from the street.

11 CHAIRPERSON GRIFFIS: So the relief of the
12 setback area is actually set in, well into the site
13 behind the existing church structure?

14 MR. BONSTRA: Yes.

15 CHAIRPERSON GRIFFIS: So that's far into
16 the site there. What you're saying is --

17 MR. BONSTRA: The relief from the -- it's
18 not about the front of the building.

19 CHAIRPERSON GRIFFIS: Right.

20 MR. BONSTRA: It's on the rear of the
21 building.

22 CHAIRPERSON GRIFFIS: Right. And then the
23 other aspect is trying to minimize the penthouse. You
24 do have to have your overrun on the elevator, which
25 will set the maximum height, but rather than having it

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1 all of a single height, which is required, why we
2 don't know, but it is.

3 MR. BONSTRA: Yes.

4 CHAIRPERSON GRIFFIS: And so you would
5 rather have one piece that extends above the other?

6 MR. BONSTRA: Yes.

7 CHAIRPERSON GRIFFIS: And it's roughly, I
8 know it's in here, but it's 12 feet high and 15.5
9 feet. Is that correct?

10 MR. BONSTRA: Yes.

11 CHAIRPERSON GRIFFIS: Okay. So it's like
12 a 3.5 feet difference of that little piece?

13 MR. BONSTRA: And that's shown in the
14 building section on sheet A15.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. BONSTRA: Where that's the overhead
17 that we need for our elevators.

18 CHAIRPERSON GRIFFIS: Grand. And what's
19 your total residential recreation square footage, at
20 this point?

21 MR. BONSTRA: I know it's a little less
22 than 15 percent. I guess the other factor there that
23 we -- 638 square feet.

24 CHAIRPERSON GRIFFIS: 638. And I have it
25 in front of me, but what was the total required?

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1 MR. BONSTRA: 15 percent.

2 MR. GROSS: 6,035.

3 CHAIRPERSON GRIFFIS: Right.

4 MR. GROSS: Is the right figure shown.

5 CHAIRPERSON GRIFFIS: I should pull this
6 up before I ask these ridiculous questions. Here is
7 on your submission page 8, total recreation space
8 provided is less 3,600 square feet. Now, I understand
9 that what you are saying is you have 1,771 of one type
10 and 1,191 of the other. And so if I add all those up,
11 it's 3,600?

12 MR. BONSTRA: I believe if you look at the
13 balconies.

14 CHAIRPERSON GRIFFIS: You just need your
15 microphone on.

16 MR. BONSTRA: Oh, if you look at the
17 private balconies?

18 CHAIRPERSON GRIFFIS: Right.

19 MR. BONSTRA: Which do not technically
20 count in residential recreation and you look at the
21 site which has ample parking space in front that will
22 be landscaped and developed, then that does come, I
23 believe, to that number.

24 CHAIRPERSON GRIFFIS: Right. And you're
25 saying parking spaces in the front on 10th Street, as

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1 in the actual public parking, as they talk about in
2 the platting.

3 MR. BONSTRA: Correct.

4 CHAIRPERSON GRIFFIS: So that's the green
5 space where you would anticipate people sitting. And
6 what's the edge condition there?

7 MR. BONSTRA: This is the parking area.

8 CHAIRPERSON GRIFFIS: Right.

9 MR. BONSTRA: Just prior, you know,
10 building face to sidewalk.

11 CHAIRPERSON GRIFFIS: And what's the edge?
12 What are you doing there? I mean, is that just
13 shrubbery or is it going to be a structural piece?

14 MR. BONSTRA: We haven't developed that,
15 but we anticipate that being planted, ground cover,
16 grass.

17 CHAIRPERSON GRIFFIS: So shrubbery, you
18 didn't look at that type of how you would actually
19 enclose that?

20 MR. BONSTRA: Well, this would be probably
21 a railing, you know, an ornamental railing at the
22 sidewalk in order to maintain some security.

23 CHAIRPERSON GRIFFIS: Right, right.

24 MR. BONSTRA: And keep people from just
25 walking off the street. So it would be controlled.

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1 There may be a gate right here. It's not uncommon in
2 our projects to do it in that fashion.

3 CHAIRPERSON GRIFFIS: Are those direct
4 access from the building out to those areas or no?
5 It's just a main single entrance?

6 MR. BONSTRA: It's off the entry area.

7 CHAIRPERSON GRIFFIS: Sure, sure.

8 MR. BONSTRA: Right.

9 CHAIRPERSON GRIFFIS: Okay. What else?

10 MS. GIORDANO: That concludes the
11 architect's statements.

12 CHAIRPERSON GRIFFIS: Okay.

13 MS. GIORDANO: If there are any questions,
14 we can --

15 CHAIRPERSON GRIFFIS: Questions, any
16 questions? Let's take questions now.

17 VICE CHAIR MILLER: I have a few questions
18 thus far. The first is probably a legal question and
19 that goes to the question of parking and the fact that
20 this is a historic building that's involved. I'm
21 wondering though if you believe that 2100.6 and 2100.7
22 apply, which talk about parking spaces required when
23 there is an addition to a historic building?

24 MS. GIORDANO: We actually confirmed our
25 understanding directly with the Zoning Administrator

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1 that the parking waiver extends to the addition. Was
2 that your question? I was actually kind of surprised
3 by that as well, but apparently that is the
4 established interpretation.

5 VICE CHAIR MILLER: So that's the
6 interpretation of the Zoning Administrator?

7 MS. GIORDANO: Yes.

8 CHAIRPERSON GRIFFIS: And this Board.

9 MR. BONSTRA: Okay. Can I add something
10 to that?

11 MS. GIORDANO: Yes.

12 MR. BONSTRA: I think that in answering
13 that question, you also have to think about the
14 original use of the building and it's an assembly use
15 as a church. So even if one looked at parking
16 credits, we would certainly not require any additional
17 parking, if you factor in the credits that would be
18 available from the church, because parking was not --

19 CHAIRPERSON GRIFFIS: Right. Based on if
20 it was built today, how much parking would be
21 required.

22 MR. BONSTRA: That's correct.

23 CHAIRPERSON GRIFFIS: Was this all a
24 single record lot?

25 MR. BONSTRA: Not originally, no.

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1 CHAIRPERSON GRIFFIS: So it wasn't part of
2 the church when it was first built?

3 MS. GIORDANO: Right.

4 CHAIRPERSON GRIFFIS: So you can see where
5 it wouldn't really --

6 MR. BONSTRA: Well, yes and no.

7 CHAIRPERSON GRIFFIS: You could take the
8 exception when you have acquired a larger piece of the
9 property.

10 MR. BONSTRA: No. Yes and no actually.
11 We believe that this property was where the original
12 church was built. And so we believe that these two
13 lots were owned by the church. There was a third lot
14 which had a warehouse, but we believe that even though
15 the lots were separate, they were church lots.

16 CHAIRPERSON GRIFFIS: Right. Okay. It's
17 my understanding and I think Ms. Miller brings up an
18 excellent point of 2100, but if we look at 2100.5,
19 that's where it starts to begin. And as I have always
20 read this, me personally, 2100.5 reads "No additional
21 parking space shall be required for a historic
22 landmark or building or structure located in an
23 Historic District, as certified by status of a
24 Historic Preservation Officer, and has contributed to
25 the character of that Historic District."

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1 That's a stand alone paragraph. Now, we
2 go and move on to that's historic. That's how you
3 deal with historic. Then we go on to well, what are
4 the other cases that may well happen in terms of
5 parking requirements and how we calculate it with
6 existing buildings. And the next is 2100.6 when an
7 intensity of the use of a building or structure
8 existing before May 12, 1958, that is outside of now
9 we have a designated, now we have a building in a
10 Historic District.

11 I have heard and I know I have argued the
12 opposite of that, but I don't see how our regulations
13 flow to say here, historic buildings and contributing
14 buildings are exempt. Except all these things that
15 they are not exempt from. The regulations, I don't
16 read them as indicating that, but rather trying to
17 pick several different ways that you might find to
18 calculate the parking.

19 MS. GIORDANO: And if I could just add, I
20 mean, I understand your question and I am reading it,
21 you know, was a little uneasy about that, and I looked
22 at my file. I don't seem to have a copy of the email,
23 but we did confirm in writing with the Zoning
24 Administrator that the waiver applied. And when we
25 were before the HPRB as well, there was no issue with

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1 respect to that.

2 VICE CHAIR MILLER: Thank you. And I
3 understand what the Chairman is saying. And sometimes
4 because 2100.6 and 7 flow right after 2100.5, it can
5 be a little confusing.

6 CHAIRPERSON GRIFFIS: Yes.

7 VICE CHAIR MILLER: Or ambiguous or
8 whatever, but I understand that interpretation. And
9 it also looks like though what you said about the
10 assembly use earlier that, in fact, would it be your
11 opinion that with the addition, the use isn't being
12 increased by 25 percent in any event for parking
13 purposes?

14 MR. BONSTRA: In terms of parking? No, I
15 think that the intensity of use for the church
16 actually would require more parking than what the new
17 structure would.

18 VICE CHAIR MILLER: Right.

19 MR. BONSTRA: Yes.

20 VICE CHAIR MILLER: Okay. I just have a
21 question with respect to the slope also. You said
22 based on your experience 20 percent is not that steep
23 a slope? If you could just elaborate on that for me
24 what that really means?

25 MR. BONSTRA: Well, I'm not an attorney

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1 and I have read that in the Zoning Code as well about
2 the requirements for 12 percent. So I don't believe
3 that it talks about an internal building ramp. I
4 thought it had to do with a driveway, which I believe
5 is from the sidewalk to the property line.

6 CHAIRPERSON GRIFFIS: I haven't ever seen
7 it invoked as an access into a parking structure.

8 MR. BONSTRA: Right.

9 CHAIRPERSON GRIFFIS: And that's where you
10 differentiate it. Driveway, have you found that
11 driveways are defined in the zoning?

12 MR. BONSTRA: I have looked. It's not
13 clear, you know, another ambiguity maybe that needs to
14 be addressed.

15 CHAIRPERSON GRIFFIS: Hard to believe,
16 quite frankly.

17 MR. BONSTRA: What's that? No offense to
18 Arnold and Porter, but it keeps attorneys busy.

19 CHAIRPERSON GRIFFIS: Yes. It is
20 interesting. I mean, let me hear other perspectives
21 if there are any in terms of how the Zoning
22 Regulations actually deal with driveways or whether,
23 you know, we do have drive aisles and driveways and
24 all of that. But is the access into a parking
25 structure -- well, let's not spend a lot of time as

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1 they are here for it, but I'm not convinced that it
2 actually would need relief from the 12 percent slope,
3 based on the driveways.

4 VICE CHAIR MILLER: And I don't want to
5 belabor this, but I just was wondering what is the
6 negative impact of a 20 percent slope? What is the
7 adverse impacts, if any?

8 CHAIRPERSON GRIFFIS: You get cars stuck
9 on the end of this thing.

10 MR. BONSTRA: Well, as the submission
11 says, we have blends at 10 percent, top and bottom.
12 And in our experience, we have done a lot of these
13 parking garages at 20 percent and they are not steep.

14 VICE CHAIR MILLER: Okay.

15 MR. BONSTRA: We have been out to other
16 buildings that are considerably steeper than 20
17 percent that we have measured and they still function
18 properly. So that limitation of 12 percent it doesn't
19 seem to be applied correctly to buildings. And, in
20 fact, we haven't needed relief on other projects, but
21 we wanted to make sure that we put that out on the
22 table and if relief was needed, that we could receive
23 it.

24 VICE CHAIR MILLER: Okay. Thank you. I
25 have one other area and that is with respect to the

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1 side yard variance you seemed to mention. I guess
2 seeking a side yard variance.

3 MR. BONSTRA: Rear yard.

4 VICE CHAIR MILLER: O, you're not seeking
5 a side yard. Okay.

6 MS. GIORDANO: He just raised the issue of
7 the side yard. There is no side yard requirement and
8 I guess the question was putting it over in what would
9 normally be considered the side yard, making that a
10 rear yard, that's when that issue came up basically.
11 But there is no side yard requirement.

12 VICE CHAIR MILLER: Okay. Thank you very
13 much.

14 COMMISSIONER JEFFRIES: Could you put your
15 rendering back up for a second? So I just had a
16 question about sort of the treatment of the brick
17 between the new brick and the existing brick. I mean,
18 can you just sort of walk me through that?

19 MR. BONSTRA: Well, again, this building
20 was designed as an in-fill building. It wasn't --
21 because the existing church was on the corner, they
22 built next to it. There is a party wall here and
23 there is an extension of that as a pilaster right
24 here. So you are seeing a pilaster there.

25 COMMISSIONER JEFFRIES: Yes.

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1 MR. BONSTRA: On the existing building.
2 We are then set flush to the property line.

3 COMMISSIONER JEFFRIES: Yes.

4 MR. BONSTRA: So we are actually -- the
5 plane of our facade is actually in the main plane, so
6 there is a vertical break between the addition and the
7 existing building. So you will have a clean
8 differentiation. And we're not suggesting it's
9 exactly the same brick, but it's a brick in the same
10 family. We want to match it as closely as we can.

11 COMMISSIONER JEFFRIES: Yes, I see your
12 pilaster there and I'm just sort of -- this whole
13 notion of, you know, merging the old with the new and,
14 you know, there is always the sense of whether there
15 was intent or whether it was a mistake as relates to
16 sort of the matching of the brick and so forth. So I
17 was just curious when I first looked at this in terms
18 of how you were going to treat that.

19 MR. BONSTRA: Well, this is clearly a
20 party wall.

21 COMMISSIONER JEFFRIES: Yes.

22 MR. BONSTRA: And it is clearly
23 anticipating another building being built up next to
24 it. Otherwise, I think we would see some of the
25 stained glass windows and, in fact, any windows along

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1 this facade.

2 COMMISSIONER JEFFRIES: Yes.

3 MR. BONSTRA: I also believe it
4 anticipates a taller building on the corner.

5 COMMISSIONER JEFFRIES: Yes.

6 MR. BONSTRA: But that's a whole other
7 discussion.

8 COMMISSIONER JEFFRIES: Right. I mean,
9 this is a comment. You know, this is one of these
10 designs where your front door off of V Street it seems
11 like the front door wants to be on 10th Street, you
12 know, given all the church and the two bays there.
13 But I understand sort of the configuration of how the
14 building had to be placed on the site. But it's just
15 a comment, you know, it's one of these situations
16 where what's your front door? You know, what's the
17 front of the building? And I see it's V, but
18 sometimes it seems like it wants to be 10th Street.

19 MR. BONSTRA: Well, in our first duration,
20 we had it on 10th Street, in fact, and I think that
21 through our discussions with HPRB and our own thoughts
22 on the entry of the building, that it was less
23 competing with the church if, in fact, the entry was
24 along V Street. And that that was a successful change
25 that we made early on in the design. I'll also say

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1 that the units that are within the church do, in fact,
2 use this entry. So this existing entry is maintained.

3 COMMISSIONER JEFFRIES: How many units are
4 you getting within the church?

5 MR. BONSTRA: Five units in the church.

6 COMMISSIONER JEFFRIES: Okay. Floor to
7 ceiling?

8 MR. BONSTRA: Yes, we're keeping the --
9 well, we have a stair tower, which will actually be
10 the stair for the top unit, and then we're raising one
11 of the lofts that was overlooking the main hall, which
12 was here at the top of the building, and adding some
13 loft to that as well. So we're not violating the
14 envelope of that building, but we're --

15 COMMISSIONER JEFFRIES: So there is not
16 going to -- I mean, the windows will not be violated
17 at all? Okay. Okay. Great.

18 MR. BONSTRA: In fact, these windows are
19 smaller windows that were placed in larger openings.
20 It's a little hard to see.

21 COMMISSIONER JEFFRIES: Yes.

22 MR. BONSTRA: We are, in fact, opening
23 those windows up to the opening size.

24 COMMISSIONER JEFFRIES: Okay.

25 MR. BONSTRA: I believe these were

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1 restrooms and so our thought was that the architect
2 originally wanted a smaller window, but didn't want
3 to, you know, violate the integrity of the proportions
4 of the facade.

5 COMMISSIONER JEFFRIES: Okay. Thank you.

6 CHAIRPERSON GRIFFIS: Anything else? Oh,
7 yes, Mr. Mann, please.

8 BOARD MEMBER MANN: You're providing a
9 total of 19 parking spaces? And there are, I think,
10 I read 42 to 45 units. Is that correct?

11 MR. BONSTRA: Yes, somewhere 42 to 44, I
12 believe, depending on the size that we finally come up
13 with.

14 BOARD MEMBER MANN: I was just curious how
15 the parking spaces were going to be allocated among
16 the units. Will they be purchased with particular
17 units or first come first serve?

18 MS. GIORDANO: I don't think that has been
19 finally decided, but I think that's probably the most
20 logical outcome.

21 BOARD MEMBER MANN: They will be sold with
22 certain units? Okay.

23 COMMISSIONER JEFFRIES: And this is what
24 two blocks from the Metro Station?

25 MR. BONSTRA: Yes.

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1 COMMISSIONER JEFFRIES: I won't say it's
2 a transit oriented development, but, you know, I would
3 imagine, you know, that would be a wonderful, you
4 know, selling feature, marketing feature for the
5 building.

6 MR. BONSTRA: Well, I think it's important
7 to note that this is a Commercial District. If it had
8 been a commercial building, I believe you would have
9 relief being within a certain distance from the Metro.

10 CHAIRPERSON GRIFFIS: But you're outside
11 of 500 feet.

12 MR. BONSTRA: What? I thought it was 800.

13 CHAIRPERSON GRIFFIS: Is it 800?

14 MR. BONSTRA: It's 800 feet. But I may be
15 wrong. But that same exemption is not afforded to
16 residential projects, which I believe it should be.

17 CHAIRPERSON GRIFFIS: It is interesting
18 looking at this application and, you know, assuming
19 this is a residential, we have actually seen numerous
20 applications around this and just assuming it's
21 residential and then you look at the FAR and then, of
22 course, the bonus FAR that you're getting and how it's
23 actually encouraging this type of residential square
24 footage. It's fascinating. Mr. Jeffries, did you
25 have additional questions?

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1 COMMISSIONER JEFFRIES: No.

2 CHAIRPERSON GRIFFIS: Let me ask you how
3 you calculated your FAR. You have a cellar level of
4 units. Is that correct?

5 MR. BONSTRA: Yes, there's a full cellar
6 level.

7 CHAIRPERSON GRIFFIS: Is it a full cellar,
8 100 percent? Is there any FAR on that level?

9 MR. BONSTRA: We don't -- well, I would
10 have to look. I'm not sure. But the ceiling of the
11 terrace level is, in fact, below 4 feet above the
12 adjacent grade.

13 CHAIRPERSON GRIFFIS: On all the adjacent
14 grades?

15 MR. BONSTRA: I would have to --

16 CHAIRPERSON GRIFFIS: Here is the direct
17 question. Do you have window wells?

18 MR. BONSTRA: I --

19 CHAIRPERSON GRIFFIS: Clearly, your
20 ceiling is above the grade there or is the grade at
21 the bottom of the window well?

22 MR. BONSTRA: Are you asking me for an
23 interpretation?

24 CHAIRPERSON GRIFFIS: I was just asking
25 whether you recalled if you calculated that or not.

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1 MR. BONSTRA: My project architect said we
2 are not calculating any percentage of the terrace
3 level as FAR space. I'm reminded though that we are,
4 in fact, below the allowable FAR.

5 CHAIRPERSON GRIFFIS: Right. Indeed. I
6 don't think it's a concern, but it may well be
7 something that you run into in further processing.
8 Okay. What else? Any other questions? Good. Let's
9 move ahead.

10 MS. GIORDANO: Mr. Gross has a few
11 comments on the residential recreation space variance.

12 MR. GROSS: Thank you, Mr. Chairman,
13 Members. I'm Nathan W. Gross from the Law Firm of
14 Arnold and Porter. I'll just make a few policy-
15 related comments regarding the residential recreation
16 space requirement. As you are probably aware, the
17 Office of Planning has formed a task force to review
18 the residential recreation space requirements in part
19 because they have triggered a lot of variance
20 requests. They formed a task force of agency
21 representatives and private sector professionals,
22 which has now made a proposal to the Zoning Commission
23 and has been set for public hearing as Case No. 05-02.

24 Some of the policy matters in their task
25 force summary report and the set down action of the

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1 Zoning Commission relate to this case in, what I would
2 consider, a mitigating fashion. One of the comments
3 in the task force report talks about how smaller lots,
4 especially, have difficulty complying with the
5 residential recreation space requirements, because the
6 building core factors tend to take up a higher
7 percentage of the available roof area.

8 And as Mr. Bonstra pointed out, in this
9 case, we have the sloping roof of the church that
10 takes away from that and the extra setback that the
11 HPRB wanted taking away from it further. At the set
12 down meeting, the Zoning Commission also addressed the
13 25 foot minimum dimension requirement for residential
14 recreation space and advertised it to go down as far
15 as 8 feet, again recognizing that on smaller lots,
16 especially, having that 25 foot minimum dimension is
17 difficult.

18 And again, we're a lot of a little over
19 9,000 square feet. I believe some of the variance
20 cases also have turned on the point that, and there
21 are such as downtown and 14th and U Street corridor,
22 where zoning of public policy encourages the use of
23 active street level uses, such as entertainment,
24 restaurants, arts uses and so on. Those uses actually
25 substitute as recreational space of a different type

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1 than let's say a city park, but nonetheless, it has
2 been considered a mitigating factor in reducing the
3 on-site residential recreation space.

4 The task force report also pointed out
5 that in Washington we have relatively lower building
6 heights and densities than a lot of other cities, so
7 that the on-site residential space is somewhat less
8 critical than in some other cities.

9 And finally, it was noted in all of this
10 that the CR Zone, which originally was the only zone
11 that had the residential recreation space requirements
12 until the late '70s, that private balconies were
13 allowed to count toward the requirement. So the
14 Zoning Commission has set down for consideration the
15 use of private balconies as counting toward these
16 requirements and I would note we have, I believe it's
17 around, 10 balconies and a couple of private terraces.

18 CHAIRPERSON GRIFFIS: Do the balconies
19 have the dimensional requirements, are you aware, in
20 the set down? Is the Commission looking at that? You
21 mentioned if we reduced it to 8 feet for the outside,
22 wouldn't it make sense then the balconies would have
23 some sort of dimension on that? Now that we're
24 playing up to policy here, we might as well put a word
25 in.

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1 MR. GROSS: Well, that can be brought up.
2 I'm not sure that it was included at the time of set
3 down, Mr. Chairman.

4 CHAIRPERSON GRIFFIS: I don't think it was
5 included. Okay.

6 MR. GROSS: But in any case, these, we
7 believe, are all kind of mitigated in favor of --

8 CHAIRPERSON GRIFFIS: I can see the
9 outcome of balconies, you know, of 8 inches. Well,
10 we've got 8 inches by 2 feet here. All right. Let's
11 move ahead. Excellent. I think it is an important
12 point. The Board is not unaware, of course, how many
13 variances we get for residential rec, because we get
14 them. And it is quite interesting to always ask, as
15 we have in the past, well, what's the history? What's
16 the purpose? What's the intent of the residential
17 rec? You know, it's fascinating. Well, we don't have
18 time for me to talk about all this. Let's move ahead.

19 MR. GROSS: That concludes my statement,
20 Mr. Chairman.

21 CHAIRPERSON GRIFFIS: Okay. Good.
22 Anything else?

23 MR. BONSTRA: Can I say something?

24 CHAIRPERSON GRIFFIS: Sure. Your
25 microphone needs to be on.

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1 MR. BONSTRA: In response to what you say,
2 I would hope that the zoning or Office of Planning
3 would not set any minimums of 8 feet for outside
4 balconies.

5 CHAIRPERSON GRIFFIS: No, indeed.

6 MR. BONSTRA: Because that --

7 CHAIRPERSON GRIFFIS: That would fly in
8 the face of what actually would be required.

9 MR. BONSTRA: Right.

10 CHAIRPERSON GRIFFIS: Or allowed for
11 balcony projections. So now, an 8 feet wouldn't be,
12 but I see us not being on the Commission that would
13 write this stuff, but looking at it from the hearing
14 perspective, either you count them totally and let it
15 go or we get into this interpretative aspect of, you
16 know, does that little guard rail outside your, you
17 know, 10th story window count towards residential rec
18 space. Anyway, we won't hopefully create too much of
19 a problem with this. Okay. What else?

20 MS. GIORDANO: This concludes our
21 presentation. I just want to note that the applicant
22 is very anxious to proceed with this project. It has
23 been -- the Government review process has extended
24 beyond what they had originally anticipated with the
25 Historic Preservation Review process. I think we were

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1 before HPRB two or three times. So we would request
2 a Bench decision if the Board sees fit. Thank you.

3 CHAIRPERSON GRIFFIS: Okay. Let's move
4 ahead. Let's go to the Office of Planning's report.

5 MR. PARKER: Good morning, Mr. Griffis,
6 Chairman, Members of the Board. My name is Travis
7 Parker with the Office of Planning. OP is on the
8 record in support of this application. The ANC has
9 come out in support and Historic Preservation has
10 given conceptual review approval. The applicant has
11 done a great job of summarizing their point. So
12 unless there is an objection or questions, I will be
13 glad to stand on the record today, with the further
14 note that I've been fortunate enough not to have to
15 work on the recreational space amendments, so I may
16 not be able to answer specific questions on what's
17 before the Zoning Commission, but I'm happy to talk
18 about it.

19 CHAIRPERSON GRIFFIS: You are writing it?

20 MR. PARKER: No, I said fortunately I'm
21 not.

22 CHAIRPERSON GRIFFIS: Oh, okay. Yes, Mr.
23 Lawson is in charge of that. Is that right?

24 MR. PARKER: I believe so.

25 CHAIRPERSON GRIFFIS: I'm sure he's doing

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1 a great job of it and it's an important piece. And
2 actually was somewhat supportive if not certainly
3 brought to the attention of the Commission by this
4 Board, based on the number of applications we were
5 getting. Mr. Jeffries, questions of Office of
6 Planning?

7 COMMISSIONER JEFFRIES: ANC, there was no
8 comment at all? I mean, it was never taken up at all?

9 CHAIRPERSON GRIFFIS: The ANC is here.
10 He's here.

11 COMMISSIONER JEFFRIES: They are here?
12 Oh, you are here.

13 CHAIRPERSON GRIFFIS: Yes.

14 COMMISSIONER JEFFRIES: Okay. I'm sorry.

15 CHAIRPERSON GRIFFIS: We will get to them
16 shortly. Any questions from the Board of the Office
17 of Planning?

18 BOARD MEMBER MANN: Did you receive any
19 information back from DDOT?

20 MR. PARKER: I did speak with DDOT. They
21 didn't have any direct comment on the slope of the
22 ramp, because they didn't feel that it would really
23 affect traffic and they really only look at traffic
24 patterns as it affects the street. This ramp comes
25 out on the alley. He didn't see any affect on the

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1 traffic and the neighborhood, and so he didn't have
2 any comment on the slope of the ramp.

3 BOARD MEMBER MANN: And I guess no concern
4 then about the narrowness of the alley or whether or
5 not there was going to be any turning radius problems?

6 MR. PARKER: They did not mention
7 anything.

8 BOARD MEMBER MANN: Or that direction.
9 Okay.

10 MR. PARKER: No mention of that.

11 BOARD MEMBER MANN: Okay. Great.

12 CHAIRPERSON GRIFFIS: Anything else?
13 Anything else for the Office of Planning? Very well.
14 Does the applicant have any cross examination of the
15 Office of Planning? Does the ANC have any cross
16 examination of the Office of Planning?

17 MR. SPALDING: No questions.

18 CHAIRPERSON GRIFFIS: Do you have any
19 cross examination of any of the testimony you heard
20 previously?

21 MR. SPALDING: No, we do not.

22 CHAIRPERSON GRIFFIS: Indeed. Okay. Very
23 well. Thank you very much. Let's move ahead and
24 welcome Mr. Spalding, our ANC Member.

25 MR. SPALDING: Phil Spalding, 1929 13th

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1 Street, N.W., and I represent ANC-1B. I do believe in
2 your packages you should have our letter. We have
3 been working with this project for a very long time.
4 And if Mr. Jeffries does not have a copy, I will
5 provide him mine. We have been working with this
6 project since it began and have been following it
7 through the entire Historic Preservation Review
8 process, the Mayor's agent and now before BZA.

9 And as noted in our letter, the support is
10 unanimous, 9-0, and I'll stand on what's inside that
11 letter and answer any questions you may have.

12 CHAIRPERSON GRIFFIS: Excellent. Mr.
13 Jeffries, did you get a copy of it?

14 COMMISSIONER JEFFRIES: Well, now I do.

15 CHAIRPERSON GRIFFIS: Okay.

16 COMMISSIONER JEFFRIES: The reason I was--
17 I mean, this is my ANC, so I just wanted to make
18 certain that, you know, I saw the Office of Planning
19 report, but that was done a few days ago. So, yes,
20 I'm set. Thank you.

21 CHAIRPERSON GRIFFIS: Good. It is Exhibit
22 No. 27. Mr. Etherly?

23 BOARD MEMBER ETHERLY: Thank you very
24 much, Mr. Chair. Not a major question, Mr. Spalding,
25 but we had just a little bit of discussion regarding

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1 the issue of placement of the entrance, 10th Street
2 versus V. Was there any discussion at the ANC about
3 kind of the focal point of the building from an
4 entrance standpoint?

5 MR. SPALDING: There was with Mr.
6 Bonstra's initial design, which showed the entrance on
7 10th Street. And there was in that initial design
8 some concern with the influence of having the entrance
9 and a lot of activity along 10th Street in
10 juxtaposition with the historic structure. As it went
11 through Historic Preservation Office review, Mr.
12 Bonstra was informed that they were really thinking of
13 moving that around to the other side. And as an in-
14 fill structure, it really did seem to make more sense
15 that the entrance and the activity would be on V. And
16 that despite the fact that it's an in-fill structure,
17 it would still be more visible without all of the
18 activity happening right next to it.

19 BOARD MEMBER ETHERLY: Okay.

20 MR. SPALDING: So we did see Mr. Bonstra's
21 illustration of an entry on 10th and we did have a
22 number of problems at that point. So it's not the
23 only reason that Mr. Bonstra redrew, but we are
24 satisfied with the entry off V.

25 BOARD MEMBER ETHERLY: Okay. Excellent.

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1 Thank you.

2 MR. SPALDING: Yes.

3 BOARD MEMBER ETHERLY: Thank you, Mr.
4 Chair.

5 CHAIRPERSON GRIFFIS: Good. Thank you
6 very much. Excellent questions. Anything else for
7 the ANC? Does the applicant have any cross
8 examination?

9 MR. SPALDING: I would like to add one
10 thing that came up in discussion earlier. The ANC and
11 the Cardozo-Shaw Neighborhood Association were
12 involved in actually doing the research to have this
13 landmarked. The research was done by Paul Williams
14 and in his research he notes that the original
15 structure of this church was at the corner of Vermont
16 and 10th, which is where the Mason's parking lot is
17 right now.

18 The church was moved to this location and
19 originally the structure that housed the congregation,
20 and it has been through a number of different
21 congregations over the years, the structure was
22 originally in the blank corner location. And it was
23 either a canvas tent or a wooden structure and it did
24 not -- once they hired the architect to build the
25 brick structure. So the original location is believed

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1 to have been in the corner location and the brick
2 structure was shortly built thereafter.

3 UNIDENTIFIED SPEAKER: Good history.

4 CHAIRPERSON GRIFFIS: Fascinating. Okay.
5 Very well. Thank you very much, Mr. Spalding. We
6 appreciate you being here and giving this report.
7 This will, of course, be given the great weight it is
8 afforded. Okay. Let's move ahead then. Anything
9 else? I don't have any other Government reports
10 attendant to this application.

11 I think we can move to anybody here
12 present to give testimony. Persons present in
13 Application 17323 either in support or in opposition
14 can come forward at this time. Not noting any persons
15 here present to provide testimony, let's move ahead.
16 Do you have anything else? Nothing else? Good. Then
17 I would note Mr. Gross has put his written testimony
18 into the record on this.

19 Any final questions from the Board?
20 Clarifications? Very well. Let's move ahead then.
21 I would move approval of Application 17323 for 2105
22 10th Street, N.W., LLC. This is for a special
23 exception from the roof structure under 411, also the
24 residential rec and we will include, of course, the
25 parking ramp as it has been brought forward to us

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1 today, and the rear yard requirements, which would
2 allow the construction of the residential condominium
3 building, and I would ask for a second.

4 VICE CHAIR MILLER: Second.

5 CHAIRPERSON GRIFFIS: Thank you very much.
6 Let's go first to we will first identify in terms of
7 residential recreation space. Of course, we're
8 looking at actually three elements of the requirements
9 of the residential rec. One is the dimensional
10 requirement of 25 feet for the roof structure and
11 that, obviously, is met. And we're also looking at
12 the total amount of square footage required. And then
13 the other element of the requirement is that 50
14 percent needs to be outside. All those aspects are
15 not met here.

16 It is fairly clear in terms of the
17 uniqueness of the historic structure and how that has
18 to be adapted into the development and connected.
19 Specifically, the unique aspect of that building with
20 the residential rec is the sloped roofs, obviously,
21 not affording areas to be used. I guess you could
22 have like a climbing wall or something on those
23 things, right? I mean, that kind of is residential
24 rec. Anyway, the point being it doesn't work well and
25 certainly is especially difficult in meeting the

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1 entire piece.

2 Some of our limited discussion on this
3 application and our lengthy discussions in other
4 applications and perhaps on our own with residential
5 rec, it is kind of interesting when you look at a
6 building of diminished unit size, because I think that
7 is really what is more important. Although, our
8 residential recreation requirements are based on total
9 square footage. When you look at unit size, you're
10 talking about how many people are actually going to be
11 needing it or using it.

12 And when you put, you know, 10 units or 16
13 units in and it may then off-put 3 or 4 or 7,000
14 square feet, it is likely that you are losing entire
15 units in the building. The point being it seems to be
16 not well adapted or suited to the smaller type, those
17 certain of the in-fill structures that are much more
18 apparent or much more numerous in applications today.
19 So the bottom line is I think that the unique
20 practical difficulty is clearly here and whether it
21 would impair the public good, I certainly don't think
22 it rises to that level.

23 The setback to the penthouse, I think, are
24 very clear. One, in terms of the actual intent of 411
25 to make it more design friendly or visually friendly

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1 or not visually intrusive. It seems to be that's the
2 actual intent that is being pursued here and not
3 raising the entire penthouse structure to one level.
4 Also accommodating that the Historic Preservation
5 Review and comments I think is an important aspect and
6 I see that it is and clearly our requirements must be
7 a showing that it would not be easily placed in
8 conformity. And I think that has been shown here
9 today.

10 The rear yard, again, I think is very
11 straightforward in terms of the existing structure.
12 What's fascinating here is that, you know, there was
13 some discussion by the Board, we didn't really bring
14 it out here, because I didn't think it was absolutely
15 needed, but with the existing building there you have
16 no rear yard even though there is a portion that is
17 open, but the rear yard goes from the outermost
18 distance of the structure to the lot line, so it's
19 clearly requested relief for 100 percent of the rear
20 yard.

21 But then if you requested the rear yard,
22 that open area, does that create a court and would
23 that court necessarily have to be conforming? It
24 wasn't brought to us in that fashion and I don't see
25 that it would actually need to be discussed in that

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1 fashion, but it's kind of an interesting dynamic here
2 that what they have clearly is a unique aspect of not
3 being able to move that existing building or re-
4 conform that building or set it back somehow off the
5 alley and being on a corner lot and then, obviously,
6 it becomes not only practically difficult, but
7 impossible then without tearing down the church to
8 provide a conforming rear yard.

9 And I don't think it impairs the intent
10 and integrity of the Zone Plan or the public good. In
11 fact, I think it actually is supportive of the public
12 good if public good can be put into an urban design
13 frame, and that is carrying that entire corner,
14 holding that corner up to the alley where there is a
15 natural break in the block and then carrying it around
16 to the other side filling out that area.

17 I think that's all I need to say on this
18 one unless I have missed anything. I will open it up
19 to others. Oh, the ramp. Yes, we'll talk to it. I'm
20 not going to talk about that. Any other comments?

21 VICE CHAIR MILLER: I just have a general
22 comment with respect to the variance tests in general.
23 In this case we clearly have a unique situation, which
24 is the historic landmark of the First African New
25 Church, so the first prong of the variance test is met

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1 with respect to all the variances, that being the
2 historic landmark. And that historic landmark has
3 been shown to necessitate or create practical
4 difficulties necessitating all of the variances.

5 And simply put -- and then there's
6 certainly no adverse impacts that have been found with
7 respect to granting any of the variances and, in fact,
8 it's in the public interest to preserve the historic
9 landmark and, as Office of Planning has stated,
10 granting the variance and special exception is in
11 accordance with the Zoning Regulations and the Zone
12 Plan.

13 CHAIRPERSON GRIFFIS: Thank you. Anything
14 else? Any others? Very well. We have a motion
15 before us. It has been seconded. I would ask for all
16 those in favor to signify by saying aye.

17 ALL: Aye.

18 CHAIRPERSON GRIFFIS: And opposed? Any
19 abstaining? Very well. Ms. Bailey, when you get a
20 moment.

21 MS. BAILEY: The vote is 5-0-0 to approve
22 the application. Mr. Griffis made the motion, Mrs.
23 Miller second, Mr. Mann, Mr. Etherly and Mr. Jeffries
24 are in agreement and we're doing a summary order, Mr.
25 Chairman?

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1 CHAIRPERSON GRIFFIS: I don't see any
2 reason why we would issue a full on this, unless
3 there's any objection to waiving our rules and
4 regulations, we can issue a summary order on this.

5 MS. BAILEY: Thank you, sir.

6 CHAIRPERSON GRIFFIS: Thank you very much,
7 Ms. Bailey. Thank you all very much. Appreciate it.
8 Let's call the next case.

9 MS. BAILEY: Application No. 17324 of the
10 D.C. Department of Housing and Community Development,
11 pursuant to 11 DCMR section 3104.1, for a special
12 exception to extend the use permitted in a lesser
13 restrictive zone into a more restrictive zone under
14 section 2514, and pursuant to 11 DCMR section 3103.2,
15 a variance to extend the lesser restrictive use into
16 the more restrictive zone by more than 35 feet under
17 subsection 2514.2(a), and a variance to allow the
18 construction of two or more principal buildings or
19 structures on a single subdivided lot that is located
20 within 25 feet of a residential district under section
21 2517.

22 This is to allow the construction of a new
23 shopping center. The property is zoned C-2-B, R-5-A
24 and R-3 and it's located at 1501 Alabama Avenue, S.E.
25 This site is also previously known as the Camp Simms

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1 Military Reservation, Square 5912, Lot 804.

2 CHAIRPERSON GRIFFIS: Ready?

3 MR. TUMMONDS: Good morning, Mr. Chair,
4 Members of the Commission. My name is Paul Tummonds.
5 I'm with the Law Firm of Pillsbury, Winthrop, Shaw,
6 Pittman. The first thing that --

7 CHAIRPERSON GRIFFIS: Now that we're
8 getting your name right, you need to call us the Board
9 not --

10 MR. TUMMONDS: Board, Board. I'm sorry.

11 CHAIRPERSON GRIFFIS: You may have been
12 here late and --

13 MR. TUMMONDS: I was wondering what the
14 smirks were about. He was looking right at me.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. TUMMONDS: A quick housekeeping
17 matter.

18 CHAIRPERSON GRIFFIS: Yes.

19 MR. TUMMONDS: We have given to the staff
20 the resume of our landscape architect, Ms. Trini
21 Rodriguez. We'll be requesting that she be granted
22 expert witness status in this case.

23 CHAIRPERSON GRIFFIS: Excellent. Let's
24 take that up right away. Are there any questions from
25 the Board Members? I'm very familiar with Trini

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1 Rodriguez and the excellent work that they do. The
2 resume, I think, speaks for itself, but let's open it
3 up for any clarification questions. Has anyone been
4 to Celebration?

5 UNIDENTIFIED SPEAKER: What's that?

6 CHAIRPERSON GRIFFIS: You don't know
7 Celebration? All right. We'll talk about it over
8 lunch. Do you have a question?

9 VICE CHAIR MILLER: I was just wondering
10 if you have done any projects in the District of
11 Columbia?

12 CHAIRPERSON GRIFFIS: Trini.

13 VICE CHAIR MILLER: I'm sorry.

14 CHAIRPERSON GRIFFIS: Why don't we have
15 you introduce yourself?

16 MS. RODRIGUEZ: Good morning. My name
17 is --

18 CHAIRPERSON GRIFFIS: You just need to
19 turn your microphone on. There it is.

20 MS. RODRIGUEZ: It's on now. Good
21 morning, Trini Rodriguez. For the record, I
22 apologize, because I think the resume that you got is
23 our overall nationwide resume. I have done a number
24 of projects in the District, many of them in this
25 area, the Oxen Creek. I have worked with W. C. Smith

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1 in a number of projects also in the southeast federal
2 center area, federal gateway. We did the initial
3 planning for the area, for the southeast. We're also
4 doing a number of projects in the Columbia Heights
5 area, downtown.

6 VICE CHAIR MILLER: Thank you.

7 MS. RODRIGUEZ: So I apologize. Thanks
8 for the question.

9 CHAIRPERSON GRIFFIS: Anyone else want to
10 give her a hard time? Good. I don't see any
11 difficulty establishing expert status of your witness,
12 Mr. Tummonds. Let's move ahead.

13 MR. TUMMONDS: Great. Thank you. As was
14 discussed by the staff, we're here this morning
15 seeking special exception and variance relief in order
16 to create a shopping center to be known as the Shops
17 at Park Village on the site of the former Camp Simms
18 Military Reservation located at 1501 Alabama Avenue,
19 S.E.

20 As shown on the site plan to my right, the
21 centerpiece of the Shops at Park Village will be the
22 development of a Giant Food grocery store. In
23 addition, a building pad site in the upper left hand
24 corner suitable for a sit down restaurant and a strip
25 shopping center will also be included in the Shops at

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1 Park Village.

2 The portion of the Camp Simms property
3 that we're discussing today is located in both the R-
4 5-A and C-2-B Zone Districts. The proposed commercial
5 uses to be included in this shopping center are all
6 permitted as a matter-of-right. We are here this
7 morning seeking special exception approval pursuant to
8 section 2514 of the Zoning Regulations to extend the
9 grocery store use into the R-5-A District by a
10 distance of, approximately, 34 feet.

11 When the application was originally filed,
12 we were seeking variance relief to extend that grocery
13 store more than the permitted 35 feet. Subsequent to
14 that initial filing, we pulled that back, so now we're
15 only seeking special exception relief to extend that
16 use into the adjacent R-5-A Zone District.

17 CHAIRPERSON GRIFFIS: Do we have that
18 showing anywhere, the extent and the changing of
19 the --

20 MR. TUMMONDS: Yes.

21 CHAIRPERSON GRIFFIS: Is everyone clear on
22 that?

23 MR. TUMMONDS: If you would go to Exhibit
24 D of your statement, the second --

25 CHAIRPERSON GRIFFIS: Just show us, so

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1 everyone knows where it is.

2 MR. TUMMONDS: The second page to Exhibit
3 D is the civil engineer's site plan and there is the
4 dashed line in the lower left corner that shows the C-
5 2-B/R-5-A Districts and there is a notation there that
6 it is actually 33.95 feet that this grocery store will
7 extend into that R-5-A Zone District.

8 CHAIRPERSON GRIFFIS: Right.

9 MR. TUMMONDS: Okay. As discussed in
10 detail in this prehearing statement, we believe that
11 the applicant fully satisfies the special exception
12 standards as the proposed structures for all three of
13 the structures are properly screened and sited from
14 adjacent residential properties.

15 With regards to the variance relief in
16 this case, the Zoning Administrator and the Office of
17 the Attorney General have determined that section
18 3202.3 of the Zoning Regulations does not apply in
19 this case. Therefore, the applicant is requesting
20 relief from section 2516 of the Zoning Regulations,
21 which discusses building controls on lots.

22 We're requesting relief from the entirety
23 of that section, but specifically with regards to
24 section 2516.4, which is the requirement that we
25 create theoretical lots outlining how each individual

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1 building would satisfy all of the relevant
2 requirements of the Zoning Regulations, such as lot
3 occupancy, height, parking, loading, side yards, rear
4 yards.

5 We believe, as discussed in detail in
6 their prehearing statement, that due to the
7 exceptional or extraordinary situation or condition on
8 the property, the practical difficulty of satisfying
9 those requirements and that approving that relief will
10 not cause a substantial detriment to the Zoning Plan
11 or the Comprehensive Plan that granting variance
12 relief from those requirements, specifically creation
13 of a theoretical lot around restaurant pad sites, a
14 big lot for the grocery store, another little lot
15 around the strip center, we believe that doing those
16 would result in a practical difficulty to the
17 applicant.

18 CHAIRPERSON GRIFFIS: Wait a minute.

19 MR. TUMMONDS: Yes.

20 CHAIRPERSON GRIFFIS: Your practical
21 difficulty is --

22 MR. TUMMONDS: The practical difficulty --

23 CHAIRPERSON GRIFFIS: -- it's difficult to
24 create theoretical lots?

25 MR. TUMMONDS: That would satisfy all of

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1 the Zoning Regulations.

2 CHAIRPERSON GRIFFIS: That would satisfy.
3 I see.

4 MR. TUMMONDS: I mean, I can go into this.
5 So for example --

6 CHAIRPERSON GRIFFIS: Yes, I understand
7 that. I mean, it's kind of interesting to look at it
8 and it's not the first time it's ever happened, but to
9 have a practical difficulty of saying it's more
10 difficult to do relief some other way, because it
11 creates so much other problems or so many other areas
12 of relief.

13 MR. TUMMONDS: I'm sorry. I probably did
14 it better. Our practical difficulty is that our
15 ability to satisfy the rear and side yard requirements
16 in a theoretical lot for, say, the restaurant pad
17 site --

18 CHAIRPERSON GRIFFIS: Right.

19 MR. TUMMONDS: You can't fit that pad site
20 into that left hand corner of the property and satisfy
21 the rear and side yard requirements.

22 CHAIRPERSON GRIFFIS: Okay. And so
23 because we have both in here, we're going to slow down
24 just a little bit.

25 MR. TUMMONDS: Sure.

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1 CHAIRPERSON GRIFFIS: To make sure
2 everyone is clear on exactly what we're looking at
3 here, and initially you were coming in under 3202.3,
4 correct?

5 MR. TUMMONDS: That's correct.

6 CHAIRPERSON GRIFFIS: And that was saying
7 -- it was saying, essentially, you are allowed to put
8 all of these commercial structures on a lot when they
9 are all in the same ownership but perhaps different
10 users.

11 MR. TUMMONDS: Yes.

12 CHAIRPERSON GRIFFIS: And for reasons you
13 have somewhat stated today and indicated that well,
14 perhaps you need to come under 2516, which is --

15 UNIDENTIFIED SPEAKER: .4.

16 CHAIRPERSON GRIFFIS: Right.

17 MR. TUMMONDS: Section 2516 is --

18 CHAIRPERSON GRIFFIS: More than one
19 principal building on the same lot.

20 MR. TUMMONDS: More than one principal on
21 a lot. And the requirements of 2516 in large measure
22 are very similar to the standards that we are required
23 to prove here for our special exception, the
24 standards. I think the Office of Planning did an
25 excellent job of outlining what those are.

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1 CHAIRPERSON GRIFFIS: Right.

2 MR. TUMMONDS: It requires things like --

3 CHAIRPERSON GRIFFIS: 2516.4 is a special
4 exception is what you're saying?

5 MR. TUMMONDS: Yes.

6 CHAIRPERSON GRIFFIS: Right. Now, so then
7 as we flow through that, what you're saying this
8 morning is the one way you could remove the
9 requirement of a special exception under 2516.4 is
10 actually create theoretical lots. So therefore, you
11 would have a single principal structure on a single
12 theoretical lot.

13 MR. TUMMONDS: Right.

14 CHAIRPERSON GRIFFIS: But the point is if
15 you started to create these theoretical lots in order
16 to surround a single structure, you then start
17 creating other area variances.

18 MR. TUMMONDS: Truthfully, we would be
19 right back here requesting variance relief in order to
20 construct that restaurant pad site, because pursuant
21 to 2516.4, we would have to show how that restaurant
22 pad site on what I have called, you know, a
23 gerrymandered really lot would satisfy its parking
24 requirement.

25 CHAIRPERSON GRIFFIS: Right.

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1 MR. TUMMONDS: Its loading requirement.
2 More importantly, its side and rear yard.

3 CHAIRPERSON GRIFFIS: Right.

4 MR. TUMMONDS: Because, you know, we think
5 the appropriate planning mechanism to put that
6 restaurant pad site in that location --

7 CHAIRPERSON GRIFFIS: Right.

8 MR. TUMMONDS: -- we would be back here
9 saying we're here today requesting a variance from the
10 rear and side yard requirements in order to place that
11 restaurant pad site in that location. So that is the
12 variance relief that we are requesting today in
13 addition to the other requirements of 2516. We
14 believe that we do generally comply, such as provide
15 a landscape plan, you know, provide evidence that the
16 traffic ingress/egress would work.

17 All of those requirements we think are
18 addressed in general in the special exception
19 standards for 2514. Kind of to wrap it all together
20 we have requested relief from 2516 but more
21 specifically, I guess, to bring attention to what this
22 Board is most concerned with, we did not draw the
23 theoretical lots to show how each of those are
24 satisfied, so that's what we wanted to bring to your
25 attention.

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1 We'll go back to -- I'll make my plea.
2 3203 talks about any combination of commercial
3 occupancies separated in their entirety, erected or
4 maintained in a single ownership shall be considered
5 as one structure. I know that the Office of the
6 Attorney General does not agree with me. The Office
7 of the Zoning Administrator does not agree with me,
8 but I truly believe that that section is created for
9 this exact scenario, so that you are not making --
10 basically, someone wouldn't necessarily have to come
11 before this Board to come back and do this 2516
12 relief.

13 I know that in the legal world we would
14 say, there is standard that bad facts make bad law.
15 So when you have -- the Zoning Commission recently
16 looked at this exact issue for the Department of
17 Transportation, their PUD on M Street. They tried to
18 say oh, yes, you know, our Department of
19 Transportation Headquarters Building, those are two
20 commercial occupancies. We have two buildings
21 stationed on this.

22 Well, I think that may have been tough for
23 the Zoning Commission to say. An office building with
24 one federal tenant as two commercial occupancies.

25 CHAIRPERSON GRIFFIS: Well, isn't that the

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1 distinguishing element between that and looking at
2 something like this? It was a single user. I mean,
3 I think what 3202.3 -- it's actually fascinating that
4 2516.4 references complying with 3202.3. So you would
5 almost think that you would stop at 3202.3 first.

6 MR. TUMMONDS: Yes.

7 CHAIRPERSON GRIFFIS: And if you couldn't
8 make that requirement, you would come in under 2516.

9 MR. TUMMONDS: Right.

10 CHAIRPERSON GRIFFIS: Which is obviously
11 what some opinions have sent you to, but the point
12 being there is an important aspect here of ownership.

13 MR. TUMMONDS: Yes.

14 CHAIRPERSON GRIFFIS: And then use.

15 MR. TUMMONDS: Yes.

16 CHAIRPERSON GRIFFIS: And I don't disagree
17 with you. We're here, so we might as well pursue it
18 as you set it up, but I don't disagree with the
19 reading of 3202.3. Otherwise, what is the scenario
20 where any combination of commercial occupancy
21 separated in their entirety, where is that invoked?
22 Where do you use that?

23 MR. TUMMONDS: You know, probably just to
24 my client for, you know, going through this but, you
25 know, what I heard was the scenario of if you had a

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1 strip commercial building, say like the one we have on
2 the upper right corner here, we're going to have 12,
3 15 tenants in that building.

4 CHAIRPERSON GRIFFIS: Right.

5 MR. TUMMONDS: If there was a scenario,
6 and I don't think this is really that applicable,
7 whereby a Starbucks wanted to buy that land, they
8 weren't going to lease their space, but they were
9 going to buy that land, well, then they would have to
10 have a separate lot in amongst this strip building so
11 they would have to be able to get relief. Well,
12 that's what this is for. I think in reality in most
13 cases what you have is --

14 CHAIRPERSON GRIFFIS: Right

15 MR. TUMMONDS: -- you don't have Starbucks
16 owning that lot. You have one owner who owns the
17 entire strip center and they have got 12 tenants and
18 they give them a lease.

19 UNIDENTIFIED SPEAKER: Fee simple.

20 MR. TUMMONDS: Exactly.

21 UNIDENTIFIED SPEAKER: Yes.

22 MR. TUMMONDS: So I mean, I think, you
23 know, that the interpretation of 3202.3 has become
24 very, very narrow if it only applies to the case where
25 you have a strip commercial center where there is fee

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1 simple ownership of, you know, the 12 different
2 tenants. I can't envision that occurring much.

3 CHAIRPERSON GRIFFIS: Right. Right.

4 MR. TUMMONDS: So I almost want to say
5 that, you know, this is again for another time, but
6 the interpretation of 3202.3 is very, very limited now
7 if we're going to follow that. Ms. Monroe could weigh
8 in if she feels otherwise, but I think 3202.3 should
9 absolutely apply to a scenario like this. I believe
10 this is what this is for.

11 CHAIRPERSON GRIFFIS: And that would
12 preclude the development of strip malls. We'll see.
13 Okay.

14 MR. TUMMONDS: I'm sorry, Ms. Monroe.

15 CHAIRPERSON GRIFFIS: Ms. Monroe?

16 MS. MONROE: I can't weigh in, because I'm
17 not the one who advised on this and I'm not giving an
18 opinion.

19 MR. TUMMONDS: Moving back to our case.
20 In addition to the Office of Planning's support for
21 both the special exception and variance relief
22 standards, this project also received the support of
23 ANC-8B as evidence by the letter of the chairperson of
24 ANC-8B who also happens to be the Single Member
25 District Commissioner for this property. That letter

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1 is attached as Exhibit H to our prehearing statement.

2 At this time there is no known opposition
3 to this case. We have three witnesses this morning to
4 provide brief statements and will be able to answer
5 any questions that you may have. Our first witness is
6 Brad Fennell on behalf of CHR LLC who will discuss the
7 goals for the commercial and residential development
8 of the Camp Simms property and the dialogue that has
9 occurred with the ANC and other surrounding community
10 organizations.

11 Our second witness is Barry Scher of Giant
12 Food, Inc. who will discuss Giant Food's requirements
13 and programmatic needs for this site. And finally,
14 our final witness is Trini Rodriguez to discuss the
15 landscape plans for this site.

16 CHAIRPERSON GRIFFIS: Good.

17 MR. TUMMONDS: With that I'll ask our
18 first witness to --

19 CHAIRPERSON GRIFFIS: Good. Okay. We're
20 going to have a couple of quick questions.

21 MR. TUMMONDS: Perfect.

22 CHAIRPERSON GRIFFIS: Then we're going to
23 run through these witnesses and get you out of here
24 for lunch, maybe. Now, the first question I have
25 though for clarification, how do the townhouses fit

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1 into this? Is this all on the same lot?

2 MR. TUMMONDS: Right now it's a single
3 lot. So this was a Large Tract Review application.

4 CHAIRPERSON GRIFFIS: So there's no other
5 additional relief for the R-5 development of the
6 townhouses on the same lot?

7 MR. TUMMONDS: They are single-family
8 detached homes. They will have -- you know, there are
9 going to be 75 homes. I believe there are 78 lots.
10 They are all on --

11 CHAIRPERSON GRIFFIS: How do we deal with
12 this in the whole discussion now of 2516? Aren't
13 these --

14 MR. FENNELL: Can I address that?

15 MR. TUMMONDS: Absolutely.

16 MR. FENNELL: Good morning. Brad Fennell
17 with William C. Smith and Company representing CHR.
18 CHR is going to acquire the property whole, the 25
19 acres. It is then going to transfer the residential
20 development to an entity in control, William C. Smith
21 and Company, and William C. Smith and Company is going
22 to move forward.

23 CHAIRPERSON GRIFFIS: But so there is
24 going to be some sort of subdivision?

25 MR. FENNELL: Correct. They are working

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1 on the subdivision currently.

2 CHAIRPERSON GRIFFIS: Okay. That's why
3 we're not --

4 MR. FENNELL: That's correct.

5 CHAIRPERSON GRIFFIS: Okay. Good. You'll
6 need to come back later when you -- you're already
7 here. Okay. Let's move ahead then.

8 VICE CHAIR MILLER: Mr. Chairman?

9 CHAIRPERSON GRIFFIS: Oh, I'm sorry. Ms.
10 Miller?

11 VICE CHAIR MILLER: I just want to
12 continue the discussion a little bit more as to how
13 we're proceeding with respect to a variance and
14 special exception, because I think that you made a
15 very significant observation with respect to 2516.4,
16 which is special exception relief, when the
17 requirements of 3202.2 and 3202.3 are met, and so I'm
18 wondering if we deal with that provision and if we
19 find that we're not bound by the opinion of ZA or the
20 Office of the Attorney General, even though we're
21 guided by them to a certain extent, if we find that
22 those requirements are met then, in fact, could we not
23 proceed just with respect to 2516.4 as a special
24 exception, as opposed to a variance?

25 MR. TUMMONDS: No. I'm sorry.

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1 VICE CHAIR MILLER: No, I'm interested in
2 your response.

3 MR. TUMMONDS: If you find that 3202.3
4 applies to this scenario, we're only here for a
5 special exception to extend the grocery store 34 feet
6 into that R-5-A Zone, because what 3202.3 says if it
7 applies is that we don't need 2516 at all.

8 CHAIRPERSON GRIFFIS: It's a matter-of-
9 right.

10 MR. TUMMONDS: It's a matter-of-right,
11 because we don't have more than one building on a
12 single record lot.

13 CHAIRPERSON GRIFFIS: Does that make
14 sense?

15 VICE CHAIR MILLER: And why doesn't 2516.4
16 apply, which references 3202.2 and 3202.3?

17 MR. TUMMONDS: You don't get to 2516.1,
18 2516.1 to 3, we don't even get into the 2516 realm.

19 CHAIRPERSON GRIFFIS: Good. Let's review
20 that again quickly, because I thought we had that.
21 But in the 3202.3, if we read it that this fits that
22 parameter, it is setting out the instances in which
23 you can have your numerous or several principal
24 buildings on a single lot. That's what it says. The
25 regulation says look, we don't allow this at all

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1 except for when it's a single ownership and different
2 commercial users, in exact words. So if they are
3 there, then they don't go to 25 whatever it is.

4 UNIDENTIFIED SPEAKER: 16.

5 CHAIRPERSON GRIFFIS: 16.4. But now, once
6 you're in 2516.4, it says you know what, but you got
7 to make sure that you are compliant with 3202 and 31
8 and a couple of other things in there. Does that make
9 sense?

10 To clarify, Mr. Tummonds is bringing this
11 application at this point under 2516 and it's a
12 special exception from 2516.4. Is that correct?

13 MR. TUMMONDS: Variance.

14 CHAIRPERSON GRIFFIS: It's a variance?

15 MR. TUMMONDS: Well, because -- I'm sorry.

16 CHAIRPERSON GRIFFIS: No, see, I thought
17 it was a special exception from 2516.4 with variance
18 relief of --

19 MR. TUMMONDS: Yes.

20 CHAIRPERSON GRIFFIS: Area variance relief
21 on the Giant store only. So it's not an area variance
22 for the entire parcel. So for instance, if we're
23 looking at the side yard or the rear yard area
24 variance, it's not every single building or it just
25 carries with it a blanket variance. Is that right?

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1 MR. TUMMONDS: No. 2516.4 would require
2 this property to create, I don't want to confuse it,
3 but a lot or we would need to show how a restaurant or
4 a sit down restaurant site would satisfy all of the C-
5 2-B Zoning Regulations, which would mean it is a 1.5
6 FAR building. So we would have to basically draw a
7 lot of, you know, 7,500 square feet. We would have to
8 show how that building on a lot that we draw would
9 satisfy rear yard, side yard, lot occupancy
10 requirements.

11 CHAIRPERSON GRIFFIS: So what you're
12 saying is if you invoke 2516.4, it is a special
13 exception to get that?

14 MR. TUMMONDS: To get that. If you were
15 to --

16 CHAIRPERSON GRIFFIS: But what you're
17 saying is you can't do it unless you can actually
18 comply. So you don't think you can get relief from
19 the area, use, height, bulk as it's indicated in 2516?

20 MR. TUMMONDS: Right.

21 CHAIRPERSON GRIFFIS: You cannot come in
22 with that special exception and a variance. It's
23 actually exactly on point, because you can't add up
24 your reliefs.

25 MS. MONROE: Can I join this colloquy

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1 here?

2 CHAIRPERSON GRIFFIS: Sure.

3 MS. MONROE: For a second. First of all,
4 Ruthanne, I think Mr. Tummonds is right. If you, as
5 the Board, decide that 3202.3 applies here and you are
6 the final arbiters of the interpretation of the
7 regulations no matter what anybody else says, then it
8 would be a matter-of-right. If you don't, then it has
9 to come under 2516. I think my interpretation is 2516
10 is a special exception in and of itself.

11 MR. TUMMONDS: Correct.

12 CHAIRPERSON GRIFFIS: It is.

13 MS. MONROE: And that means that the
14 applicant would have to meet all of the sections of
15 2516 all the way through .10 or whatever the last one
16 is, okay, which you're saying essentially are similar
17 to the ones in 2514. Okay. But they all have to be
18 met. The one that can't be met is 2516.4, because the
19 side yard and rear yard of the restaurant pad building
20 don't make it. Okay?

21 So they are looking for a variance from
22 that one specific provision of 2516. Just to make it
23 less clear, I think there is an inconsistency in the
24 regulations, because 2516.4 says you have to meet
25 3202.3 and if you meet 3202.3, you would never be

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1 here. And I just think it's an inconsistency, I
2 think, an error.

3 CHAIRPERSON GRIFFIS: Right.

4 MS. MONROE: I mean, I hate to say that.
5 So I would kind of read that out of 2516.4.

6 CHAIRPERSON GRIFFIS: Yes. The way I read
7 the 3202.3 was exactly so saying look, check this to
8 make sure you don't meet that and that way you're not
9 here and if you don't fall within that, then you come
10 back.

11 MS. MONROE: Right, 2516.

12 CHAIRPERSON GRIFFIS: So it's not as if
13 it's adding requirements of what you need to fulfill.

14 MS. MONROE: Right. You can't read it.
15 Right. You have to read it the way you're saying it
16 on order to make sense.

17 CHAIRPERSON GRIFFIS: Right.

18 MR. TUMMONDS: Right.

19 MS. MONROE: But 2516 is a special
20 exception. I mean, you know that.

21 MR. TUMMONDS: Yes.

22 MS. MONROE: But I'm just saying so you
23 have to meet, make that whole thing and then you get
24 the variance from the one rear yard, side yard, which
25 comes under 2516.4. And it's up to you guys to

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1 determine how you want to go.

2 MR. TUMMONDS: Yes. To make it real easy,
3 if you were to determine that 3202.3 applies to this
4 scenario, we are only here for a special exception to
5 allow the grocery store structure to encroach 33.95
6 feet into the R-5-A Zone.

7 COMMISSIONER JEFFRIES: Could you give me
8 an example of -- and I think you talked about a strip
9 center as actually satisfying section 3202. I mean,
10 in terms of there is one owner that owns all fee
11 simple and then simply, you know, leases structures to
12 various owners?

13 MR. TUMMONDS: You know, my example, the
14 one big project that I know of is Washington Harbor.
15 Washington Harbor, if you go down the middle of it
16 there are -- there's a commercial office building on--
17 I want to call it the east side. On the west side
18 there are the restaurants. There are the stores.

19 There is single ownership of that
20 building, of those two buildings, one owner, but we do
21 not have a lot line that runs right through the middle
22 of those two buildings, and then so you have the
23 building on the east side has its own lot and it
24 satisfies its lot occupancy, rear yard, side yard.
25 They say that entire structure that is Washington

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1 Harbor is a commercial occupancy separated in their
2 entirety, erected or maintained in single ownership.

3 CHAIRPERSON GRIFFIS: Wow.

4 MR. TUMMONDS: That is the one I know of
5 for sure and, you know, truthfully, with the question
6 about, you know, how many strip centers do you have
7 where you have individual tenants owning in fee
8 simple, I don't think that's realistic in the
9 marketplace.

10 CHAIRPERSON GRIFFIS: Yes, it would have
11 to be some sort of condominium situation.

12 COMMISSIONER JEFFRIES: Yes, that would be
13 a condo and that wouldn't work in a strip center.

14 CHAIRPERSON GRIFFIS: Right. Okay. Does
15 everyone understand that, 3202.3? We're at that
16 level, because now we need to get more confusing,
17 because the next confusing aspect is as we walk into
18 2516.4, which is a special exception if you meet all
19 the area requirements, and what you're saying is now
20 you want a variance for 2516.4, because you don't meet
21 the area requirements.

22 So you're doing away with the special
23 exception. You're saying I don't meet that one
24 paragraph, that one section?

25 MR. TUMMONDS: Correct, and I think that

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1 is why we addressed it in the -- in our discussion,
2 the prehearing statement, we discussed how we believe
3 that for the rear and side yard requirements for that
4 restaurant pad site, we went through the area variance
5 standards. We talked about how when you look at that,
6 it is extremely narrow and shallow. So how would you
7 put a building in that corner to satisfy the rear and
8 side yards?

9 CHAIRPERSON GRIFFIS: No, this is --

10 MR. TUMMONDS: Well, we can't. There is
11 a practical difficulty.

12 CHAIRPERSON GRIFFIS: I think it's almost
13 proving itself out looking at 2516.4 and how you would
14 have to come for relief if this is part of 3202.3.
15 Because my concern is that if we did that, if we give
16 a variance, then we're giving a variance from use,
17 height, bulk, open spaces, you know, all this stuff.
18 Basically, it just replans itself, you know, as
19 opposed to specifically. I mean, I know it's not
20 directly that.

21 MR. TUMMONDS: Right.

22 CHAIRPERSON GRIFFIS: Because we have
23 plans in front of us and that's what's going to be
24 approved, but shouldn't it go directly to the one
25 specific circumstance as opposed to the entire site

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1 not making that or we look at granting a special
2 exception and then a variance from those specific
3 areas of relief.

4 MR. TUMMONDS: That's fine. I mean, if
5 you wanted to do that, that's okay.

6 CHAIRPERSON GRIFFIS: I don't know. It
7 just seems to be -- actually, I have never seen the
8 regulations somewhat laid out that way.

9 BOARD MEMBER ETHERLY: Mr. Chair, if I
10 could, it might be appropriate perhaps to pause for a
11 moment and let that sink in. I'm going to err on the
12 side of being safe rather than sorry and just make a
13 disclosure.

14 CHAIRPERSON GRIFFIS: Oh, okay.

15 BOARD MEMBER ETHERLY: It's a somewhat
16 unusual case because of the presence of Mr. Scher, but
17 I do want to note for the record that by virtue of my
18 professional affiliation with a beverage company, Mr.
19 Scher's organization, Giant, is a significant customer
20 of ours and I want to note that disclosure.

21 I do not believe that that would impair my
22 ability to sit impartially on this case and hear all
23 of the facts and make the appropriate decisions, but
24 I wanted to make that disclosure for the benefit of
25 the record and my colleagues and open myself up to any

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1 questions if there are any. Once again, I am employed
2 by a beverage company, which is a large corporate
3 customer of Giant Food and I want to make that
4 disclosure.

5 CHAIRPERSON GRIFFIS: Good. Thank you.
6 Any questions from the Board Members? Mr. Tummonds,
7 do you have any difficulty in Mr. Etherly continuing?

8 MR. TUMMONDS: None.

9 CHAIRPERSON GRIFFIS: Does anyone here
10 present for this application or in the general public
11 have any questions of Mr. Etherly or concerns to raise
12 regarding him continuing on this case?

13 UNIDENTIFIED SPEAKER: Yes.

14 CHAIRPERSON GRIFFIS: Do you have a
15 question, sir? Good. Actually, you're going to have
16 to come up and have a microphone. Make yourself very
17 comfortable. I'm going to just have you state your
18 name and address for the record. And what I'm doing
19 is just taking questions right now on the statement
20 Mr. Etherly has said, whether you have any questions
21 of him of whether he could impartially hear this case.

22 UNIDENTIFIED SPEAKER: Oh, no.

23 CHAIRPERSON GRIFFIS: You don't have any
24 questions? Okay. And don't forget your questions on
25 the application, because you are going to have plenty

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1 of time coming right up. Okay.

2 BOARD MEMBER ETHERLY: Thank you, Mr.
3 Chair.

4 CHAIRPERSON GRIFFIS: Good. Let's move
5 ahead then, back to the fascinating realm of the legal
6 aspects of the Zoning Regulations and the relief being
7 sought today. Yes, Ms. Miller?

8 VICE CHAIR MILLER: Mr. Chairman, as we're
9 considering the applicability of 3202.3 to the facts
10 in this case, I'm wondering if it might be appropriate
11 to ask Office of Planning if they have an opinion with
12 respect to, in particular, whether an interpretation
13 that this situation would be covered under 3202.3,
14 would that subvert the lot control provisions of the
15 Zoning Regulations, which was the language in the
16 Zoning Commission order that is attached to the Office
17 of Planning report that was a basis for the finding
18 and that decision.

19 CHAIRPERSON GRIFFIS: So what you're
20 asking is directly at a zoning analysis interpretation
21 of if we went 3202, would that subvert the lot control
22 provisions in the regulations?

23 VICE CHAIR MILLER: Yes.

24 CHAIRPERSON GRIFFIS: Good question.

25 MS. BROWN-ROBERTS: I think we got the

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1 opinion, because I think we weren't sure ourselves of
2 the full interpretation of 3202, and I think that's
3 why we tried to get an interpretation from the Zoning
4 Administrator and also the Office of the Attorney
5 General. And as we stated in our report, I think we
6 wanted to remain neutral, because we just weren't able
7 to come up with an opinion on that.

8 VICE CHAIR MILLER: Thank you.

9 CHAIRPERSON GRIFFIS: Okay. Where are we
10 then?

11 VICE CHAIR MILLER: I think we're at a
12 juncture as to whether or not we want to decide this
13 issue up front.

14 CHAIRPERSON GRIFFIS: I think that's
15 probably best.

16 VICE CHAIR MILLER: Mr. Tummonds, I would
17 like to ask you one more question.

18 MR. TUMMONDS: Absolutely.

19 VICE CHAIR MILLER: As a follow-up on the
20 question that I asked Office of Planning with respect
21 to subverting the building lot control provisions of
22 the Zoning Commission -- of the Zoning Regulations.
23 Can you distinguish this case or address why this case
24 would not do that in your opinion?

25 MR. TUMMONDS: Yes.

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1 VICE CHAIR MILLER: And why it may be
2 different from the Zoning Commission order that's
3 attached to the Office of Planning report?

4 MR. TUMMONDS: Right. I mean, I think,
5 one, you do truly have I think what everyone would
6 agree are true commercial occupancies, a supermarket,
7 a sit down restaurant and a building that is going to
8 include 10 to 12 stores that are going to be true
9 retail type stores as opposed to the Zoning Commission
10 case for the Department of Transportation building.
11 There you had a single occupant, very large office
12 building.

13 Second, with regards to this case, this
14 project went through Large Tract Review, and so the
15 building lot control and whether these buildings are
16 properly sited and if there is enough open space and
17 traffic impacts, that is what the Large Tract Review
18 process does, is it creates and gives approval through
19 projects of subdividing large parcels or creating
20 large office buildings go through the Large Tract
21 Review process.

22 So I think for both of those reasons,
23 determining that this project satisfies the plain
24 meaning of 3202.3 does not subvert the Zoning
25 Regulations with regards to this case and, truthfully,

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1 if there is a concern about precedent, that next case
2 that comes up before you, you will be able to look at
3 and say is this truly commercial occupancy separated
4 in their entirety, single ownership?

5 And to the degree that that next case that
6 comes before you, someone tries to say this and it is
7 again, you know, three large law firms in two
8 commercial office buildings, then I think you can
9 point to well, the Zoning Commission has ruled in the
10 Department of Transportation case, that doesn't apply.
11 If it's someone coming up and saying we have, you
12 know, two commercial strip centers separated by, you
13 know, the front on the street separated by an entrance
14 to the parking lot on a single lot, that would be a
15 case where you would say yes, that is very similar to
16 BZA Application No. 17324, where you do have true
17 commercial occupancies that would not need to go
18 through the 2516 review.

19 BOARD MEMBER ETHERLY: Let me follow-up on
20 Mrs. Miller's question and you may have touched upon
21 this, but I kind of want to come back to it a little
22 more overtly and that's the issue of separation of the
23 buildings or in the context of the Zoning Order
24 attached to the Office of Planning report, the issue
25 of above ground communication.

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1 MR. TUMMONDS: Right.

2 BOARD MEMBER ETHERLY: Clearly, here you
3 would accept that there is no "above ground"
4 communication between the structures at issue here.

5 MR. TUMMONDS: That's correct. Right.

6 BOARD MEMBER ETHERLY: What does that do
7 for us or not do for us?

8 MR. TUMMONDS: Right. Well, if we were to
9 say take from our commercial, the strip commercial
10 building down to the Giant, if we were to say put a
11 covered walkway along that point, and this is the
12 covered walkway goes down there, we do something
13 similar and create a covered walkway along Alabama
14 Avenue.

15 BOARD MEMBER ETHERLY: Yes.

16 MR. TUMMONDS: We now then have an above
17 grade connection between those three structures on
18 that site. We would then be able to say, based on
19 past interpretation of Zoning Regulations from the
20 Zoning Administrator, we now have a single building on
21 a record lot. That would be one way to address the
22 issue. Well, obviously, having a covered walkway
23 along Alabama Avenue, we don't need that.

24 BOARD MEMBER ETHERLY: Yes, well, I think
25 part of the challenge here, and I think part of the

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1 challenge is perhaps when we think traditionally what
2 a strip mall used to be and perhaps used to be a
3 single row along a certain amount of street frontage
4 that had five or six different stores attached to it.

5 MR. TUMMONDS: Yes.

6 BOARD MEMBER ETHERLY: But we're looking
7 at, I don't want to say a model, variations on that
8 theme now.

9 MR. TUMMONDS: Yes.

10 BOARD MEMBER ETHERLY: Where you're
11 talking separate structures.

12 MR. TUMMONDS: Right.

13 BOARD MEMBER ETHERLY: A little more of a
14 different treatment in terms of just the landscaping
15 and the whole presentation of it.

16 MR. TUMMONDS: Right. And I think what
17 maybe the answer to is that, obviously, this is a very
18 large site.

19 BOARD MEMBER ETHERLY: Yes.

20 MR. TUMMONDS: And as we know, there's not
21 that many sites like this in the District.

22 BOARD MEMBER ETHERLY: This is true.

23 MR. TUMMONDS: And so most of the time,
24 you know, you would not have this amount of area
25 available to be developed.

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1 BOARD MEMBER ETHERLY: Yes.

2 MR. TUMMONDS: In one project.

3 BOARD MEMBER ETHERLY: Yes.

4 MR. TUMMONDS: So typically, you would
5 have just that one strip center just because of the
6 ability to accumulate that much land.

7 BOARD MEMBER ETHERLY: And just for the
8 benefit of understanding the interpretation, this
9 perhaps has no import, but just for my own
10 visualization and it's a project if I recall from
11 review of the resume, our architect is familiar with,
12 Potomac Yard. What would you call Potomac Yard? Is
13 that a strip mall?

14 MR. TUMMONDS: Sure. I mean, I guess.

15 BOARD MEMBER ETHERLY: Okay.

16 MR. TUMMONDS: I mean, in, you know --

17 BOARD MEMBER ETHERLY: Our current --

18 CHAIRPERSON GRIFFIS: Let me put it into
19 some context as to why we're throwing it out there,
20 because Mr. Etherly is exactly right what we need to
21 have to wrestle with in Executive Session out here.
22 Of course, the Zoning Commission's Order talks about
23 strip malls. That this was, in fact, written for
24 strip malls.

25 MR. TUMMONDS: Yes.

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1 CHAIRPERSON GRIFFIS: Strip mall is not
2 defined in the regulations. And we have all talked
3 off the record and now on of okay, so what is a strip
4 mall? Show me one. Show me one and how it lays out.
5 The one that has now been invoked here, actually has
6 numerous principal independent buildings and
7 structures. But it seems to me that the legislative
8 history shows that the Zoning Commission took out
9 those aspects of our traditional kind of car park
10 strip mall, that division wall that is in common and
11 moved it into the realm of what we're looking at more
12 today, which is separate buildings all around a very
13 large lot.

14 Now, all of this could be solved if you
15 developed this differently and put it all in one
16 structure on the street edge to find your street edge
17 and put residential on top of it, but that would take
18 us more of the day to get into. So back in direct
19 purpose here, it seems to me I still have not been
20 persuaded otherwise that we're not in 3202.3. Even
21 with -- and I think there is enough to differentiate
22 as Mr. Tummonds and Ms. Miller and now Mr. Etherly are
23 pointing to differentiate this case from the Zoning
24 Commission Order 03-05.

25 BOARD MEMBER ETHERLY: I would agree, Mr.

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1 Chair.

2 CHAIRPERSON GRIFFIS: Ms. Monroe, last
3 chance to save us. I mean, to comment.

4 MS. MONROE: Sorry, we were actually
5 discussing something else, but I don't have anything
6 further to say, unless you would like to go into the
7 anti-room and discuss this among yourselves for a
8 while and come up and, you know, think about it. I
9 told you the traditional interpretation of OAG and the
10 Zoning Administrator is that 3202.3 does not apply
11 here. But the language looks like it might and it's
12 up to you guys to determine it, I mean.

13 MR. TUMMONDS: I mean, maybe more toward
14 what you said, the legislative history of what is a
15 strip mall, you know. A strip mall in 1970 was one
16 thing. A strip mall in 2005 is something completely
17 different. And so I think, you know, it's that
18 definition of what is a modern strip mall? I would
19 say it's this.

20 BOARD MEMBER ETHERLY: Let me ask you a
21 weird question, Mr. Tummonds. And I know Mr. Jeffries
22 wants to get in, but this is the only way I can
23 characterize it and it's going to be unusual.

24 MR. TUMMONDS: Yes.

25 BOARD MEMBER ETHERLY: I think this is a

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1 very appropriate question, because we're trying to
2 sort out what's the best way to proceed with this
3 application.

4 MR. TUMMONDS: Yes.

5 BOARD MEMBER ETHERLY: Put yourself in the
6 Zoning Administrator's shoes for a moment and perhaps
7 what would be the worst case under an interpretation
8 that you are seeking, under 3202.3? You know, I'm
9 asking to an extent, argue against yourself for a
10 moment. But what's the worst case scenario here?
11 What would be your fear?

12 MR. TUMMONDS: The worst case is the EPA,
13 not the Department of Transportation. The EPA comes
14 back and says we have got this brand new big
15 commercial office building site. It is going to be --
16 we're going to put it, you know, down at Buzzard Point
17 in CR Zone. We are going to have these two big
18 buildings. We have to create a campus. We are going
19 to have, because they are owned by the same owner, the
20 Federal Government, these are two commercial
21 occupancies, separate in their entire record or
22 maintaining a single ownership.

23 So therefore we should be able to build,
24 you know, these two say 500,000 square foot office
25 buildings down there. It would have to go through

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1 Large Tract Review, just like this, and they could say
2 oh, then now, we don't have to show how the one
3 500,000 square foot office building satisfies all the
4 zoning criteria.

5 BOARD MEMBER ETHERLY: Okay.

6 MR. TUMMONDS: That to me is their concern
7 is that people are going to use this for federal
8 office buildings, large law firm office buildings, but
9 to try and use that type of thing where, you know,
10 maybe the problem is it's not -- it's commercial
11 occupancies. You know, is an office building a
12 commercial occupancy? Yes. But that would be, I
13 think, the Zoning Administrator and the Office of
14 Attorney General's concern. It's that you're taking
15 a situation where it was certainly not intended to
16 really, I think, apply to office buildings. It was
17 intended to apply to strip commercial centers. I
18 believe this is a strip commercial center. And I
19 don't think --

20 MS. MONROE: Chairman, can I say one other
21 thing kind of along those lines? I think that one of
22 the main controls in zoning is lot control and I think
23 that you have to be careful to interpret it out of
24 existence. And I'm not trying to argue against Mr.
25 Tummonds. I'm just saying that's on the other side.

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1 Every principal structure is supposed to have a lot
2 and that's why 3202.3 is there. And that exception
3 for the commercial occupancies is an exception. So
4 you have to read it either loosely or narrowly as you
5 see fit.

6 Can I ask one, too, just one question, I
7 guess, of the applicant? I just want to be clear on
8 this completely. This whether we go into 2516 or
9 3202.3, we're only talking about the commercial
10 structures, right? Because this is all one lot, as I
11 recall. All that residential use there is only one
12 lot.

13 MR. TUMMONDS: Right.

14 MS. MONROE: And none of this -- I just
15 want to be clear that none of the relief you are
16 getting today is going to go to those residential
17 structures.

18 MR. FENNEL: Correct.

19 MS. MONROE: Okay.

20 MR. FENNEL: Upon when we acquire the
21 property, in fact, the surveyor is drawing up the
22 plats right now for the separation.

23 MS. MONROE: Okay.

24 MR. FENNEL: And we have two different
25 entities that are going to develop the sites as a

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1 matter-of-course in order to respond to the RFP. The
2 District felt it was necessary that we acquire the
3 property as CHR and then could subdivide. And that's
4 what we're going to do.

5 MS. MONROE: It's fine with me. I just
6 wanted this order that gets written, whoever ends up
7 writing it, I want to make sure that we specify that
8 any relief that's going to the lot as a whole, it only
9 applies to the commercial building. It doesn't
10 include the rest of the lot, the residential
11 structures.

12 MR. TUMMONDS: Absolutely.

13 MS. MONROE: Okay.

14 MR. TUMMONDS: Yes.

15 MS. MONROE: Good. Thanks.

16 COMMISSIONER JEFFRIES: Mr. Tummonds, I
17 just wanted to say, I know that strip center is really
18 not a defined term in our regs here, but I have to
19 tell you just intuitively, I don't see this as a strip
20 center from how historically I understand it to be.

21 MR. TUMMONDS: Yes.

22 COMMISSIONER JEFFRIES: You know, and I
23 know that 3202 doesn't talk about, you know, strip
24 center.

25 MR. TUMMONDS: A strip center, right.

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1 COMMISSIONER JEFFRIES: But just as a
2 point of reference, I mean, you know, historically I
3 understand strip centers to be, I might say that,
4 either shops that you're going to put at the upper
5 right hand side. You might say that that aspect of
6 the overall development is a strip center, just
7 historically.

8 MR. TUMMONDS: Yes.

9 COMMISSIONER JEFFRIES: But I have some
10 ambivalence around sort of, you know, how we're
11 looking at this.

12 MR. TUMMONDS: Right. And I think my only
13 response to that would be is that this is obviously
14 not a typical site just because of it's huge size and
15 the ability to do this site in one project.

16 COMMISSIONER JEFFRIES: Right.

17 MR. TUMMONDS: And so most of the times we
18 see, you know, that you would have truly a landowner
19 where just the amount of land that's ready to build
20 that one strip site.

21 COMMISSIONER JEFFRIES: Right.
22 Absolutely.

23 MR. TUMMONDS: And then someone else comes
24 by and then they build the restaurant later.

25 COMMISSIONER JEFFRIES: Yes, but you would

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1 subdivide it out.

2 MR. TUMMONDS: Exactly.

3 BOARD MEMBER ETHERLY: And I'll note just
4 as a follow-up to Mr. Jeffries that I'm perhaps
5 somewhat a little more comfortable with the 3202
6 interpretation, but I'm coming at it more from perhaps
7 just a philosophical posture of wanting to read the
8 regulations in such a way as to be sensitive to the
9 context that we find ourselves in.

10 I wouldn't necessarily want to see an
11 outcome where for every new iteration of a strip mall
12 or every new iteration of commercial development as we
13 see it going into, you know, increasingly residential
14 areas that we have to necessarily have a Zoning
15 Commission language change to kind of keep up with
16 that. I see the flexibility in the language to
17 contemplate that type of interpretation. That's the
18 direction in which I'm heading, Mr. Chair.

19 CHAIRPERSON GRIFFIS: Thank you.
20 Excellent.

21 MS. MONROE: Mr. Chair, could I have one
22 last word on this or another word on the subject?
23 This is a 10.5 acre site, but if you had a 50 acre
24 site, you could end up using 3202.3 to put in, you
25 know, lots of commercial occupancies and make it one

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1 lot.

2 CHAIRPERSON GRIFFIS: All with one
3 building.

4 MS. MONROE: Because there's no lot size
5 designated in the regulations anywhere, so it could be
6 any size. And I don't know if that's too much
7 flexibility. That's kind of the worst case scenario.

8 MR. TUMMONDS: But then that would also be
9 a Large Tract Review.

10 MS. MONROE: Right.

11 MR. TUMMONDS: And I mean, that's --

12 MS. MONROE: Right. Those are the
13 safeguards here.

14 CHAIRPERSON GRIFFIS: And what your point
15 is that the Large Tract Review is another, if not
16 another, very important aspect of insuring the lot
17 control mechanism.

18 MR. TUMMONDS: Absolutely. Truly, that's
19 what the Large Tract Review process was created for.

20 CHAIRPERSON GRIFFIS: Right.

21 MR. TUMMONDS: When you were having these
22 big huge lots of former estates, you know, along
23 Foxhall Road, Foxhall Crescent, because they were
24 taking these little pipe-stem lots and creating these
25 big property zones then. It was because of those

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1 types of things where they could point to the fact of
2 saying, you know, yes, I'm subdividing 20 acres along
3 Foxhall Road, but I have my minimum width requirements
4 and so I can build this 100 unit residential
5 community.

6 The Large Tract Review process was to say
7 we need to be able to look at those types of
8 buildings, those types of projects for building lot
9 control, so that we can take a kind of holistic view
10 to see what are the traffic, environmental, land use
11 impacts by having this subdivision of these large
12 properties. I would, you know, maybe delve
13 Commissioner Jeffries a little more. Ms. Rodriguez
14 talked about --

15 MS. RODRIGUEZ: Mr. Chairman, if I may
16 just add, I practice in the area of land planning in,
17 you know, all over the Washington area and out in the
18 country and these issues happen in other
19 jurisdictions. What's unique here in Washington is
20 that as a city, it's a lot more urban. And a strip
21 mall is really, in general, more of a suburban model.
22 Interestingly enough, there are a couple of things
23 that are happening here.

24 One, the site is actually extremely and
25 awkwardly shaped. It's so difficult that if, you

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1 know, the developers and the retail developer had the
2 druthers, they would reorganize this to follow more
3 closely the principles of a strip mall, which are
4 basically what I wanted to say.

5 It is that the components of a strip mall
6 are there, which are an anchor, which in this
7 particular case is a grocery store, and in-line
8 retailers that basically attach, generally attach
9 themselves to the anchor, because what happens is the
10 trip is generated to the store and you happen to tag
11 along other things with it. So if, you know,
12 everything worked well here, we would have had a
13 shopping environment here that would have been shaped
14 just slightly different.

15 To be honest with you, we try many, many
16 rations to kind of shape it more that way. Now, all
17 that being said, the shops --

18 CHAIRPERSON GRIFFIS: But the economic
19 layout isn't necessarily a definition of a strip mall,
20 I mean.

21 MS. RODRIGUEZ: No, there are -- and there
22 is evolution in those.

23 CHAIRPERSON GRIFFIS: Right.

24 MS. RODRIGUEZ: As you know. But the
25 components of it are very important, which are here.

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1 CHAIRPERSON GRIFFIS: I see.

2 MS. RODRIGUEZ: And I guess what I was
3 going to say, and Mr. Chairman sort of started that,
4 is that as it is evolving it's reshaping itself. I
5 mean, sometimes these in-line stores are in different
6 locations and then they also have these additional
7 users which are what they usually call pads, pad size,
8 which is what this restaurant here would be. Except
9 that we're trying to push it up to the street to
10 create more of a street environment.

11 CHAIRPERSON GRIFFIS: Yes.

12 MS. RODRIGUEZ: So to summarize, I mean,
13 the elements are there.

14 CHAIRPERSON GRIFFIS: It's the next
15 thousand feet, we wonder about. Okay.

16 VICE CHAIR MILLER: I just want to quickly
17 follow-up. The components that you see that are
18 significant for designing a strip mall are an anchor,
19 what else did you say, additional?

20 MS. RODRIGUEZ: In-line retailers.

21 VICE CHAIR MILLER: In-line retailers.

22 MS. RODRIGUEZ: Yes, they are usually in-
23 line, because what happens is like, you know, even the
24 retail in the city, you really want to be with others,
25 the critical mass, because people don't shop for just

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1 one thing. You go in and you do your drugs and your
2 groceries and your cleaners, well, drug store. I
3 didn't mean it that way. Drug store.

4 CHAIRPERSON GRIFFIS: You have your legal
5 pharmaceuticals is what you mean.

6 MS. RODRIGUEZ: This comes with a bias
7 when you speak another language.

8 CHAIRPERSON GRIFFIS: Right.

9 MS. RODRIGUEZ: Because in another
10 language that's the same word of a drug store. But
11 your medicines, I meant, I may say now.

12 VICE CHAIR MILLER: What do you mean by
13 in-line, in-line retailers?

14 MS. RODRIGUEZ: They are attached to each
15 other, so they are one next to each other in-line and
16 they are usually very small. Let me add this, that's
17 a good clarification. Your anchor is usually your
18 largest square footage footprint. And then all the
19 other stores are usually very small. They range
20 between 1,500 and 2,500 square feet. They are little
21 slices and they cannot live on their own. And that's
22 why this regulation would be applicable, because they
23 really need to be attached to others.

24 COMMISSIONER JEFFRIES: Well, I mean, so
25 typically, what would happen here is that let's say if

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1 you took the restaurant pad and then the several
2 smaller retailers that are going to be at the top of
3 that and just brought them down and attached them to
4 the Giant, they would then represent in-line
5 retailers. Board Member, Ruthanne?

6 VICE CHAIR MILLER: No, well, I just
7 wonder is the point that this is like a strip mall or
8 that it isn't like a strip mall?

9 MS. RODRIGUEZ: Well --

10 CHAIRPERSON GRIFFIS: It functions like
11 one, but isn't laid out like one.

12 COMMISSIONER JEFFRIES: Right.

13 CHAIRPERSON GRIFFIS: Is that correct?

14 MS. RODRIGUEZ: That's correct.

15 COMMISSIONER JEFFRIES: Yes, but I would
16 actually question about the whole notion of
17 functionality though. I mean, because what's the --
18 I mean, this is not quite pedestrian friendly here.
19 I mean, you can go to that Giant and park your car.
20 You have a little bit of a walk to go to other stores.
21 I mean, location is important as it relates to, you
22 know, a fully functioning shopping center, which by
23 the way I differentiate that from a strip center.

24 VICE CHAIR MILLER: Right.

25 COMMISSIONER JEFFRIES: But and then also

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1 I do agree with you that given sort of the District of
2 Columbia and sort of urban locations and in-fill
3 construction that you can't always do that. But I
4 would question just in terms of just how functional
5 this would be, you know, if you compare it to
6 historically how these shopping centers have grown up
7 and how the in-line retailers really do feed off the
8 anchors.

9 MS. RODRIGUEZ: I think, you know, you're
10 making a very good point. The fact is that these
11 shops have lived there. I mean, the existing shops
12 have lived there even without the anchor and they are
13 heavily used, actually because they are neighborhood
14 serving. One important thing that I think is going to
15 happen here and like many other places is that a lot
16 of people are going to walk to the shops. And many
17 will be walking even to the grocery store. So that
18 will be the way, if you can point to it, people will
19 walk, you know, in front of the stores and down to the
20 shopping. So a lot of this use here --

21 COMMISSIONER JEFFRIES: What's the
22 distance?

23 MS. RODRIGUEZ: One second and I'll tell
24 you.

25 COMMISSIONER JEFFRIES: And then also walk

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1 me --

2 CHAIRPERSON GRIFFIS: It's about 150 feet.

3 COMMISSIONER JEFFRIES: Yes, you don't
4 have to -- I mean, and then in terms of the homes, you
5 don't expect them to walk?

6 MS. RODRIGUEZ: These ones here?

7 COMMISSIONER JEFFRIES: Yes. Take your
8 hand down and move to your right, left, yes.

9 CHAIRPERSON GRIFFIS: Right. None of
10 those can make it there.

11 MS. RODRIGUEZ: Well --

12 CHAIRPERSON GRIFFIS: Actually, I can't
13 have you talk over there, because you're not on a
14 microphone. All right. I think we need to come back
15 a little bit.

16 COMMISSIONER JEFFRIES: Yes.

17 CHAIRPERSON GRIFFIS: Savannah Street, is
18 that opening up again across the property?

19 MR. TUMMONDS: It is not.

20 CHAIRPERSON GRIFFIS: It is not. It's
21 closed up. This is all very interesting, but I still
22 have to move the Board back to where we would have to
23 decide whether it was a shopping center or strip mall
24 and how that would go directly into the regulations,
25 unless we're going to write the new text. Even my

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1 point is we're not going to be able to solve it here.

2 COMMISSIONER JEFFRIES: Exactly.

3 CHAIRPERSON GRIFFIS: Okay. It brings us
4 back to the point of whether we are under 3202.3 or
5 2516.4, and so we have to look at with the Zoning
6 Commission's Order also in the past procedure which we
7 have offered great reliance on in terms of the Zoning
8 Administrator, which would put us to 2516.4 or whether
9 or reading of that Zoning Commission Order 03-05 and
10 our reading of the regulations would put us into
11 3202.3. Let's hear last comments on that.

12 VICE CHAIR MILLER: All right. I guess
13 I'll lay out where I am on this. First of all, it
14 looks to me like this situation falls within the plain
15 meaning of the regulation, the plain words of the
16 regulations. I have heard that the Office of the
17 Attorney General and the Zoning Administrator don't
18 believe so, but we don't have anything in the record
19 to guide us as to why not. Office of Planning has
20 said that they are taking a neutral position.

21 But I believe I can interpret correctly
22 that they certainly didn't say that an interpretation
23 finding this application falls within the regulations
24 averts the lot control provisions of the Zoning
25 Regulations. I think that the facts of this case are

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1 distinguishable from the Zoning Commission Order 03-
2 05C that we have been trying to grapple with.

3 In this case, we do have different
4 commercial occupancies, even though we have one owner,
5 we have separate tenants in each building. Whereas,
6 in the Zoning Commission Order there was just one. I
7 think it makes sense in this case to apply 3202.3
8 here. When we looked at the alternative, it seems
9 rather convoluted and messier and just doesn't fit as
10 well.

11 So I think we have also been trying to
12 deal with the whole strip mall issue, but I don't
13 think that that's a definitive factor, because it's
14 not within the regulations and I'm even having trouble
15 understanding how it relates to 3202.3, since in many
16 cases strip malls are attached and we're talking about
17 separate buildings.

18 CHAIRPERSON GRIFFIS: It seems almost as
19 if the Zoning Commission was looking at
20 differentiating between commercial office use, as Mr.
21 Tummonds is saying, you know, law offices and towers
22 and Crystal City type thing, and retail. So it seems
23 like maybe someone caught on the word of strip mall as
24 it was to be analogous to retail use. Again, that's
25 not directly in the regulations, but it seems to be

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1 fairly clear in reading and what we are trying to
2 differentiate here that that would be a much clearer
3 interpretation.

4 Okay. Anything else? Any other opinions?
5 Then let me just hear any opposition to continuing.
6 Yes, Mr. Jeffries is going to speak.

7 COMMISSIONER JEFFRIES: Well, no, I just
8 in terms of what Mr. Tummonds spoke about in terms of
9 the point of the Large Tract Review and what it is
10 supposed to do as sort of a first step in this
11 process, I thought was somewhat compelling to get me
12 to this 3202. So I'm sort of getting a little bit
13 more comfortable here. And I do not feel that the
14 Zoning Commission, the case that's attached to the
15 Office of Planning's report really relates to what we
16 have at hand here.

17 CHAIRPERSON GRIFFIS: Excellent.

18 BOARD MEMBER ETHERLY: I'm comfortable
19 moving forward, Mr. Chair, as my colleague, Mrs.
20 Miller, has laid out. I think it's the appropriate
21 direction and I think it to an extent moves in the
22 same spirit as some of the language in the Zoning
23 Commission's Order as it spoke to in particular the
24 issue of that last sentence of 3202.3 and the
25 reasoning behind why it was changed to the present

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1 language, and that was as the Zoning Commissioner
2 wrote, to avoid an anomalous result.

3 And I think, in essence, we're talking
4 about a very similar situation here today where we
5 don't find another kind of incongruity, so to speak,
6 by simply adhering in a, you know, overly formulated
7 way to language. So I'm in agreement with Mrs.
8 Miller's direction.

9 CHAIRPERSON GRIFFIS: Good. Thank you.
10 Others, Mr. Mann?

11 BOARD MEMBER MANN: I'm also in agreement
12 with what I have heard. And I think you could get
13 into a lot theoretical discourse about the meaning of
14 a strip mall. I mean, you know, you probably turn to
15 something like ICFC's definition of a mall or strip
16 mall, but I don't think that we need to do that,
17 because I think that the components are there that do
18 contribute to its characteristics as a strip mall.

19 CHAIRPERSON GRIFFIS: Excellent.
20 Excellently said. Okay. Others? It seems to be a
21 consensus of the Board to continue this under 3202.3,
22 which would move us only to the relief of the zoned
23 boundary line. Is that correct, Mr. Tummonds?

24 MR. TUMMONDS: That's correct. We are
25 here this morning to present a special exception

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1 application to extend the grocery store use into the
2 R-5-A District by 33.95 feet. That is the sole relief
3 we will need in moving forward. With that, I will
4 call our first witness.

5 CHAIRPERSON GRIFFIS: Let's do it.

6 MR. TUMMONDS: Brad Fennell from CHR LLC.

7 MR. FENNELL: Good morning. I'm a senior
8 vice president with William C. Smith and Company. CHR
9 LLC is a joint venture between three different
10 organizations, William C. Smith and Company, Mid City
11 LLC and East of the River CDC. In 2000, the District
12 put out an RFP for the redevelopment of Camp Simms.
13 We responded and were awarded the rights to develop
14 the property in May of 2001.

15 William C. Smith and Company has a strong
16 interest in Ward 8. We have been managing and
17 developing property probably for in excess of 30
18 years. We have a number of communities that are
19 adjacent to Camp Simms site, about 1,500 apartment
20 units that we own and operate and manage, actually
21 bordering the east side of the site. Mid City is also
22 very active in the ward. They have a large HOPE IV
23 project that is happening currently just across the
24 street to the north of the site. And obviously East
25 of the River speaks for itself in terms of its

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1 interest in seeing development happen within East of
2 the River.

3 In responding to the RFP, it was our goal
4 to develop a neighborhood retail center that was
5 anchored by a supermarket and that provided
6 convenience and shopping opportunities for residents
7 within the ward. It's well known that Ward 8 is the
8 only ward in the city that doesn't have a supermarket.
9 It also has a lack, in general, of retail
10 opportunities. And beyond the retail opportunities,
11 it has a lack of employment opportunities.

12 So by coming together and working to bring
13 about the redevelopment of the shops at Ashford Court,
14 the shops at Park Village, excuse me, we sought to
15 respond to the District's desire to create retail
16 opportunities and create economic job opportunities
17 for residents within the ward. Furthermore, we saw an
18 opportunity to address the development of housing.
19 Specifically, we wanted to bring about the development
20 of sort of a move up product, single-family detached.

21 A number of years ago back in '97/98, this
22 Smith Company took on a project known as Oxen Creek,
23 which was the first development of townhome for sale
24 product in this ward, probably in decades. It was a
25 large scale 210 unit property and we were quite

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1 successful in attracting affordable home ownership
2 opportunities for residents within the ward. Over
3 half of the purchasers at Oxen Creek were current
4 residents of southeast.

5 In looking at the ward as a whole, seeking
6 opportunity to provide the next step of housing to
7 attract diversity of income as well as to provide move
8 up opportunities for residents who currently reside in
9 the ward was our overall goal for the residential
10 development. So CHR is looking at the 25 acre
11 redevelopment of Camp Simms by taking it in two parts.
12 The first part is the 10.5 acres which are known as
13 the shops at Park Village and it sits on the upper
14 half of the site. The lower half of the site is 14
15 acres and it's laid out as 75 single-family detached
16 houses.

17 The site, I should say, is challenged with
18 a severe topographical slope that cuts between the two
19 elements and making it difficult to attach the lower
20 residential piece with the commercial structure. In
21 moving the plans forward, we have sought to create a
22 site plan that accommodates our anchor supermarket,
23 also provides the greatest amount of retail clustered
24 within a single structure, so we're looking at taking
25 down part of the existing Parkland Shopping Center and

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1 basically attaching about a 10,000 square foot
2 addition to that structure and also looking to lay out
3 a pad opportunity for a sit down restaurant.

4 There is no sit down restaurant
5 opportunity within the ward and we're very bullish on
6 the fact that now is the time. This is an opportunity
7 and we're out heavily marketing the site looking to
8 attract that sit down retailer, sit down restaurant
9 that would be on the far left hand or the western
10 portion of the site.

11 I should say that in looking at the
12 revisions to the project since we first conceived and
13 conceptualized the plan, we agreed to lease terms with
14 Giant. And Giant came back and actually increased the
15 size of the store that they had initially thought that
16 they were looking at. And so that gave us an
17 opportunity to look at going back and discussing with
18 the community and discussing with the Office of
19 Planning the different configurations in order to meet
20 that layout.

21 So the original plan that was approved
22 under Large Tract Review the Giant store was about a
23 55,000 square foot store. Today it's about a 65,000
24 square foot store. And we have moved the store from
25 the west to the east and we have flipped the service

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1 aisle in order to accommodate the larger store. And
2 we have made several improvements. The service drive
3 now has a looped drive, so that the trucks have an
4 easier time to come in and to get access to the
5 loading berth. We have also --

6 CHAIRPERSON GRIFFIS: And they get a nice
7 view of the houses as they go by, too, right?

8 MR. FENNELL: Yes, a little bit, sure. We
9 have also taken the approach of trying to center the
10 loading berth so that it wasn't in -- before it was --
11 actually, the loading berth was centered back towards
12 the houses.

13 CHAIRPERSON GRIFFIS: Okay.

14 MR. FENNELL: So by doing that, while you
15 can have a view perhaps, you are actually pushing it
16 away.

17 CHAIRPERSON GRIFFIS: Well, my humor
18 always has a purpose. Listen, there's some question
19 in looking at this and, you know, not everyone up here
20 is an architect --

21 MR. FENNELL: Sure.

22 CHAIRPERSON GRIFFIS: -- designer or a
23 landscape architect. So they are looking at a flat
24 plan.

25 MR. FENNELL: Yes.

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1 CHAIRPERSON GRIFFIS: And when I say that,
2 it is true that that is the area of the retaining wall
3 that Giant is sitting up higher and the houses are
4 below.

5 MR. FENNELL: Yes, correct.

6 CHAIRPERSON GRIFFIS: So it also lends
7 into, because this is what you are telling us, and
8 let's see if it's true, the lighting and stuff will be
9 buffered, because of the grade changes and also the
10 setback.

11 MR. FENNELL: Right.

12 CHAIRPERSON GRIFFIS: So that's actually
13 allowing a major setback of the structure and the
14 loading facilities away from it and so you do have
15 that big turnaround.

16 MR. FENNELL: Correct. And the building
17 itself is no longer encroaching as close on the
18 residential units.

19 CHAIRPERSON GRIFFIS: Right.

20 MR. FENNELL: Because it has moved to the
21 east.

22 CHAIRPERSON GRIFFIS: Good. And I don't
23 expect that as was indicated that you have probably
24 been through numerous iterations of how you site this.

25 MR. FENNELL: Yes.

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1 CHAIRPERSON GRIFFIS: It's actually with
2 the growing square footage of a single user. A quick
3 question. Are you maxing out the FAR on this site?

4 MR. FENNELL: Yes.

5 CHAIRPERSON GRIFFIS: Did you look at
6 actually putting several levels on top instead of a
7 single level?

8 MR. FENNELL: Meaning collapsing the floor
9 plan?

10 CHAIRPERSON GRIFFIS: Or putting 1,000
11 units on top of Giant? No?

12 MR. FENNELL: No.

13 CHAIRPERSON GRIFFIS: Okay.

14 MR. FENNELL: We did not.

15 CHAIRPERSON GRIFFIS: That's all right.
16 And that's not what we're here to discuss today. I
17 was just interested in whether that had been looked at
18 or not. Okay. Excellent.

19 MR. FENNELL: Additionally, and I'll just
20 wrap up by saying that we have spent a good deal of
21 time out within the community, both ANC-8B, ANC-8E,
22 which borders the west of the site, Congress Heights
23 Civic Association, as well as numerous other groups,
24 the Ward 8 Business Council, residents within the
25 Villages of Parklands and Green Elementary School are

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1 all groups that we have contacted, groups that we have
2 gone and visited on multiple occasions to share with
3 them our plans and to describe the project as a whole.

4 CHAIRPERSON GRIFFIS: Fabulous.
5 Excellent. And I don't disagree. I think you ought
6 to be applauded, first of all, for taking on what, is
7 seemingly now that we have it in front of us all drawn
8 up, is not complex, but clearly a complex development
9 scenario for numerous reasons. One, obviously,
10 finding the tenants, getting your group together that
11 would actually finance all this and then laying it out
12 correctly.

13 We will have 5 if not 10 different
14 opinions up here of what we are looking at, but we
15 will stay directly focused on exactly what we are
16 reviewing. But it is a difficult endeavor and you
17 should be applauded on all the other work you are
18 doing in that area. Every neighborhood could use at
19 least one supermarket, right? Some of which we should
20 be able to walk to. Okay. Any other questions?
21 Follow-up, Mr. Etherly?

22 BOARD MEMBER ETHERLY: Thank you very
23 much, Mr. Chair. Just very briefly. So just to recap
24 with respect to the issue of loading docks, having had
25 some experience with this, the illustration that you

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1 have on the lower easel represents essentially the
2 advantage point from these properties here looking
3 back in that direction. Is that correct?

4 MS. RODRIGUEZ: Yes.

5 BOARD MEMBER ETHERLY: I see. So kind of
6 from this side looking there. Okay. And it's the
7 testimony of the architect that the viewpoint or the
8 advantage point from residences that would be a little
9 further south of the Giant would be somewhat similar.
10 Okay. So it's your intention that vehicles from a
11 loading standpoint will come down here along what's
12 the west wall of the Giant property and curve back for
13 loading in this area here, correct?

14 MS. RODRIGUEZ: Yes.

15 BOARD MEMBER ETHERLY: Okay. And so from
16 the standpoint of the topographical changes of the
17 subject property, this grade here is lower, correct?

18 MS. RODRIGUEZ: That's correct.

19 BOARD MEMBER ETHERLY: So just in terms of
20 the usual stuff that one tends to hear, vehicle,
21 lights, noise and things along those lines, you are
22 not anticipating any direct light coming into those
23 properties at the south?

24 MS. RODRIGUEZ: No.

25 BOARD MEMBER ETHERLY: Okay. And then

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1 from the standpoint of lighting in the rear of the
2 store, of course, there will be appropriate lighting,
3 but you are also anticipating that lighting to be
4 handled in a way that's, shall we say, considerate?

5 MS. RODRIGUEZ: That's right.

6 BOARD MEMBER ETHERLY: Of properties on
7 this end as well.

8 MS. RODRIGUEZ: That's correct. And this
9 island here will provide for additional buffer to the
10 residential where the generation of sort of movement
11 is right at the loading area.

12 BOARD MEMBER ETHERLY: Okay.

13 MS. RODRIGUEZ: So we get a tier buffer
14 system there.

15 BOARD MEMBER ETHERLY: And then to the
16 east of the proposed Giant property, what's currently
17 here now in that area? Is that residential?

18 MS. RODRIGUEZ: Those are apartments.

19 BOARD MEMBER ETHERLY: Okay. And so could
20 you speak a little bit to what you're anticipating in
21 terms of screening and/or buffering on that boundary
22 line?

23 MS. RODRIGUEZ: Right. There is existing
24 in that area, there is some lawn and some plantings
25 and we're planning to reinforce the planting with

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1 additional evergreens to provide for the buffering.

2 BOARD MEMBER ETHERLY: Okay. I'm looking
3 for my picture.

4 MS. RODRIGUEZ: This ward here shows --

5 MR. FENNELL: The third one. That's
6 right.

7 MS. RODRIGUEZ: Right. Shows the addition
8 of a 6 foot ornamental fence.

9 BOARD MEMBER ETHERLY: Yes.

10 MS. RODRIGUEZ: With landscaping and there
11 where it's showing street trees as well as evergreen.

12 COMMISSIONER JEFFRIES: Yes, I think
13 that's the east elevation.

14 BOARD MEMBER ETHERLY: Okay.

15 COMMISSIONER JEFFRIES: That's the east
16 elevation that we're looking at that says left side
17 elevation.

18 MS. RODRIGUEZ: Right. That's correct.

19 COMMISSIONER JEFFRIES: Okay.

20 BOARD MEMBER ETHERLY: Okay. Thank you.

21 Thank you, Mr. Chair.

22 CHAIRPERSON GRIFFIS: Mr. Mann?

23 BOARD MEMBER MANN: Is there any -- well,
24 I've got to kind of get an unusual question in here.
25 Is there any chance the site plan could change as this

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1 is submitted to other approval review authorities,
2 such as when you submit it to NCPC under section 5 of
3 the National Capital Planning Act?

4 MR. FENNELL: No.

5 BOARD MEMBER MANN: So it seems unlikely
6 that any sort of substantial changes will occur that
7 could affect the decision that we make today?

8 MR. FENNELL: Correct.

9 BOARD MEMBER MANN: Okay. Thank you.

10 COMMISSIONER JEFFRIES: I would -- oh, I'm
11 sorry.

12 CHAIRPERSON GRIFFIS: Ms. Miller?

13 VICE CHAIR MILLER: Oh, all right. I just
14 have a couple of quick questions. What do the
15 rectangular boxes represent that are on either side of
16 Savannah Street, I believe that says?

17 MS. RODRIGUEZ: These ones?

18 VICE CHAIR MILLER: Yes, those.

19 MS. RODRIGUEZ: These are apartments that
20 are on the --

21 MR. FENNELL: They are 12 unit, just three
22 story brick apartments.

23 VICE CHAIR MILLER: That currently exist?

24 MR. FENNELL: Yes.

25 VICE CHAIR MILLER: Okay.

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1 MR. FENNELL: They are 1950s vintage.
2 They are part of a portfolio. The property is owned
3 by Smith Company known as the Villages of Parklands.

4 MS. RODRIGUEZ: That's the condition, that
5 side yard, you can see the green buffer and this is
6 the area where the existing trees are and we're
7 planting some additional buffering at the other edge.

8 VICE CHAIR MILLER: Okay. Thank you.

9 MR. TUMMONDS: These -- I'm sorry. These
10 pictures are in Exhibit B, your prehearing statement.

11 VICE CHAIR MILLER: And I'm also wondering
12 is there some buffer with respect to the loading area
13 that is planned?

14 MS. RODRIGUEZ: Yes. We were going to go
15 into a little more detail later, but we can explain
16 that now. As you know, there is a great difference
17 between the lower sort of plateau and the upper
18 plateau. That's actually how it was graded and it was
19 left after its military use. So these here, there's
20 a very large great difference which right now we're
21 tiering with a series of walls to create a buffer. In
22 addition --

23 CHAIRPERSON GRIFFIS: What is the
24 approximate distance dimension? 40 feet?

25 MS. RODRIGUEZ: It is -- to the wall is

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1 about 68 feet.

2 CHAIRPERSON GRIFFIS: 68 feet. And you
3 have retaining walls that are holding that back?

4 MS. RODRIGUEZ: We have retaining walls.

5 CHAIRPERSON GRIFFIS: Two of them?

6 MS. RODRIGUEZ: Two of them.

7 CHAIRPERSON GRIFFIS: So they setback in
8 terms of making up a different area?

9 MS. RODRIGUEZ: Yes. We can walk you
10 through that.

11 CHAIRPERSON GRIFFIS: We have that
12 section.

13 MS. RODRIGUEZ: You have an exhibit in
14 your application that is the section showing the
15 property line. One of the changes that we have
16 proposed with this submission was actually pushing
17 those walls further to create a larger backyard and
18 push these walls further from the property line. So
19 we have the first wall that is about 14 feet tall.
20 Then that grade slopes back and then we have a wall
21 that ranges -- actually, these are the maximum heights
22 of these walls. They go from 14 to 4 and 5 and this
23 one 23 to, you know, about the same range.

24 And we have created some plateaus in order
25 to plant in those areas. So we can minimize the

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1 effect of those walls. Also, these are --

2 CHAIRPERSON GRIFFIS: I'm sorry to
3 interrupt you, but as the landscaper, do you design
4 this retaining wall?

5 MS. RODRIGUEZ: Yes.

6 CHAIRPERSON GRIFFIS: Thank you.

7 MS. RODRIGUEZ: It used to be one
8 continuous big wall that tall.

9 CHAIRPERSON GRIFFIS: It still is, isn't
10 it? All right.

11 MS. RODRIGUEZ: It's broken --

12 CHAIRPERSON GRIFFIS: Go ahead.

13 MS. RODRIGUEZ: -- up and buffered, yes.

14 CHAIRPERSON GRIFFIS: Indeed.

15 MS. RODRIGUEZ: Yes.

16 MR. FENNEL: Well, it was the side of the
17 building actually.

18 MS. RODRIGUEZ: Right. It used to be.

19 CHAIRPERSON GRIFFIS: All right. Let's
20 move ahead.

21 MS. RODRIGUEZ: Yes.

22 VICE CHAIR MILLER: My last question is
23 and it's probably not for you, but maybe it's for the
24 applicant. It's when will the loading occur, during
25 what hours does that happen?

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1 MR. SCHER: Generally when that -- I'm
2 Barry Scher with Giant Foods. Generally, when we move
3 into any area, we scout the immediate neighborhood and
4 we decide if it's going to be a quiet zone, which
5 means we will only load during the daytime hours.
6 It's too early for us to tell, at this point. But we
7 always try and be very good neighbors as far as
8 lighting and keeping refrigerated trailers off during
9 the evening hours. So we will decide, but we -- out
10 of our 200 stores, approximately, 30 to 40 are
11 currently what we call "quiet zone" stores. Many of
12 those we have again voluntarily made a decision not to
13 unload during the a.m. hours.

14 VICE CHAIR MILLER: Why is it too early to
15 tell?

16 MR. SCHER: Pardon me?

17 VICE CHAIR MILLER: Why is it too early
18 for you to tell whether this should be a quiet zone?

19 MR. SCHER: Because we have to assess the
20 type of business that will be done and how many trucks
21 will be coming and going to that store and we're not
22 at that point yet. Some of our stores may receive two
23 or three trailers a day. Other stores when they are
24 very busy, you may look at 8 to 10 a day. It depends
25 upon the volume that the store will do. Once we open

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1 a store, we have a good idea what the business will be
2 and usually it levels off. So it may require less
3 trailers at a new store.

4 VICE CHAIR MILLER: So the volume doesn't
5 depend on the proximity of the neighbors? It depends
6 on another business?

7 MR. SCHER: There's a lot of factors.
8 There's a lot of factors that will go into deciding
9 whether it's a quiet store. In some areas it's law.
10 We have, I believe it's Montgomery County, for a
11 certain square footage, feet from a residential area,
12 we can't unload during the a.m. hours. In other areas
13 we look at if there is a law. Of course, we comply
14 with the law.

15 If there isn't, we will make a decision to
16 be good neighbors. The last thing we want, I can
17 assure you, is to get complaints from customers, a
18 customer that your trucks are keeping me up all night.
19 And I can tell you after all the years I have been
20 with Giant, when we get those complaints, we will
21 often voluntarily change the loading hours of the
22 store.

23 VICE CHAIR MILLER: Thank you.

24 CHAIRPERSON GRIFFIS: Yes, they are close
25 enough to hit you with a rock, so I would be careful.

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1 Okay.

2 COMMISSIONER JEFFRIES: Mr. Chair?

3 CHAIRPERSON GRIFFIS: Yes?

4 COMMISSIONER JEFFRIES: A quick question.
5 From Alabama Avenue can you just, and Alabama Avenue
6 is the point of origin, walk me through the elevation
7 drops back to -- from like the front of -- from
8 Alabama Avenue to the Giant and then to the homes.

9 MR. FENNELL: Can you do that, Trini, or
10 do you want me to?

11 MS. RODRIGUEZ: I can do it.

12 MR. FENNELL: Okay, the residential.

13 CHAIRPERSON GRIFFIS: It would go from a
14 high of 190 feet down.

15 MS. RODRIGUEZ: Right, right.

16 COMMISSIONER JEFFRIES: Yes, so just go.

17 MS. RODRIGUEZ: I think what I'm going to
18 do is initially I'm just going to describe the general
19 lay of the land.

20 COMMISSIONER JEFFRIES: Yes.

21 MS. RODRIGUEZ: Alabama Avenue here, there
22 is a plateau in this upper area where the commercial
23 fits in that is fairly level.

24 COMMISSIONER JEFFRIES: It's fairly level,
25 okay.

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1 MS. RODRIGUEZ: It goes down a little bit.
2 It does fall this way.

3 COMMISSIONER JEFFRIES: Okay.

4 MS. RODRIGUEZ: But it's a natural fall.

5 COMMISSIONER JEFFRIES: Okay.

6 MS. RODRIGUEZ: Then there is --

7 COMMISSIONER JEFFRIES: So what would that
8 fall be about how many feet?

9 MS. RODRIGUEZ: Do you know off the top of
10 your head?

11 MR. FENNELL: I don't.

12 MS. RODRIGUEZ: I can find it.

13 MR. FENNELL: Like 5 feet.

14 COMMISSIONER JEFFRIES: So it's pretty --

15 MR. FENNELL: It's very minor.

16 COMMISSIONER JEFFRIES: Okay.

17 MS. RODRIGUEZ: Yes.

18 COMMISSIONER JEFFRIES: Okay.

19 MS. RODRIGUEZ: Yes.

20 MR. FENNELL: Giant doesn't want to sit in
21 a hole.

22 COMMISSIONER JEFFRIES: Yes, I just --

23 MR. FENNELL: It's going to be --

24 COMMISSIONER JEFFRIES: Okay.

25 MS. RODRIGUEZ: It's really just enough

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1 sort of for drainage.

2 COMMISSIONER JEFFRIES: Okay.

3 MS. RODRIGUEZ: So it will be about 2
4 percent.

5 COMMISSIONER JEFFRIES: Yes.

6 MS. RODRIGUEZ: Then that plateau it
7 currently exists. It extends about to this area, so
8 that's all fairly flat. There is only a 4 foot
9 difference at the loading area versus the front door,
10 which is sort of the standard.

11 COMMISSIONER JEFFRIES: Okay.

12 MS. RODRIGUEZ: I mean, requirements
13 anyway and it works well with the topography of the
14 land. Then there is sort of a, I don't want to say
15 cliff, but there is a grade change, a drastic grade
16 change that currently exists.

17 MR. FENNEL: It's about 60 feet.

18 MS. RODRIGUEZ: Right here. It's about 60
19 feet.

20 COMMISSIONER JEFFRIES: So if you're
21 driving along Alabama Avenue, you really have no --
22 there's no visibility at all --

23 MR. FENNEL: No, no.

24 COMMISSIONER JEFFRIES: -- of the homes at
25 all?

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1 MR. FENNELL: No.

2 MS. RODRIGUEZ: No, none.

3 COMMISSIONER JEFFRIES: Okay.

4 MS. RODRIGUEZ: There really --

5 COMMISSIONER JEFFRIES: So if you're
6 driving along you're just looking -- you think you're
7 looking at a strip center.

8 MS. RODRIGUEZ: A neighborhood center.

9 COMMISSIONER JEFFRIES: Excuse me?

10 MS. RODRIGUEZ: A neighborhood center.

11 COMMISSIONER JEFFRIES: Yes, yes, yes.

12 MS. RODRIGUEZ: A modified --

13 COMMISSIONER JEFFRIES: Yes, neighborhood
14 center. I'm sorry, that just didn't capture my
15 figures there. Okay. Okay. So if you were on
16 Alabama Avenue, it's just sort of a vista?

17 MS. RODRIGUEZ: Right.

18 COMMISSIONER JEFFRIES: I mean, beyond the
19 Giant and the parking?

20 MS. RODRIGUEZ: Right.

21 COMMISSIONER JEFFRIES: Okay.

22 MS. RODRIGUEZ: There are a few trees that
23 are in the background so you can see that edge.

24 COMMISSIONER JEFFRIES: Yes.

25 MS. RODRIGUEZ: As a background. But the

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1 houses are really, you know, 60 feet at this point,
2 but these houses down here --

3 COMMISSIONER JEFFRIES: Yes, right, right,
4 right.

5 MS. RODRIGUEZ: -- are even below.

6 COMMISSIONER JEFFRIES: Okay. Okay.
7 Thank you.

8 MS. RODRIGUEZ: You're welcome.

9 MR. TUMMONDS: We'll continue our
10 testimony with Mr. Scher from Giant Food.

11 MR. SCHER: Mr. Chairman, Members of the
12 Committee, I'm Barry Scher with Giant Food. We are
13 very excited about this project. As a matter of fact,
14 it will be our biggest store in the District and right
15 now we have quite a number of new and major
16 renovations under way at our other stores. The latest
17 will be the Tivoli store at Columbia Heights, which
18 will open on June 23, Thursday the 23rd.

19 We have been looking at this site for many
20 years. As a matter of fact, when I was initially
21 involved in the 2000/2001 period, 2002, it was going
22 to be about a 55,000 square foot store. We became
23 integrated with Stop and Shop which is a new parent
24 company. Their real estate committee came down to
25 take a site ride. I wasn't able to go. I was holding

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1 on to my seat, because I thought they were going to
2 look at the area and say are you sure we want to put
3 a store here, because it's an area that needs a lot of
4 new things and I'm delighted to say that they are
5 coming.

6 The review committee got back to Landover
7 Offices and I was almost holding onto the wall and the
8 real estate vice president said guess what and I was
9 expecting the worst. He said the instructions are to
10 make the store bigger. I live in the city and I was
11 very, very happy to see that we're going to be
12 building the biggest store in our chain. The store
13 will have all the latest services. There will be a
14 food/pharmacy combination store.

15 There will be no shortcuts. The last
16 thing we want is a customer going into the store and
17 saying are we second class citizens? I was at one of
18 your stores in Rockville and I saw you have this, this
19 and this, gourmet foods, why don't we have it? The
20 neighbors will have everything at this new modern
21 store that any suburban store, the latest suburban
22 store will have.

23 One thing that people have asked me a lot
24 is in reference to hiring in the community. The store
25 will have, approximately, 150 full and part-time jobs.

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1 They are all Union positions. The vast majority
2 probably in the 90 percentile will come from that
3 community. The only people that we will bring in with
4 a lot of experience are the department managers, meat,
5 deli, produce, seafood and occasionally an assistant
6 department manager. Everyone else will be hired from
7 the community to work in that store.

8 We usually look four to six months out for
9 employees. And what we do, we will hire them and
10 train them at other nearby Giants, so when we open the
11 new store at Camp Simms, you go in and say everyone
12 seems to know what they are doing, because we don't
13 want you to go in and say it's a great store, but
14 nobody knows how to run the place.

15 CHAIRPERSON GRIFFIS: How many people do
16 you think you would be employing in this store?

17 MR. SCHER: Applying for positions?

18 CHAIRPERSON GRIFFIS: No, employing. How
19 many?

20 MR. SCHER: Employing, I'm sorry, 150.

21 CHAIRPERSON GRIFFIS: Okay.

22 MR. SCHER: Probably give or take 15 or
23 20.

24 CHAIRPERSON GRIFFIS: Good. And I think
25 this is all very commendable and it's an excellent

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1 opportunity. What I want to do is utilize your time
2 expeditiously and obviously it doesn't go directly to
3 the test of the zoning that we need to look at, but we
4 obviously want to give you enough time to say what you
5 want to say.

6 MR. SCHER: Well, I'm basically done, Mr.
7 Chairman.

8 CHAIRPERSON GRIFFIS: Okay.

9 MR. SCHER: We will be good corporate
10 citizens as we are in all the communities and give
11 back to the community. And it's an area that we
12 definitely want to give back to, because, again, I
13 live in the city. I've been over to the site many
14 times and it needs a lot of good corporate citizenship
15 and we will provide that.

16 CHAIRPERSON GRIFFIS: Good. Indeed and
17 Giant does and I think this is, as I said before, an
18 excellent opportunity to bring services into this
19 area, as all areas need, be it Cleveland Park or
20 Columbia Heights or Ward 8, all of them could utilize
21 the same. Yes, Mr. Jeffries?

22 COMMISSIONER JEFFRIES: Indulge me just
23 one second and make certain that your response is very
24 short. I just want to have a sense of what percentage
25 of prepared foods are going to be part of this store.

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1 MR. SCHER: The meat and deli department
2 will have all the prepared foods of suburbia. You're
3 probably looking at 10 to 15 percent.

4 COMMISSIONER JEFFRIES: 10 to 15 percent?

5 MR. SCHER: 10 to 15, yes.

6 COMMISSIONER JEFFRIES: And that would be
7 similar to what would happen at Tivoli?

8 MR. SCHER: Exactly the same.

9 COMMISSIONER JEFFRIES: Okay. Thank you.

10 CHAIRPERSON GRIFFIS: Excellent. Thank
11 you very much. We appreciate you being down here to
12 provide us with this information. Mr. Tummonds, what
13 else do you have?

14 MR. TUMMONDS: We have -- I'll just have
15 Trini Rodriguez real quickly go through some aspects
16 of the landscaping plan that we haven't touched on
17 yet.

18 CHAIRPERSON GRIFFIS: Do we need to?

19 MR. TUMMONDS: You tell me.

20 CHAIRPERSON GRIFFIS: Well, I think we
21 need very specific questions on a couple of aspects.
22 First of all, what is the landscape plan for the
23 buffering in terms of the island and the turnaround,
24 the loading area? Also, is there a more developed
25 landscape plan for the edge condition on the west side

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1 as we have established that? And lastly, are you
2 doing the lighting on the Giant store or is Giant
3 actually picking the fixtures? There's a lot of good
4 feeling words in the application about how it won't
5 shine on anybody and be perfectly appropriate for the
6 site. But is there more specificity to that?

7 MS. RODRIGUEZ: Okay. Thank you, Mr.
8 Chairman, I'll be very brief, because I think we have
9 touched on most of the aspects of the application in
10 the past. Just to start, I mean, we wanted to make
11 very clear pedestrian connections. As you can see,
12 there is a very strong link down to the Giant. There
13 is a treatment of streetscape along Alabama with the
14 continuation of the street trees. There are no trees
15 right there now, so we're continuing the planting
16 strip, the sidewalk with pedestrian connection to the
17 mall.

18 Also, the parking lot treatment to sort of
19 break up these parking lot into rooms. And then as we
20 go about the perimeter of the site, we have some
21 existing trees that we're preserving one of the --
22 actually, one of the points that I wanted to also
23 highlight, I think it's clear in the graphic, is that
24 Savannah Street basically does get punched into the
25 site and basically becomes an extension. The Giant

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1 building becomes an extension of Savannah Street, so
2 that frontage sort of from the urban design standpoint
3 becomes the definition of that street edge.

4 And that pedestrian connection then moves
5 to the west and ties to 15th Street. Something that
6 we do need to point out is that there is quite a bit
7 of grade change here, which is why the street never
8 really connected through.

9 CHAIRPERSON GRIFFIS: Is that area going
10 to be controlled by the developer of the residential?

11 MR. FENNELL: Correct.

12 CHAIRPERSON GRIFFIS: And that's the --

13 MR. FENNELL: No, not residential. The
14 commercial.

15 CHAIRPERSON GRIFFIS: So it's a commercial
16 lot?

17 MR. FENNELL: It's all commercial, yes.

18 CHAIRPERSON GRIFFIS: Better. Is that
19 being lighted or landscaped or anything?

20 MS. RODRIGUEZ: That's correct and it will
21 be controlled access. At dusk it will be closed.

22 CHAIRPERSON GRIFFIS: Oh, interesting.

23 MR. FENNELL: Yes, so we bring a staircase
24 out to Savannah Street on the west.

25 CHAIRPERSON GRIFFIS: I see. All right.

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1 And that's an excellent connection. So I note that
2 your comment is the Savannah Street, which, of course,
3 is a public street, but as it enters the site it
4 becomes private but continues on through.

5 MS. RODRIGUEZ: Yes, that's correct.

6 CHAIRPERSON GRIFFIS: Okay.

7 MS. RODRIGUEZ: I think maybe so that it
8 reads more as a street.

9 CHAIRPERSON GRIFFIS: Okay. Right.

10 MS. RODRIGUEZ: So we will be preserving
11 the existing trees here. As you know, some of the
12 required grading at this edge has necessitated a
13 series of walls which have been tiered and we're
14 proposing planting, a series of sort of evergreens and
15 trees. And we're doing -- a plant pallet has been
16 submitted that is more reinforcing the natives. We
17 have some natives on the existing woods. These woods
18 are not a primary forest, but it's a second growth.
19 We're trying to sort of make that blend in.

20 The other end of that is that island, we
21 are proposing also additional planting, for sort of a
22 tier buffering. And as we talked about before, we
23 want to further reinforce the buffer along that edge,
24 so we have evergreen trees as well as some canopy
25 trees.

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1 CHAIRPERSON GRIFFIS: So you don't have
2 the specific variety of what's going to happen in that
3 island?

4 MS. RODRIGUEZ: We do. We have a list and
5 I can go over those. We have American Hollys, Norway
6 Spruce.

7 CHAIRPERSON GRIFFIS: Why don't we submit
8 it?

9 MS. RODRIGUEZ: Sure.

10 CHAIRPERSON GRIFFIS: Because it won't
11 mean that much to me.

12 MS. RODRIGUEZ: We'll do that.

13 CHAIRPERSON GRIFFIS: And that's fairly
14 definitive of what you're going to do.

15 MS. RODRIGUEZ: Yes.

16 CHAIRPERSON GRIFFIS: Is that correct?

17 MS. RODRIGUEZ: That's correct.

18 MR. FENNEL: Correct.

19 MS. RODRIGUEZ: That's there, too.

20 CHAIRPERSON GRIFFIS: What else?

21 MS. RODRIGUEZ: I believe I answer all
22 your questions.

23 CHAIRPERSON GRIFFIS: Do you have a
24 lighting plan, a lighting scheme?

25 MS. RODRIGUEZ: Oh, yes. Actually, we

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1 personally are not doing the lighting plan, but as you
2 know in retail areas, you know, the parking areas is
3 the one that usually get more of the lighting. And in
4 this case, it sort of worked well as a buffer from,
5 you know, the building itself buffers the residential
6 and the residential uses. We put in lighting only in
7 this edge to be sensitive to the apartments that are
8 there. And then the loading areas usually have
9 downward lights that are attached to the buildings.

10 MR. FENNELL: That's right. Giant will be
11 responsible for the lighting on the Giant facility.

12 CHAIRPERSON GRIFFIS: Good.

13 MR. FENNELL: On the building itself, the
14 structure lighting. The field of parking will be part
15 of the plan that we'll implement.

16 CHAIRPERSON GRIFFIS: Right. And I'm sure
17 that the parking will comply with the zoning
18 requirements for lighting and all that, which we have
19 some flowery words in there. Do we know specifically
20 what fixtures are going on the side of the Giant? For
21 instance, on the drive aisle? Are they wall scones?
22 Just up down lights? Are they actually poled fixtures
23 there?

24 MS. RODRIGUEZ: They're building mounted.

25 MR. SCHER: Yes, they are building mounted

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1 sconces in a lot of instances. We have a new model
2 store because of Stop and Shop and this will be one of
3 the -- sort of borrowing from what we call the best of
4 the best. Good lighting, safety and the security in
5 mind, but also we don't want to blind neighbors with
6 bright lights.

7 CHAIRPERSON GRIFFIS: Okay. And I can
8 see, I mean, obviously, you're hearing the Board's
9 concern also, especially with that sitting much higher
10 than the residential below.

11 MR. FENNEL: Right.

12 CHAIRPERSON GRIFFIS: Okay. What else?

13 VICE CHAIR MILLER: I'm wondering if the
14 applicant could respond to a comment of Office of
15 Planning that's set forth on page 9 of their report?
16 It says that "Due to specifications by the operators
17 of the supermarket, the development has a more
18 suburban design. OP would have preferred to have the
19 supermarket located closer to Alabama Avenue with the
20 parking to the rear or to the side of the building."
21 Could you comment on that as to --

22 MR. FENNEL: Yes.

23 VICE CHAIR MILLER: Okay.

24 MR. FENNEL: I'll start and maybe Mr.
25 Scher can finish it. You know, in our negotiations

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1 with Giant, they were very specific and very clear
2 about the number of parking spaces and the convenience
3 and access that those parking spaces present to the
4 front of the store. And so we have designed and
5 responded our site plan to the requirements of the
6 tenant.

7 MR. SCHER: I think I should say and I
8 don't mean to be funny, that's why we run good
9 supermarkets and they come up with suggestions like
10 that. People want parking period. And if you have a
11 store fronting on a major drive, the first thing out
12 of someone's mind if they are not used to the site is
13 can I get on? Is there a place to park? In the time
14 they say yes or no, they are passed the site. They
15 just pass us by. So it's to our advantage to show
16 good parking access to the store, because that brings
17 in the customer.

18 VICE CHAIR MILLER: But are you saying
19 that you couldn't accommodate the number of parking
20 spaces elsewhere on the site in the manner that OP was
21 suggesting or you're just saying that consumers won't
22 know the parking is there if they don't see it right
23 on the street?

24 MR. SCHER: We probably could accommodate
25 it, but it's not good for the business. If you look

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1 at probably 99 percent of the supermarkets in this
2 country, they are always at the back of a lot. You
3 don't have parking on the side or behind a retail
4 store.

5 VICE CHAIR MILLER: Okay.

6 MR. SCHER: The comment was made earlier
7 to put this store fronting on Alabama, right?

8 VICE CHAIR MILLER: Yes. But I'm just
9 wondering --

10 MR. SCHER: Yes, it doesn't make sense.

11 VICE CHAIR MILLER: Right.

12 MR. SCHER: In the retail business to have
13 parking behind stores.

14 VICE CHAIR MILLER: It doesn't make sense?
15 Is that --

16 MR. SCHER: It doesn't work.

17 VICE CHAIR MILLER: It's empirically been
18 shown that it doesn't work?

19 MR. SCHER: It doesn't work.

20 VICE CHAIR MILLER: Is that what you're
21 saying?

22 MR. SCHER: It's sort of like the same
23 reason you have a handicapped parking right in front
24 of the store, but every customer that is not
25 handicapped wants to park in that number one spot.

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1 See, parking has to be convenient and ease of access
2 and you have to demonstrate it, especially when you go
3 into a new community that it's easy to get into our
4 store and shop.

5 MR. TUMMONDS: I understand your concerns
6 and these are some issues that the applicant has been
7 trying to deal with through the Large Tract Review
8 process of addressing the urban planning goals of the
9 Office of Planning and of the District and then also
10 the physical needs of Giant Food. And so I think
11 we've been trying to be cognizant of both of those
12 things, so I think that was what, when Ms. Rodriguez
13 talked about trying to line the store with Savannah
14 Street to create some sense of the street edge along
15 Savannah Street, knowing also that, you know, we do
16 have the constraints of Giant Foods and their goals
17 for having the parking in front of the store.

18 VICE CHAIR MILLER: And I don't want to
19 pursue this too much, except I do want to make sure
20 that I understand what the applicant is saying and it
21 sounds to me like well, yes, they could accommodate
22 the spaces in accordance with Office of Planning's
23 suggestion, but the reason that they don't is because
24 they don't believe that consumers would believe that
25 the parking was behind and, therefore, it would

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1 discourage them from shopping at the supermarket.

2 MR. FENNELL: To the west of the site is
3 a triangular shaped piece. It's a wedge. It's a
4 Pepco substation. The District bought this property
5 from the Federal Government in 1984 with the idea of
6 putting retail development on it, and the District has
7 tried a number of times with a number of different
8 developers to come out with a plan that would be
9 accommodating and appealing to retailers and get them
10 to commit to the site, but also address these other
11 neighborhood design issues.

12 We took the box and moved the box around
13 any number of different ways. That pinch point
14 created by the Pepco substation is a real deterrent.
15 When you look at the site as a whole and you were to
16 describe the Alabama Avenue frontage, one would say
17 well, this is ideal retail, because you have got
18 tremendous frontage on your main avenue.

19 But when you then look at the impediment
20 that is forced by the Pepco substation, it becomes a
21 real hardship to figure out how you can get the best
22 of the best and a state of the art supermarket, which
23 the neighborhood is going to benefit substantially by
24 having, and by having a 65,000 square foot store that
25 is going to have a full line of products including a

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1 whole aisle that is going to be dedicated to Staples
2 office products, you know, there has to be some
3 convergence of the retailer's need for feeling
4 confident that they are going into a site and into a
5 location at a store that's going to meet the test of
6 market convenience and be acceptable and widely used
7 versus the idea that you want to create a pedestrian
8 friendly building.

9 CHAIRPERSON GRIFFIS: Right.

10 MR. FENNELL: With street frontage on your
11 main avenue.

12 CHAIRPERSON GRIFFIS: I think you bring up
13 the excellent pertinent point here, because we could
14 argue for weeks, in fact people have for now years, of
15 how you do urban retail and what it takes. Is it just
16 the store that's going to define it all or is it the
17 actual development around it? Are they walking to the
18 grocery store or are they actually driving by,
19 looking, fascinating stuff and, in all sincerity, I
20 would love to talk about it.

21 But you have hit on the point of why this
22 is different and why that store sits back because,
23 believe me, I think the entire Board came up thinking
24 just move it up front if we could. And I was with
25 them, but that pinch point is very important to look

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1 at. When you look at the dynamic of Giant, even if it
2 was 55,000 square feet, you're looking at a
3 depth/width dimension.

4 Now go to 65 or 70, maybe this would
5 become -- obviously, it gets larger, but you wouldn't
6 be able to access the site by vehicle. In fact, that
7 would be even more pertinent to the argument that I
8 have just heard established that not only would you
9 not be able to find it, you would have to go up to the
10 next intersection and come down and around and you
11 would lose your other retail opportunities there.

12 You know, is there a million ways to do
13 these things? There probably is but, again, looking
14 at that, I see that that does rise to an interesting,
15 unique and problematic way to actually lay it out.
16 Okay. What else do we need to know? Any other
17 questions? No other questions from the Board? Very
18 well. Mr. Tummonds, we're going to go to the Office
19 of Planning.

20 We're going to get through this very
21 quickly now as we go through but, Mr. Tummonds, what
22 I need you to answer perhaps at the end, unless you
23 want to do it right now, is if we have -- as the Board
24 has now decided to go to look at this as it originally
25 came in under 3202.3, does that relieve the entire

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1 site from any of the other area requirements, the side
2 yards, the other yards or any other aspects or how do
3 we deal with those that may not calculate out
4 correctly?

5 MR. TUMMONDS: Right. Well, I think, you
6 know, there we would -- when they come back and they
7 finally site, you know, I would say because now we'll
8 have -- there will be one building as far as zoning
9 purposes. So when we look at what is the rear yard,
10 we'll measure the rear yard from Giant.

11 CHAIRPERSON GRIFFIS: Right.

12 MR. TUMMONDS: From the Giant store. So
13 when we look at the pad, the restaurant pad site,
14 we'll have to make sure that that is sited so it will
15 satisfy its side yard requirement on that portion of
16 the site.

17 CHAIRPERSON GRIFFIS: Okay. So in your
18 understanding and looking at this now as it's laid out
19 and it was brought before us under 3202.3, you don't
20 need any other relief or it meets all the area
21 requirements?

22 MR. TUMMONDS: Except for the special
23 exception to extend the grocery store into the R-5-A.

24 CHAIRPERSON GRIFFIS: Okay.

25 MR. TUMMONDS: That's correct.

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1 CHAIRPERSON GRIFFIS: Good. Very well.
2 Let's move ahead then and go to the Office of Planning
3 and a very good afternoon to you.

4 MS. BROWN-ROBERTS: Yes. Good afternoon,
5 Mr. Chairman and Members of the Board. I am Maxine
6 Brown-Roberts representing the Office of Planning.
7 Generally, we support. I shouldn't say generally. We
8 do support the special exception to extend the
9 building into the residential zone by, approximately,
10 34 feet. We do not find that it will be a detriment
11 to the residential, the single-family dwellings
12 because of the proposed buffering that the applicant
13 has proposed, and also because of the change in the
14 topography.

15 We also believe that the noise will be
16 buffered from the driveway and also from the loading
17 dock. We still had some concerns about the lighting
18 adjacent to the apartment buildings. We did request
19 a little bit more detail on that and I think that is
20 something that the Board may want to ask the applicant
21 to provide.

22 CHAIRPERSON GRIFFIS: On which side? Oh,
23 you're talking about --

24 MS. BROWN-ROBERTS: To the apartments.

25 CHAIRPERSON GRIFFIS: The screened side on

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1 the Giant or on the parking lot or both?

2 MS. BROWN-ROBERTS: From the -- on the
3 Giant side.

4 CHAIRPERSON GRIFFIS: Okay. So on the
5 building.

6 MS. BROWN-ROBERTS: Yes, on the building.

7 CHAIRPERSON GRIFFIS: Right. Okay.

8 MS. BROWN-ROBERTS: Because our concern
9 there was those apartments have windows on that side.

10 CHAIRPERSON GRIFFIS: Sure.

11 MS. BROWN-ROBERTS: So that was something
12 that we thought could be further addressed. And we're
13 not considering anything else, so I won't address
14 anything else. One of the things I also want to point
15 out to the Board is, you know, how important this
16 development is to Ward 8 and the District as a whole,
17 and it is specifically mentioned in the Comprehensive
18 Plan about the development of getting a supermarket
19 and a restaurant in this area and specifically in this
20 site.

21 So that is something that is important and
22 we think that the proposed development meets the
23 Comprehensive Plan recommendations and also meets the
24 requirements of the special exception and recommends
25 approval. Thank you, Mr. Chairman.

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1 CHAIRPERSON GRIFFIS: Excellent. Thank
2 you very much and I think the report was excellent in
3 all of the analyses and especially in talking about
4 the Comprehensive Plan, and I think you set the Board
5 in a certain direction and also supported some of our
6 own analysis and thoughts and view of this
7 application.

8 Let me go to any other questions from the
9 Board of the Office of Planning. If there are no
10 other questions or questions, does the applicant have
11 any cross examination of OP?

12 MR. TUMMONDS: None.

13 CHAIRPERSON GRIFFIS: Okay. Very well.
14 Ms. Roberts, thank you very much. We do appreciate
15 you being here. Let's move ahead then to other
16 Government agency reports and I have -- what do I
17 have? Is ANC-8B represented on this application
18 today, 17324?

19 MR. FENNELL: They are not here today, but
20 he did submit a letter of support.

21 CHAIRPERSON GRIFFIS: Sure, yes, Exhibit
22 No. 25, which we will get to. I don't have any other
23 attendant Government reports, Mr. Tummonds, unless
24 you're aware of any other reviewing agencies in this.

25 MR. TUMMONDS: No, I don't.

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1 CHAIRPERSON GRIFFIS: Obviously, we have
2 talked extensively about Large Tract, which it had the
3 Office of Planning coordinating the other agencies.
4 Okay. If there is nothing else, let's move ahead to
5 persons in support or in opposition to the Application
6 17324, that is for the Department of Housing and
7 Community Development, I would ask that you come
8 forward at this time.

9 MR. BROWN: Hello. My name is Sean Brown.

10 CHAIRPERSON GRIFFIS: A very good
11 afternoon to you and thank you so much for your
12 patience, being down here all morning. If you
13 wouldn't mind, just state your address.

14 MR. BROWN: It's 3402 15th Street.

15 CHAIRPERSON GRIFFIS: Excellent. And
16 you're coming to give testimony in this application in
17 opposition or in support?

18 MR. BROWN: In opposition.

19 CHAIRPERSON GRIFFIS: Good. Move right
20 ahead.

21 MR. BROWN: I noticed there was a lot of
22 talk about the topography of the area. I am at the
23 top of there where the Giant is going to be. Also,
24 there are no residential houses. They say that the
25 residents don't care. No one in that area owns any of

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1 that property and that's where the problem comes in.
2 The picture looks totally different from when you're
3 actually in the area. It looks totally different.

4 CHAIRPERSON GRIFFIS: You mean the actual
5 photographs or their renderings?

6 MR. BROWN: Their rendering.

7 CHAIRPERSON GRIFFIS: Yes, sure.

8 MR. BROWN: Their rendering, it looks
9 totally different. It's going to be too much light in
10 the area. Also, Savannah Street is fine on that side.
11 That walkway there --

12 CHAIRPERSON GRIFFIS: Right.

13 MR. BROWN: -- it's a bad idea. Their
14 walkway should not be coming across onto Savannah.
15 That street is closed off right now.

16 CHAIRPERSON GRIFFIS: Right.

17 MR. BROWN: It's closed off and there are
18 two vacant buildings, three vacant buildings,
19 apartment buildings on the side, right above from the
20 Pepco plant.

21 CHAIRPERSON GRIFFIS: Right.

22 MR. BROWN: Okay. That is not on there.
23 The rest of the property should have been on the
24 rendering. I noticed they put the properties -- it
25 seems that they put only the properties which they

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1 have interest in or ownership in some way of. There
2 are other buildings. In this small corner right here
3 direct across from the Giant --

4 CHAIRPERSON GRIFFIS: On the west, on the
5 right side of that board?

6 MR. BROWN: Yes, to the west of it.

7 CHAIRPERSON GRIFFIS: Okay.

8 MR. BROWN: It would be right there at
9 Savannah and 15th.

10 CHAIRPERSON GRIFFIS: Sure.

11 MR. BROWN: Okay.

12 CHAIRPERSON GRIFFIS: There is more
13 buildings there.

14 MR. BROWN: There's more buildings there.

15 CHAIRPERSON GRIFFIS: Sure.

16 MR. BROWN: And then on the other side
17 there's a complex running down the other side.

18 CHAIRPERSON GRIFFIS: Okay. Let me just
19 say quickly on that --

20 MR. BROWN: People are not going to walk
21 through there.

22 CHAIRPERSON GRIFFIS: Pardon me?

23 MR. BROWN: People are not going to walk
24 through there. They are not going to walk through
25 there.

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1 CHAIRPERSON GRIFFIS: They may someday,
2 hopefully, but I understand your point. But let's get
3 directly, so I understand where you're leading us.
4 First of all, those are residential buildings on
5 Savannah and 15th is what you're saying?

6 MR. BROWN: Yes.

7 CHAIRPERSON GRIFFIS: And so you're going
8 to tell me a little bit more about what your concern
9 is in terms of the --

10 MR. BROWN: My concern is noise, noise.

11 CHAIRPERSON GRIFFIS: Noise from the
12 loading and everything else?

13 MR. BROWN: Yes, it's going to be
14 excessive light.

15 CHAIRPERSON GRIFFIS: Right, lights I got.

16 MR. BROWN: And the traffic, I'm not sure
17 where they think the traffic is going to go, but you
18 can hear it. The bus shakes the windows when it comes
19 around and turns that corner.

20 CHAIRPERSON GRIFFIS: On 15th?

21 MR. BROWN: When they start bringing those
22 -- excuse me?

23 CHAIRPERSON GRIFFIS: I'm sorry. On 15th
24 Street?

25 MR. BROWN: Yes.

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1 CHAIRPERSON GRIFFIS: Okay. Good.

2 MR. BROWN: There is a bus stop directly
3 at that corner across from the Pepco, a little bit
4 lower down, right in between that driveway.

5 CHAIRPERSON GRIFFIS: Right.

6 MR. BROWN: When that bus turns that
7 corner, it shakes the windows and you can feel it
8 rumble. Okay. I don't know how or whether it's the
9 soil that isn't packed, but with heavier vehicles I
10 see it as being a major problem.

11 CHAIRPERSON GRIFFIS: Okay. Good. Now,
12 you mentioned something about the pedestrian access
13 from Savannah down to 15th. You say that's a bad
14 idea. I can probably understand why you think it's a
15 bad idea, but did you understand that it's actually
16 controlled, that it will close up I guess when the
17 store closes or at some point?

18 MR. BROWN: Yes, and it's going to be
19 monitored by Giant?

20 CHAIRPERSON GRIFFIS: That I have no idea.

21 MR. BROWN: I think we need to set into
22 motion the things that are said that are going to be
23 done. I notice I heard a lot of talk of "seems
24 unlikely." That's really -- I don't think that's good
25 enough, seems. I think that it --

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1 CHAIRPERSON GRIFFIS: You don't think you
2 can rely on that?

3 MR. BROWN: Everything is -- I don't think
4 you can rely on it. I don't think "seems unlikely" --

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. BROWN: "Most probably we won't. I
7 really don't think that will be the case." These are
8 loophole words. These are words that I hear,
9 "probably 90 percent of the people working there will
10 come from the area." I don't personally believe that.
11 I would like to see it. I'm sure there have been
12 stores opened in other places, for instance where the
13 driver's test lot was.

14 CHAIRPERSON GRIFFIS: Right.

15 MR. BROWN: I would like to know how many
16 of those employees are actually from that area before
17 we start to speculate.

18 CHAIRPERSON GRIFFIS: So you want some
19 real facts?

20 MR. BROWN: Yes, I want some real facts.

21 CHAIRPERSON GRIFFIS: Sure.

22 MR. BROWN: Because this isn't a company
23 that's just started and just said oh, well, you know,
24 we're going to open our first store here and we think
25 we're going to do this. You have a track record. You

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1 have an employee list of rules. You have addresses.
2 You shouldn't be saying it's likely or more than
3 likely, we should do this.

4 CHAIRPERSON GRIFFIS: Indeed.

5 MR. BROWN: There should be something
6 where we can say well, in the past --

7 CHAIRPERSON GRIFFIS: Right, exactly.

8 MR. BROWN: -- we have done this.

9 CHAIRPERSON GRIFFIS: Exactly.

10 MR. BROWN: Know people by their deeds.

11 CHAIRPERSON GRIFFIS: Okay. And so I
12 understand. We have an employee base, where they are
13 from, the lights, the lighting, the impact. I'm
14 taking it as the parking area, but also on the Giant
15 store and how it impacts on that.

16 MR. BROWN: Yes, because those houses
17 there --

18 CHAIRPERSON GRIFFIS: Yes.

19 MR. BROWN: From the back, when I'm
20 looking at them, they are about 40 feet down from me.

21 CHAIRPERSON GRIFFIS: Sure. Sure. You're
22 talking about the new houses?

23 MR. BROWN: Yes, the new houses.

24 CHAIRPERSON GRIFFIS: Sure, sure.

25 MR. BROWN: That's graded all the way down

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1 in the ground.

2 CHAIRPERSON GRIFFIS: Right.

3 MR. BROWN: So I'm high above them.

4 CHAIRPERSON GRIFFIS: Okay.

5 MR. BROWN: So if they have noise it won't
6 be a problem.

7 CHAIRPERSON GRIFFIS: Right.

8 MR. BROWN: Because it will basically be
9 in the dirt, because I'm above them already.

10 CHAIRPERSON GRIFFIS: Right. Your concern
11 is more on the existing housing stock and the
12 apartment buildings in the surrounding area, not the
13 new. Is that correct?

14 MR. BROWN: Yes.

15 CHAIRPERSON GRIFFIS: Right. Right. I'm
16 clear on that. So we have the lighting. We have the
17 pedestrian access.

18 MR. BROWN: And it's going to bring a lot
19 of traffic there.

20 CHAIRPERSON GRIFFIS: Do you think it
21 might?

22 MR. BROWN: Originally, I came into that
23 area, because I said oh, look, I have my own forest
24 here. It's a lot of trees. They are all gone.

25 CHAIRPERSON GRIFFIS: Yes.

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1 MR. BROWN: But at the same time, some of
2 them could have been left. The development is down in
3 the hole. It used to be swamp in there.

4 CHAIRPERSON GRIFFIS: Yes.

5 MR. BROWN: The people who cleared it,
6 they know. It was swamp.

7 CHAIRPERSON GRIFFIS: Yes, sure.

8 MR. BROWN: It was actually swamp in that
9 area. I haven't seen the racoon, but there's a large
10 racoon in the area, about 3 feet tall. I have not
11 seen him. I'm assuming he's dead.

12 CHAIRPERSON GRIFFIS: Yes. He's waiting
13 for the supermarket to open for nightly scraps.

14 MR. BROWN: Quite possible, quite
15 possible.

16 CHAIRPERSON GRIFFIS: He's going to be 4
17 and a half feet in no time. Okay. I understand your
18 point though. It's a big change, but in terms of the
19 pedestrian access you think that it possibly is just
20 not -- it will not be a safe access. Why is it not a
21 good idea?

22 MR. BROWN: I think it's going to be a
23 haven for crime.

24 CHAIRPERSON GRIFFIS: Okay. Okay.

25 MR. BROWN: That access there and those

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1 trees are larger. It's a large wooded area. It's a
2 steep hill probably with about a 15 feet rise there.

3 CHAIRPERSON GRIFFIS: Right.

4 MR. BROWN: That's going to go up and
5 over. There is a trail there now.

6 CHAIRPERSON GRIFFIS: Good.

7 MR. BROWN: But people don't travel it.
8 There is a trail and usually seedy people are the ones
9 that go up and down there.

10 CHAIRPERSON GRIFFIS: Got you. Would it
11 make a difference if more people used that regularly,
12 you think, if it was actually opened up and --

13 MR. BROWN: If it was opened up and it
14 had --

15 CHAIRPERSON GRIFFIS: Some lights.

16 MR. BROWN: -- let's say some high
17 pressure sodium lights or something like that.

18 CHAIRPERSON GRIFFIS: Sure, sure, sure.
19 Okay. Good. What else? What other elements? I have
20 one, two, three, four, five that you have talked
21 about, the employees, the lights, the pedestrian
22 access, the noise, the traffic. Is there anything
23 else that I haven't understood?

24 MR. BROWN: Actually, I think that's about
25 it. I do have a question. They said it wasn't

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1 feasible, but with the access there, if it was going
2 to be there, it would make sense to make Savannah go
3 all the way through.

4 CHAIRPERSON GRIFFIS: Yes.

5 MR. BROWN: Rather than putting a trail
6 there, because you're just asking for bad things by
7 putting a trail on the other side.

8 CHAIRPERSON GRIFFIS: Right. But did you
9 indicate that the grade is a pretty big change from
10 the top to the --

11 MR. BROWN: It about 15 feet. Everything
12 is on a slant.

13 CHAIRPERSON GRIFFIS: Sure.

14 MR. BROWN: It's on a slant. It doesn't
15 look like it's hard to pave it the rest of the way
16 through to me.

17 CHAIRPERSON GRIFFIS: Okay.

18 MR. BROWN: It doesn't. You grade it.
19 No.

20 CHAIRPERSON GRIFFIS: Right.

21 MR. BROWN: With the distance going back
22 and the grade, it's not like there is a mountain there
23 or anything.

24 CHAIRPERSON GRIFFIS: Right.

25 MR. BROWN: I'm sure the road could be --

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1 you could bulldoze it through in about three hours,
2 four hours. It's -- it was harder for them to grade
3 that with the trees than it would be for that.

4 CHAIRPERSON GRIFFIS: Okay.

5 MR. BROWN: It's not hard to do and I
6 think it should be added that the street go directly
7 through. Therefore, you can have a point of access
8 from both sides. It seems as if this development is
9 basically catering to the Parkland Complex and not to
10 the Congress Heights. It looks like everything from
11 this end is cut off. You have to go all the way back
12 up and around to go in there. If you're going to open
13 one side of Savannah, then you open both sides of it.
14 You said it's a straight through.

15 CHAIRPERSON GRIFFIS: Okay. That's an
16 excellent point. I don't disagree. In fact, it seems
17 to make some sense.

18 MR. BROWN: Perhaps it's, I don't want to
19 say it, but who the rent is getting paid to as to why
20 the street would be on that side.

21 CHAIRPERSON GRIFFIS: You think?

22 MR. BROWN: Um-hum.

23 CHAIRPERSON GRIFFIS: I would think if I
24 was a retailer, I would want that street open so I
25 would get even more people coming by.

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1 MR. BROWN: Exactly, exactly, unless you
2 didn't want those people on that side really to come
3 over.

4 CHAIRPERSON GRIFFIS: Right. It's all the
5 same money, but I don't own stores. Okay. Anything
6 else? Questions from the Board? Mr. Tummonds, do you
7 have any cross examination of the witness?

8 MR. TUMMONDS: None.

9 CHAIRPERSON GRIFFIS: Very well. Thank
10 you very much.

11 MR. BROWN: Thank you.

12 CHAIRPERSON GRIFFIS: This is excellent
13 and very directed testimony. We appreciate it. Is
14 there anyone else who would like to provide testimony
15 to the Board under 17324 today, anyone else? Very
16 well. Let's move ahead then as we have heard from all
17 persons in support or in opposition to the application
18 and go to Mr. Tummonds, if you would like to make
19 closing summation remarks.

20 MR. TUMMONDS: Yes. Again, thank you.
21 This was a rather enlightening zoning experience for
22 the first hour of our presentation, but then when we
23 finally got into truly talking about this project, I
24 think we were able to convey the benefits that this
25 project is going to bring to the Congress Heights

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1 community, the Parklands community, Ward 8 and really
2 a large swath of the District of Columbia.

3 We believe that we have satisfied the
4 Zoning Regulations requirements for special exception
5 approval to extend that grocery store use into the
6 adjacent R-5-A Zone District and we believe that we
7 have provided appropriate landscape buffering and
8 screening, so that there will not be any objectionable
9 impacts on the adjacent properties.

10 We would like to note that the pedestrian
11 connection from Savannah Street to 15th Street was
12 really created at the request of ANC-8E. It was
13 during a community presentation to that group that a
14 comment was made about how are we going to allow
15 residents to the west in the Congress Heights
16 community to come into this project?

17 As we discussed, there are significant
18 grade changes that prohibit the road from continuing,
19 but we thought that pedestrian access was a good
20 alternative. It also encourages people to walk to the
21 store. CHR LLC, the property owner, will be
22 responsible for monitoring that access gate on a
23 nightly basis just as they will be responsible for
24 maintenance of the parking lot, removing the snow when
25 it needs to. If a light needs to be replaced in the

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1 parking lot, CHR will have that responsibility to make
2 sure that the parking lot, the pedestrian access are
3 maintained in an appropriate manner.

4 With the significant support that this
5 project has received from the Office of Planning, from
6 ANC-8B, we believe that it is appropriate for the
7 Board to review this application, hopefully grant a
8 decision today. We note that it is with the approval
9 of this application that the applicant and Giant Food
10 can conclude their lease negotiations and move this
11 project forward which, as we all know, this has been
12 a process that has taken a considerable amount of time
13 and we would love to have that process be finally
14 concluded, so that this important project can move
15 forward. Thank you very much.

16 CHAIRPERSON GRIFFIS: Excellent. Thank
17 you very much and we do take that in all seriousness
18 moving things expeditiously, and we would not unduly
19 delay anything. However, based on two factors, one
20 specifically with this application, I think it's
21 important enough to get at, and I don't think it takes
22 that much time to do, an actual lighting diagram,
23 meaning just a very quick schematic or however you
24 want to represent it in plan, the points of which
25 lights while be placed.

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1 And I would include that into the parking
2 lot area, but most importantly on the Giant structure,
3 on the drive aisles in the back and then on the west
4 edge. And then if we have cut sheets on fixtures or
5 typical or like fixture, it will be important for the
6 Board to review that and may well, in fact, become a
7 condition of the order.

8 I want to make sure that we're absolutely
9 clear that the submissions in terms of landscaping
10 will tell us specifically what goes where, meaning the
11 buffered island in back, which is going to be
12 landscaped. Is it your understanding that we have
13 that into the record now?

14 MR. TUMMONDS: We can submit for the
15 record an enhanced landscaping plan that will tie the
16 landscape plan that you have to the sheets --

17 CHAIRPERSON GRIFFIS: Good. I think --

18 MR. TUMMONDS: -- where we talked about
19 the typical species, we'll tie those together.

20 CHAIRPERSON GRIFFIS: Because I think that
21 will be very helpful and, obviously, we're not going
22 to be so prescriptive that, you know, these have to
23 maintain the exact species, but rather the elements of
24 what they create in terms of its buffering points and
25 that would be on both sides of that island and also on

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1 the property line.

2 I think we'll leave the record open also
3 for any additional narrative that you have in terms of
4 how that pedestrian area is actually going to be
5 monitored. I think it is clear from some of the
6 Board's questions but now is really very clear on the
7 testimony that we heard is these all sound great and
8 they make us feel fine, but in pure implementation,
9 and we all have them in our own neighborhoods,
10 elements that are described but don't turn out to
11 practice the same way.

12 What is the actual anticipation? What
13 does monitoring mean and how will that be maintained
14 to be safe and secure and clean? There it is. I
15 think, because I still have the microphone on, I would
16 say that we have a great opportunity. The Giant
17 representative is here and the community member that
18 was interested in examples of other businesses and
19 other aspects of the supermarket, of how they have
20 done employees and where they get their employees from
21 and what that area is, I think that could well be just
22 an exchange of information today while everyone is in
23 the same area and that could be delivered.

24 I'm not looking at that coming into the
25 record as jurisdiction doesn't go far enough for us to

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1 be able to deal with that at all as much as we would
2 like to, but I can make it apparent that everyone is
3 here and can address that, and I'm sure there's been
4 opportunities and it has done it. But let's get it to
5 everybody at this point.

6 Okay. That's what I have. Ms. Miller, do
7 you have additional?

8 VICE CHAIR MILLER: I just have one other
9 possible addition and that is more information
10 possibly with respect to the loading times. I had
11 asked Mr. Scher about that. It seems to me that falls
12 within one of our criteria for considering adverse
13 impacts upon neighboring properties, and if we could
14 get more specific information to evaluate the
15 practices or what the considerations would be for that
16 quiet zone versus not quiet zone or whatever, I think
17 that would be useful.

18 CHAIRPERSON GRIFFIS: I mean, shouldn't we
19 go directly to what they're proposing?

20 VICE CHAIR MILLER: That would be very
21 useful, yes.

22 CHAIRPERSON GRIFFIS: I mean, I don't
23 think --

24 VICE CHAIR MILLER: And Mr. Scher was very
25 vague about, you know --

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1 CHAIRPERSON GRIFFIS: Indeed.

2 VICE CHAIR MILLER: Okay.

3 CHAIRPERSON GRIFFIS: Well, and to be
4 clear, my understanding of that testimony was to the
5 point of look, they have to open this door and see how
6 it operates and then assess. I'm sure he didn't
7 mention it, but we can assume the truck routes and how
8 they are all coming in, factor into all of that.

9 I would think that we would look for the
10 applicant to provide the extent of times that the
11 loading would actually happen and we will assess it,
12 at that point, because by the time we get this into
13 the record it's yes or no. It's not more evaluation
14 or, you know, how. We want to know exactly what it's
15 going to be and that's going to mean, you know, a
16 positive or a negative for us.

17 Is that what you're looking for, Ms.
18 Miller?

19 VICE CHAIR MILLER: Well, that sounds
20 right and I think he also made a comment that, you
21 know, in certain instances it's governed by certain
22 laws or whatever and I think that that's part of our
23 responsibility in this case, is to determine whether
24 the loading practice would be adequate in this case
25 and not have an adverse impact. So it seems like

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1 now's the time for us to take a look at that. So you
2 should be specific as to what you're proposing.

3 MR. TUMMONDS: Absolutely.

4 CHAIRPERSON GRIFFIS: Okay. Anything
5 else? Okay. Very well. I say we should set this for
6 the 7th for decision, which means, Mr. Tummonds, you
7 have about a week and a half to get this in. Is that
8 a possibility?

9 MR. TUMMONDS: Yes, absolutely.

10 CHAIRPERSON GRIFFIS: Okay.

11 MR. TUMMONDS: So the decision date is
12 June 7th?

13 CHAIRPERSON GRIFFIS: That's correct. Ms.
14 Bailey, does that work?

15 MS. BAILEY: It will work for me, Mr.
16 Chairman. I just wanted to highlight that you have,
17 I believe, seven cases for that day, so this would be
18 the eighth. One, two, three, four, five, six, seven.
19 Yes, there's seven, so this would be the eighth, but
20 that obviously works for me.

21 CHAIRPERSON GRIFFIS: Seven decisions?
22 That's not so many.

23 MS. BAILEY: May, next Wednesday, Mr.
24 Tummonds, would that be okay for you?

25 MR. TUMMONDS: Yes, is that June 1st?

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1 MS. BAILEY: Yes, June 1st.

2 MR. TUMMONDS: Yes.

3 MS. BAILEY: Mr. Chairman, would that
4 work, June 1st?

5 CHAIRPERSON GRIFFIS: I'm sorry. Are we
6 clear?

7 MS. BAILEY: Yes, sir. The decision is
8 June 7th and the submissions are June 1st.

9 CHAIRPERSON GRIFFIS: Excellent. Anything
10 else, Mr. Tummonds, any clarifications?

11 MR. TUMMONDS: Nope. That's it.

12 CHAIRPERSON GRIFFIS: Great. And we have
13 everything we need then. Board Members, anything else
14 on that? Very well. Thank you very much. We
15 appreciate your patience in the legal wrangling on
16 getting this established and I think this is ready to
17 move forward. So we will see you on the 7th. Of
18 course, that is our Public Meeting. No other
19 additional testimony will be provided, except for that
20 for which we kept the record open. We'll look for
21 that on the 1st, clear, concise and direct, and we'll
22 be able to move right ahead to our decision making.
23 Thank you.

24 MR. TUMMONDS: Great.

25 CHAIRPERSON GRIFFIS: Ms. Bailey, is there

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1 any other business for the Board in the morning
2 session?

3 MS. BAILEY: Mr. Chairman, not for the
4 morning, but there's quite a few people in the
5 audience, so --

6 CHAIRPERSON GRIFFIS: Indeed.

7 MS. BAILEY: Okay.

8 CHAIRPERSON GRIFFIS: Let me adjourn our
9 morning session, of course, for the 24th of May and
10 address everyone that is now here for our afternoon
11 session. This is what I propose as we have a great
12 amount of folks here for the afternoon. We have three
13 cases to hear. We have preliminary matters in two of
14 those.

15 What I would like to do, the Board has
16 been here since early this morning, we're going to
17 take a 10 minute break. In 10 minutes we're coming
18 back. We're going to call the afternoon session. In
19 the afternoon session we're going to call all the
20 preliminary matters. That way we can assess what
21 we're doing this afternoon and whether you all need to
22 sit here rather than us taking a leisurely, you know,
23 four hour lunch and coming back whenever. No, we
24 would never do that. So give us 10 minutes, so that
25 we can stretch our legs and we'll be back and get to

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1 the afternoon schedule.

2 (Whereupon, the hearing was recessed at
3 1:24 p.m. to reconvene at 1:48 p.m. this same day.)
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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

1:48 p.m.

CHAIRPERSON GRIFFIS: Good afternoon, ladies and gentlemen. Let me call to order the 24th of May 2005 afternoon session of the Board of Zoning Adjustment of the District of Columbia. My name is Geoff Griffis, Chairperson. Joining me today, of course, is Ms. Miller, Vice Chair, and we could not proceed without Mr. Etherly. Representing the National Capital Planning Commission, Mr. Mann and representing the Zoning Commission, Mr. Jeffries on several of the cases today and we will have others with us.

Copies of today's hearing agenda are available for you. They are located at the wall where you entered into the hearing room. I'm going to get through my opening very quickly, because we have a numerous amount of preliminary matters and then, after the preliminary matters, I will update or actually, after my opening, I will give you an idea of how we are going to proceed.

First of all, as I said, all proceedings before the Board of Zoning Adjustment are recorded. They are recorded in two fashions. Importantly, the Court Reporter is creating the official transcript.

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1 We are also being broadcast live on the Office of
2 Zoning website. Attendant to that there are several
3 things that people should be aware of.

4 First of all, we would ask that everyone,
5 please, refrain from making any disruptive noises or
6 action in the hearing room. That only disrupts our
7 transmission to those watching, to the transcript that
8 is being created and, most importantly, to those
9 giving testimony before the Board. I would also ask
10 that people turn off cell phones and pagers or
11 beepers, at this time, so again we do not disrupt the
12 proceedings.

13 Prior to coming forward to speak to the
14 Board, you will need to fill out two witness cards.
15 Witness cards are available at the table in front of
16 us where you will provide testimony, also at the table
17 where you entered into the hearing room. Those two
18 cards go to the recorder prior to coming forward.
19 When you do come forward to address the Board, I would
20 ask that you make yourself comfortable, have a seat.
21 You will need to state your name and address once for
22 the record. Obviously, that is so we can record
23 exactly what you say.

24 The order of procedure for special
25 exceptions is as follows: First, we hear from the

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1 applicant, their case presentation. Secondly, we hear
2 all Government reports attendant to the application.
3 Third, we hear from the Advisory Neighborhood
4 Commission. Fourth, we hear and encourage all persons
5 in support of an application to come forward and
6 provide us testimony. Fifth, we encourage all those
7 in opposition to the application to come forward and
8 provide testimony. Sixth, finally, we hear from the
9 applicant again and that is for rebuttal testimony,
10 closing remarks and conclusions.

11 Cross examination of witnesses is
12 permitted by the applicant and parties in a case.
13 Parties are those that are established by this Board
14 or -- and, I should say, the ANC. The ANC within
15 which the property is located is automatically a party
16 in the case. These parties, those participants and
17 the applicant, will be able to conduct cross
18 examination and there is nothing, of course, that
19 prohibits this Board from limiting cross examination,
20 be it in time, direction, but I will be more specific
21 as need be in each case.

22 The record will be closed at the
23 conclusion of the hearing on a case, except for any
24 material that we specifically request and we will be
25 very specific of what information should be submitted

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1 into the record and when it is to be submitted into
2 the Office of Zoning. After that material is
3 received, it should be clearly understood that the
4 record is finally closed. No other information is
5 taken into the record. No other information is a
6 basis of our deliberation and decision.

7 The Sunshine Act requires that this Board
8 conduct its hearing in the open and before the public.
9 This Board does enter into Executive Sessions both
10 during or after hearings on a case and that is for
11 purposes of reviewing the record and/or deliberating
12 on a case. This is in accordance with our rules,
13 regulations, procedures and it is also in accordance
14 with the Sunshine Act.

15 The decision of all contested cases before
16 the Board, and all cases before the Board are
17 contested that we'll be hearing this afternoon, must
18 be based exclusively on the record that is created
19 before us. Therefore, we ask two things. First of
20 all, make sure that you indicate and submit into the
21 record everything that you want us to deliberate on
22 and also, most importantly, we ask that people present
23 today this afternoon not engage Board Members in
24 private conversation as that would give the appearance
25 or it might tend to give the appearance of us

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1 receiving information outside of the public record.

2 At this time, actually, let me say a very
3 good afternoon to Ms. Bailey. One of the most
4 important parts of our proceedings is the Office of
5 Zoning and its staff. Ms. Bailey is sitting on the
6 very far right. The Office of the Attorney General is
7 with us, Ms. Glazer, and also Mr. Moy with the Office
8 of Zoning.

9 I'm going to ask, at this point -- well,
10 let me step back and tell you what we are going to
11 proceed with. We have gone straight through our
12 morning session, have taken a quick break and are now
13 calling the afternoon session. We have two cases that
14 have preliminary matters, at least one preliminary
15 matter each.

16 I want to go through the preliminary
17 matters and see where we are and what that does to our
18 schedule. We would then take a very short, but needed
19 lunch break and then continue with the afternoon. I
20 don't think all this should, hopefully, not take more
21 -- well, more time than needed. Let me leave it at
22 that.

23 So with that, Ms. Bailey, let me ask you
24 if there are any preliminary matters for the Board's
25 attention. Preliminary matters, for all those here,

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1 are those elements that relate to whether a case will
2 or should be heard this afternoon.

3 They are whether proper and adequate
4 notice of an application has been provided, whether
5 there is a request for a continuance, whether there is
6 a withdrawal. These are the elements that we will
7 need to address. We do not get into substance of the
8 case at this point. It is as it's named, preliminary
9 matters. They are just possibly more procedural
10 matters of whether we'll call a case. Ms. Bailey?

11 MS. BAILEY: Mr. Chairman, good afternoon
12 and to everyone, good afternoon as well. There is a
13 preliminary matter and it concerns Application 17304.
14 There are two requests for a continuance. One is from
15 Cynthia Giordano, the applicant, the applicant's
16 representative, and there is also another request from
17 Council Member Vincent Gray for a continuance as well.

18 CHAIRPERSON GRIFFIS: Excellent. Thank
19 you. And let me ask you while we're on the schedule,
20 the 17310, is there Board action required regarding
21 that case?

22 MS. BAILEY: Yes, Mr. Chairman. Well,
23 just to inform the Board that they are requesting or
24 staff is recommending that that case be rescheduled
25 for another date. Did you want to take that up first?

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1 CHAIRPERSON GRIFFIS: I would. Is there
2 representatives from 17310, Stancioff, is that how
3 it's stated, the appeal in 2E? Is anyone here for
4 that appeal case? Aha. That makes the discussion
5 easy. Ms. Bailey, what should we do with it?

6 MS. BAILEY: There is a companion case
7 that is scheduled for June 7th, that's two weeks, and
8 once the companion case has been decided, then perhaps
9 the Board can come back to this appeal at that time.

10 CHAIRPERSON GRIFFIS: Excellent. Then I
11 would recommend, Board Members, that we postpone the
12 Appeal 17310 until after the 223 application, 17327,
13 is called and decided as it may, in fact, inform the
14 appeal or moot the appeal. Are there any questions or
15 oppositions to doing that? Very well.

16 Let's set that, Ms. Bailey. What is the
17 date that we are postponing this to?

18 MS. BAILEY: Sometime in September, Mr.
19 Chairman.

20 CHAIRPERSON GRIFFIS: That sounds good.
21 Why don't we pick a date?

22 MS. BAILEY: Maybe we have to go to
23 October. Mr. Chairman, do you have your schedule with
24 you?

25 CHAIRPERSON GRIFFIS: Yes. Let's do --

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1 MS. BAILEY: The afternoon of September
2 20th. Did you want to add it there?

3 CHAIRPERSON GRIFFIS: Absolutely, third
4 case in the afternoon of September 20th. Is that
5 correct?

6 MS. BAILEY: Yes, sir.

7 CHAIRPERSON GRIFFIS: Excellent. We will
8 then postpone 17310 to 20th September in the
9 afternoon. Very well. Let's move ahead then to
10 17304. I understand that there are preliminary
11 matters as laid out by Ms. Bailey. Could I have the
12 applicant at the table? Also, is there a
13 representative from the Council Member's Office here
14 with us today? Very well. And let us have the ANC
15 representative at the table also. If you wouldn't
16 mind introducing yourself.

17 MS. GIORDANO: Good afternoon, Members of
18 the Board. My name is Cynthia Giordano from Arnold
19 and Porter Law Firm representing the applicant.

20 CHAIRPERSON GRIFFIS: Very well. Do you
21 want to just address your motion to continue?

22 MS. GIORDANO: Yes. We have requested a
23 continuance for, approximately, 30 days. The Council
24 Member contacted the applicant and asked if we would
25 be willing to postpone the hearing for 30 days to do

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1 some additional community outreach. Apparently, there
2 is -- some community members felt that they weren't
3 noticed at the first hearing.

4 We have had an additional 30 days since
5 that time and I think another additional 30 days would
6 certainly make sure that everybody is well-aware of
7 the hearing. We also have been meeting with a number
8 of civic organizations and ANCs since the last hearing
9 and we are intending to do some additional community
10 outreach with organizations that may be interested in
11 this application.

12 CHAIRPERSON GRIFFIS: Okay.

13 MS. GIORDANO: Beyond 30 days would be --
14 starts to become problematic for the applicant and the
15 feasibility of the project. So I know you have a very
16 heavy schedule, but we're trying to see if we could be
17 somehow shoe-horned into a date approximately 30 days
18 from today.

19 CHAIRPERSON GRIFFIS: Okay. We'll be
20 assessing that. So my understanding is for your
21 purposes, you are in alignment with the Council Member
22 and also the community members in terms of going out
23 and continuing to work with them for 30 days to try
24 and get this back in here?

25 MS. GIORDANO: That's correct.

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1 CHAIRPERSON GRIFFIS: Okay. Questions
2 from the Board? Any clarifications on that?

3 BOARD MEMBER ETHERLY: Very quickly, Mr.
4 Chair. Mrs. Giordano, could you give an indication of
5 what your outside time frame is? As you're probably
6 aware, the Council Member's letter did indicate a 30
7 to 60 day window anticipating perhaps that there might
8 be comment from other quarters of the community for a
9 longer continuance. Do you have an outside time
10 frame?

11 MS. GIORDANO: 60 days. I mean, I'm very
12 well-aware that the Board is in recess in August, so
13 I'm very concerned about extending beyond August. So
14 you know, early July would probably not be a major
15 problem, but September definitely would be.

16 BOARD MEMBER ETHERLY: Thank you. Thank
17 you, Mr. Chair.

18 CHAIRPERSON GRIFFIS: Okay. And we'll
19 assess. If we do grant the postponement today, we can
20 assess the schedule and try and get this done. Very
21 well. If there is nothing further from the Board, did
22 you want to address the motion for -- if you wouldn't
23 mind, I'll just have you turn on your microphone,
24 state your name and address for the record.

25 MS. DOUGLAS: My name is Dorothy Douglas.

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1 I'm the ANC Chairperson of 7D. My address is 4401
2 Minnesota Avenue, N.E., Washington D.C., ZIP, 20019.

3 VICE CHAIR MILLER: Ms. Douglas, may I
4 just interrupt for a minute?

5 MS. DOUGLAS: Yes.

6 VICE CHAIR MILLER: There was a lot of
7 confusion at the least hearing as to who was properly
8 representing the ANC and my question is do you have
9 authorization from the ANC to represent them today?

10 MS. DOUGLAS: Well, as of today, I am
11 representing the ANC Chairperson, so there is no
12 opposition to that. So we have still commissioners in
13 favor and support in the community, so --

14 VICE CHAIR MILLER: I'm sorry. I'm not
15 following you. Is there an ANC report authorizing you
16 in writing to represent the Commission?

17 MS. DOUGLAS: Yes, I'm still continuing to
18 represent the ANC as chairperson and that is my
19 obligation.

20 VICE CHAIR MILLER: I understand that.
21 Excuse me. I understand that you are the chairperson,
22 but I also understand that there was a split in the
23 ANC and there was a question of whether you're
24 representing the ANC as a whole and if so, you need
25 written authorization to do so.

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1 MS. DOUGLAS: Well --

2 VICE CHAIR MILLER: If not, I'm sure the
3 Board may entertain what you have to say, but not as
4 a representative of the ANC as a whole.

5 MS. DOUGLAS: Well, as the ANC as a whole,
6 I still have that responsibility and also I didn't
7 feel that we needed a letter of recommendation from
8 the ANC, because they had already specified their
9 support. So the majority said that they were in
10 support of the community.

11 There were only three commissioners that
12 was not in support of the issue, so that information
13 still stands the same, because we have seven
14 commissioners and only three was the ones that was in
15 support and the others had already said that they were
16 not. They are opposing this. They are in support of
17 the community, so that would be the majority.

18 VICE CHAIR MILLER: Is there -- I'm sorry
19 if I'm still confused. Is there some exhibit I should
20 see that shows that you are authorized to speak on
21 behalf of the Commission?

22 MS. DOUGLAS: Well, let me read my letter
23 to you here that I can and also District law says that
24 I can speak on behalf of the Commission, and I have it
25 in my testimony here saying that it says so.

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1 CHAIRPERSON GRIFFIS: Very well. Go
2 ahead, Ms. Miller.

3 VICE CHAIR MILLER: I was just going to
4 say why don't we hear you and then we'll decide at a
5 later point as to, you know, who we attribute it to?

6 MS. DOUGLAS: Okay. Well, I just wanted
7 to let you know Mr. Gray had also extended the 30 days
8 to 60 days extension. And I think the community needs
9 a little bit more time, because we have a lot of
10 senior citizens. I know you all schedule in August to
11 meet, but because they weren't really the people that
12 was in the 200 range in the even numbers were not
13 really notified, so I feel that they should have a
14 little bit more time than 30 days, if possible.

15 CHAIRPERSON GRIFFIS: Okay. Let's cut to
16 the chase here, because we're in a preliminary matter.
17 We have a motion from the applicant to continue this.
18 They are asking us to do it as quickly as possible, 30
19 days. I know the Council Member had asked for 30 to
20 60 days. So you are in support of continuing this
21 today?

22 MS. DOUGLAS: Yes, we're in support of
23 that. The community is in support of that, but I
24 think 30 days might not be enough for them because as
25 here, we have a lot of senior citizens here that might

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1 need a little bit more time, and we need to outreach
2 a little bit more community people that have not been
3 notified. And each and every day since we left here,
4 we have been getting calls saying that we have not
5 notified --

6 CHAIRPERSON GRIFFIS: Sure, sure, sure.

7 MS. DOUGLAS: Also churches also saying
8 they want to be a part of this.

9 CHAIRPERSON GRIFFIS: Sure.

10 MS. DOUGLAS: So that's why I would like
11 to have, because --

12 CHAIRPERSON GRIFFIS: Okay.

13 MS. DOUGLAS: Appreciate that.

14 CHAIRPERSON GRIFFIS: How many folks are
15 here for this application today? That's an awful lot
16 of people that know about this. Let me just be clear
17 on this in terms of -- and I think we always err on
18 the side of the fact of giving more time for
19 applicants to work with the community or get more
20 information out. That is of critical importance to
21 having a public hearing.

22 But also let me say the Board, when it
23 boils it all down, when we create this record and
24 everything that we have to decide on and deliberate
25 on, there will be very specific zoning issues that are

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1 involved here and it could take 150 people telling us
2 150 different things or that one person telling us
3 that one thing, meaning you don't have to pack the
4 hearing rooms. We need substance. We need to go
5 directly to the fact. Tell us why this works, why
6 this doesn't work and tell us what the issues are with
7 the community.

8 So I would suggest as we go out, if it
9 seems like everyone is in line here, we'll get through
10 a couple of the preliminary matters. If we set this
11 off, utilize that 30 days productively and try and
12 talk about some of the issues that are of critical
13 importance to this Public Hearing, and then be
14 prepared and we'll come back and do it. It's not
15 going to all get solved out there. It may have to be
16 solved, some of it, in here and we're perfectly
17 capable of hearing that as long as we stay within the
18 boundaries of our own jurisdiction, the zoning issues.

19 Okay. So what else can you tell us about
20 30 days?

21 MS. DOUGLAS: Well, as you said, as I can
22 recall at our last meeting, that you said that the
23 citizens could come and testify and that is why the
24 room is packed.

25 CHAIRPERSON GRIFFIS: I know.

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1 MS. DOUGLAS: Because those persons were
2 not really notified and within that limited time,
3 those people were contacted. So I felt that they
4 needed a little -- well, they feel that they need more
5 time to address this issue, because there are a lot of
6 things.

7 CHAIRPERSON GRIFFIS: Okay. And I get
8 there. You know, that's a little bit troubling. You
9 need more time to get more people here when everyone
10 is here today.

11 MS. DOUGLAS: No, I'm not saying --

12 CHAIRPERSON GRIFFIS: But I understand
13 that. I think we're on the same -- I don't disagree
14 with looking at additional time for this. Okay. You
15 had brought up the other aspect of notification and
16 that is the mailing notification. I don't know if the
17 Board wants to address that or not. It seems like the
18 word is getting out there, and so perhaps we just let
19 it go at that unless others have comments on it. Mr.
20 Mann?

21 BOARD MEMBER MANN: Well, I might just
22 actually ask the applicant's representative if she has
23 any comment regarding this issue of notification and
24 whether or not she feels that adequate notification
25 was given in response to some of these inquiries.

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1 MS. GIORDANO: We are checking the
2 notification. We just heard from the council member
3 yesterday and I haven't seen the affidavits, but I
4 think that we're talking about notification for the
5 April 19th hearing and it was continued then until
6 today, which is another 30 days. We're talking about
7 another 30 days. So I think the notification issue is
8 going to be covered. The required notification is 30
9 days by mail and then there was the posting,
10 obviously, in the publication.

11 BOARD MEMBER MANN: Right. And do you
12 feel that you understand what the issue was regarding
13 the 200 feet and the property boundary?

14 MS. GIORDANO: I believe so. I haven't
15 checked it in detail, yes.

16 BOARD MEMBER MANN: And so there may be --
17 the way that you would resolve this then is to perhaps
18 engage in additional notification by mail or by
19 alternative methods?

20 MS. GIORDANO: I'm certainly willing to do
21 it by mail. If we get the date here, I would be
22 willing to either provide mailing labels to the staff
23 or send it out directly, but I really do believe, at
24 this point, that everybody is pretty well-aware of the
25 hearing and the continuance.

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1 BOARD MEMBER MANN: But at a minimum, is
2 it fair to say that --

3 MS. DOUGLAS: No, that's not true, no, no,
4 no.

5 BOARD MEMBER MANN: -- mailing list would
6 be larger than it was originally?

7 MS. GIORDANO: Yes.

8 CHAIRPERSON GRIFFIS: Okay.

9 MS. DOUGLAS: Can I say something in
10 regards to the notification? The notification was not
11 given properly in the beginning and this is why the
12 citizens are here now and to say that, as you see, the
13 notice, by them being present here. That's because at
14 the short time that we were allowed at our last
15 meeting on April the 19th, we started a process of
16 letting people know what was going on, because those
17 people weren't known, and plus we have gotten more
18 information from maps and title that those people
19 weren't notified on that list.

20 CHAIRPERSON GRIFFIS: You mean they didn't
21 get the mailing?

22 MS. DOUGLAS: No, they didn't get the
23 mailing at all, and so proper notification was not
24 done in a timely manner.

25 CHAIRPERSON GRIFFIS: Okay.

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1 MS. DOUGLAS: Even also addressed to me,
2 which I have documents to show that I did not get it
3 in time.

4 CHAIRPERSON GRIFFIS: Okay. But let's see
5 how we remedy that.

6 MS. DOUGLAS: Okay.

7 CHAIRPERSON GRIFFIS: So next time we get
8 here we don't have the same issues.

9 MS. DOUGLAS: Right. But I just wanted to
10 let you know that she said that they are -- she gave
11 proper notification in a timely manner. That did not
12 happen. So I wanted to give some clarification on
13 that.

14 CHAIRPERSON GRIFFIS: Okay. Believe me,
15 we have studied your submission on that. I think we
16 are well-aware of what the issue is in it. It may be
17 -- well, there it is. We need to remedy it for the
18 next meeting. Mr. Etherly?

19 BOARD MEMBER ETHERLY: It would perhaps be
20 my suggestion, Mr. Chair, I think, one, we appear to
21 have some agreement on the issue of a continuance. So
22 I think everyone is in agreement that we're not moving
23 forward today. It would perhaps be my desire to offer
24 a little bit of a compromise scenario here. I have
25 heard that at the outset 30 days would not be

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1 disagreeable to the applicant, at minimum.

2 I think, as we have discussed a little bit
3 at our earlier proceeding and as we continue to hear
4 through testimony today in some of the written
5 submissions on the part of the ANC, we still do have
6 something of a question of fact regarding whether or
7 not notice has gone out sufficiently. It, perhaps,
8 would be my inclination to look at a somewhat longer
9 period of time. I'm perhaps not inclined to go a full
10 60 days, because I think this Board, obviously, has to
11 balance a little bit, one, the applicant's desire to
12 move forward with some type of resolution, but also,
13 two, the concerns on the part of the community with
14 regard to having enough opportunity to prepare
15 testimony to support opposition or what have you.

16 MS. DOUGLAS: Right. I agree with you
17 very much.

18 BOARD MEMBER ETHERLY: So it might perhaps
19 be my suggestion, Mr. Chair, of looking at a middle
20 point between the 30 and the 60, but perhaps going a
21 little farther than the 30 days. But I want to echo
22 what the Chairman said that that would be time that
23 could be very valuably spent.

24 MS. DOUGLAS: I understand.

25 BOARD MEMBER ETHERLY: In terms of further

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1 dialogue between the community and the applicant and,
2 you know, whether you reach some type of resolution or
3 not. It may be the case that all of these minds will
4 not come to an agreement on what happens at this
5 subject property. And that's okay.

6 MS. DOUGLAS: Yes.

7 BOARD MEMBER ETHERLY: But I would think
8 that perhaps a little longer than a 30 day time frame,
9 perhaps a 40 or 45 day time frame --

10 MS. DOUGLAS: Right.

11 BOARD MEMBER ETHERLY: -- would be
12 sufficient, Mr. Chair.

13 CHAIRPERSON GRIFFIS: Indeed. Okay. It
14 seems like we have three, certainly the applicant, Ms.
15 Douglas have indicated, and also the Council Member
16 requesting a continuance of this. Mr. Etherly brings
17 some good compromise that fits well into our schedule,
18 too.

19 MS. DOUGLAS: Thank you.

20 CHAIRPERSON GRIFFIS: We'll start at 30
21 and see where we go. It's probably closer to 45 as he
22 is indicating.

23 MS. DOUGLAS: Okay.

24 CHAIRPERSON GRIFFIS: Let's check our
25 schedules on this.

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1 MS. DOUGLAS: Thank you.

2 CHAIRPERSON GRIFFIS: Where are we? We're
3 at 7. How's July 5th look, Ms. Giordano?

4 MS. DOUGLAS: How many days is that, July
5 5th that you're saying?

6 CHAIRPERSON GRIFFIS: Days? I don't know.

7 MS. DOUGLAS: Yes. Well, could you just
8 tell us how many days out, please?

9 UNIDENTIFIED SPEAKER: It's more than 30.

10 CHAIRPERSON GRIFFIS: It's more than 30.

11 MS. DOUGLAS: Huh?

12 CHAIRPERSON GRIFFIS: It's all of June,
13 whatever is left in May and the first week of July.

14 BOARD MEMBER ETHERLY: It's somewhere in
15 the neighborhood of 37 to 40 days.

16 CHAIRPERSON GRIFFIS: Yes, it's about 40
17 days.

18 MS. DOUGLAS: Okay. Thank you.

19 CHAIRPERSON GRIFFIS: And the only reason
20 why I'm going there is, quite frankly, if it's not the
21 5th, it's October and that doesn't --

22 MS. DOUGLAS: Okay.

23 CHAIRPERSON GRIFFIS: From our schedule
24 and from what we need, it may please some folks to
25 think of that date. It doesn't please me having to

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1 review all the information again to be prepared. The
2 Board doesn't like to continue cases for numerous
3 reasons, but the one most --

4 MS. DOUGLAS: I understand. I appreciate
5 it. I'm sure the community appreciates the extension.

6 CHAIRPERSON GRIFFIS: Okay. So what we
7 can do is we'll do it on the 5th. We do have other
8 cases in the afternoon. They should go fairly quickly
9 and then we'll get to this one. Very well. What else
10 do we have? Mr. Etherly?

11 BOARD MEMBER ETHERLY: It might perhaps be
12 useful, Mr. Chair, to speak briefly to the issue of
13 notice and any kind of guidance that the Board might
14 want to offer, so we don't necessarily have to address
15 that issue again on the 5th. I mean, I'm open to any
16 suggestions that the applicant and/or the ANC might
17 have or once again we want to encourage maybe a little
18 bit of dialogue among the Board around how we, to the
19 extent possible, address this issue of notice, so we
20 don't have to deal with it on the 5th.

21 MS. GIORDANO: Right. If I may, Mr.
22 Chair, it's not typically required for a continuance,
23 but I'm happy to send out a Public Hearing notice to
24 the 200 foot property owners, even a little bit
25 beyond, if Ms. Douglas feels that would be helpful.

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1 CHAIRPERSON GRIFFIS: Ms. Douglas, do you
2 think it's the mailing now that is attracting people's
3 attention or there are other means of which notice is
4 going to be provided?

5 MS. DOUGLAS: Well, we will do everything.
6 We've done walking, skating, riding, whatever.

7 CHAIRPERSON GRIFFIS: Right. So you're
8 saying you're getting the word out, right?

9 MS. DOUGLAS: We're getting it out in the
10 mail and also it's been whatever means that it can,
11 because it's short notice that we can do.

12 CHAIRPERSON GRIFFIS: Okay.

13 MS. DOUGLAS: So --

14 CHAIRPERSON GRIFFIS: Ms. Giordano, I
15 think you ought to repost the property with the new
16 date for the next hearing.

17 MS. GIORDANO: Okay.

18 CHAIRPERSON GRIFFIS: Is that all right?

19 MS. DOUGLAS: July the 5th, right? Yes.

20 CHAIRPERSON GRIFFIS: Yes.

21 MS. DOUGLAS: Yes.

22 CHAIRPERSON GRIFFIS: Okay. That way
23 anyone walking by the notice, they're going to know
24 when to be here.

25 MS. DOUGLAS: Can I just ask the community

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1 would they be in favor of that for a minute, please?

2 CHAIRPERSON GRIFFIS: Can you do what?

3 MS. DOUGLAS: May I ask the community is
4 that feasible with them, because I know they are the
5 ones that have been dealing with the property owners.
6 May I ask them a question is that okay with them?

7 CHAIRPERSON GRIFFIS: Ask the community a
8 question?

9 MS. DOUGLAS: Yes, because we represent
10 the community.

11 CHAIRPERSON GRIFFIS: That's going to be
12 a great feat. That's like talking to the -- I want to
13 talk to the world.

14 MS. DOUGLAS: Well, you know.

15 CHAIRPERSON GRIFFIS: I'm sorry. What do
16 you want to ask?

17 MS. DOUGLAS: I just wanted to address the
18 community are they -- is that good enough for them.
19 I just want to ask the question.

20 MS. GIORDANO: Posting and a mailing.

21 MS. DOUGLAS: Posting and the mailing,
22 right.

23 CHAIRPERSON GRIFFIS: Posting and a
24 mailing?

25 MS. DOUGLAS: Right.

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1 CHAIRPERSON GRIFFIS: But the mailing is
2 going to go -- all right. There it is. Ms. Giordano,
3 what we're going to ask is, what's interesting about
4 this site and, of course, our regulations, past
5 procedure may not have followed this, but in larger
6 sites often times it's the center and a radius of 200
7 feet. We would ask you that, in this particular case,
8 that you go 200 feet from the property lines. And so
9 this will probably pick up as we have assessed half a
10 block in each direction, so there are several more
11 houses that would be involved in that.

12 MS. GIORDANO: That's fine. We can get it
13 out tomorrow.

14 CHAIRPERSON GRIFFIS: Okay.

15 MS. GIORDANO: And it's not a very long
16 list.

17 CHAIRPERSON GRIFFIS: No, exactly.

18 MS. GIORDANO: I mean, it's certainly
19 smaller than the people in this room.

20 CHAIRPERSON GRIFFIS: Exactly. Okay. We
21 need to get that in as quickly as possible. You're
22 going to have this office mail them out? Is that
23 correct? Are you going to mail it? This is what I
24 propose. Why don't you do it, why don't you mail it,
25 why don't you just submit the list of the addressees

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1 that you have mailed to?

2 MS. GIORDANO: Okay.

3 CHAIRPERSON GRIFFIS: Why don't you give
4 it to the ANC and just submit it into the record? We
5 won't need to have this discussion again, because
6 everyone is going to know about it. And we'll move
7 ahead from there.

8 Ms. Bailey, are you aware of any other
9 preliminary matters for our attention?

10 MS. BAILEY: Yes, Mr. Chairman.

11 CHAIRPERSON GRIFFIS: She is. She is
12 aware of one other one. I'm sorry to cut you off, Ms.
13 Bailey. We have had a submission, Exhibit 45. It's
14 dated April 9 from a Jeannie Knox, and it is a request
15 for party status. Ms. Giordano, are you in receipt of
16 this?

17 MS. GIORDANO: No, I have not seen this.

18 CHAIRPERSON GRIFFIS: Is Ms. Knox present?

19 MS. DOUGLAS: Yes, she is. Ms. Knox?

20 CHAIRPERSON GRIFFIS: Do you want to come
21 up for a quick second, please? First of all, Ms.
22 Knox, actually, why don't you just state your name and
23 address for the record?

24 MS. KNOX: Yes, my name is Jeannie Knox.
25 My address is 32 46th Street, N.E.

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1 CHAIRPERSON GRIFFIS: And you do realize
2 that if I'm not mistaken, this is not timely filed?

3 MS. KNOX: I'm sorry?

4 CHAIRPERSON GRIFFIS: This isn't a timely
5 filed request for party status.

6 MS. KNOX: It wasn't timely? It was my
7 understanding that it should have been filed within 10
8 days of the hearing. Is that not correct?

9 CHAIRPERSON GRIFFIS: That is correct.

10 MS. KNOX: Okay.

11 CHAIRPERSON GRIFFIS: Of the first
12 hearing.

13 MS. KNOX: The hearing -- sorry?

14 CHAIRPERSON GRIFFIS: Of the first
15 hearing.

16 MS. DOUGLAS: No, you said after here --
17 that was after the hearing.

18 CHAIRPERSON GRIFFIS: Is that right?

19 MS. DOUGLAS: We didn't get the notice, so
20 how could they have known about the first hearing?
21 She didn't get the notice.

22 CHAIRPERSON GRIFFIS: What was the date of
23 our first hearing?

24 MS. DOUGLAS: April 19th.

25 UNIDENTIFIED SPEAKER: But it was received

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1 on --

2 CHAIRPERSON GRIFFIS: It came into this
3 office on May 10th.

4 MS. KNOX: It came into this office on
5 May, yes, it should have. I brought it into -- hand
6 delivered it on May 10th to ask for party status for
7 this particular hearing. I had no idea of the first
8 hearing at all, so -- because I wasn't notified by the
9 applicant.

10 CHAIRPERSON GRIFFIS: All right.

11 MS. KNOX: I'm one of the homeowners
12 within the 200 foot range that was not notified. I
13 submitted my letter to that effect indicating that all
14 residents on the 46th Street block with even addresses
15 were not notified.

16 MS. GIORDANO: Can I just ask whether you
17 were at the previous hearing?

18 MS. KNOX: Yes, I was. And the reason I
19 was there, I was notified by the ANC, a little flyer
20 delivered to my home address.

21 CHAIRPERSON GRIFFIS: Yes.

22 MS. KNOX: Two days before the hearing and
23 that's the only way I knew about it.

24 CHAIRPERSON GRIFFIS: All right. But
25 we're confusing the issue. I just asked you why it

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1 wasn't 10 days prior to the hearing --

2 MS. KNOX: Okay.

3 CHAIRPERSON GRIFFIS: -- in calling this
4 case.

5 MS. KNOX: And I thought --

6 CHAIRPERSON GRIFFIS: And you said you
7 didn't know about the first one, but you were here.

8 MS. KNOX: I was here and, as I mentioned,
9 the way I knew about it was that the ANC --

10 CHAIRPERSON GRIFFIS: But that doesn't
11 matter, necessarily.

12 MS. DOUGLAS: Yes, it does matter.

13 CHAIRPERSON GRIFFIS: We'll get to that
14 issue.

15 MS. DOUGLAS: It does matter.

16 UNIDENTIFIED SPEAKER: It does matter.

17 CHAIRPERSON GRIFFIS: I understand it
18 matters.

19 MS. KNOX: Okay. But I'm not getting the
20 point.

21 CHAIRPERSON GRIFFIS: We take one issue --
22 please, please, let me finish. We take one issue at
23 a time. This is a legal procedural regulatory issue.

24 MS. KNOX: Okay.

25 CHAIRPERSON GRIFFIS: There is a filing

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1 date.

2 MS. KNOX: Okay.

3 CHAIRPERSON GRIFFIS: For a request for
4 party status.

5 MS. KNOX: All right.

6 CHAIRPERSON GRIFFIS: It was not timely
7 filed.

8 MS. KNOX: Okay.

9 CHAIRPERSON GRIFFIS: I'm trying just to
10 assess why it wasn't. You indicated to me that well,
11 you didn't know about it and you weren't notified.

12 MS. KNOX: Okay.

13 CHAIRPERSON GRIFFIS: But you were here.

14 MS. KNOX: Right.

15 CHAIRPERSON GRIFFIS: Because you were
16 notified other ways. Your timeliness of filing may
17 relate to why it wasn't in, although it doesn't really
18 make a lot of sense to me.

19 MS. KNOX: Okay.

20 CHAIRPERSON GRIFFIS: That you could make
21 it here, but you are, essentially, saying but the
22 applicant didn't tell me to be here, someone else did,
23 that's why I didn't put my request for party status
24 in.

25 MS. DOUGLAS: She didn't know about it.

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1 MS. KNOX: I didn't know about the hearing
2 in time.

3 MS. GIORDANO: Mr. Chairman, can I make a
4 suggestion? Maybe this is something we should take up
5 at the next hearing.

6 CHAIRPERSON GRIFFIS: Right.

7 MS. GIORDANO: That way I'll have a chance
8 to review the request.

9 UNIDENTIFIED SPEAKER: Don't change it.

10 MS. KNOX: In addition to that, in reading
11 the Zoning Rules and perhaps I misread them, it didn't
12 indicate whether I should have applied for party
13 status for the first one or the second one or any
14 thereafter.

15 CHAIRPERSON GRIFFIS: Right. And I
16 understand. Listen, it gets more complicated as we go
17 in.

18 MS. KNOX: I'm sure.

19 CHAIRPERSON GRIFFIS: That's why we're
20 just trying to get the first one out of the way and
21 then move on. Ms. Giordano, I am amenable to do that
22 if we could take Ms. Knox and treat her as a party
23 until we get there to actually decide. Meaning, as
24 you proceed that in the filing --

25 MS. GIORDANO: I'll serve her.

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1 CHAIRPERSON GRIFFIS: -- she would be in,
2 you would serve on Ms. Knox. In which case, what we
3 could do is allow the applicant time to review this
4 and then we can assess this as a first preliminary
5 matter that comes forward. So, in a sense, Ms. Knox,
6 at this point, we would have the Board establish that
7 you would be served on everything that was filed.

8 MS. KNOX: I appreciate that.

9 CHAIRPERSON GRIFFIS: Okay. Board
10 Members, any opposition to that?

11 VICE CHAIR MILLER: No.

12 CHAIRPERSON GRIFFIS: Mr. Jeffries, you
13 okay with that? You want to run through the party
14 status now?

15 MS. DOUGLAS: You are excused. You're
16 excused. He's in follow-up.

17 CHAIRPERSON GRIFFIS: Very well. Ms.
18 Knox, I would like to proceed in that fashion.
19 Meaning, also, in that respect that you will --
20 anything that you decide to file into the record,
21 although we're not anticipating that you would, Ms.
22 Knox, are you anticipating that you would?

23 MS. KNOX: I'm sorry?

24 CHAIRPERSON GRIFFIS: Indeed. Are you
25 anticipating that you are going to do additional

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1 filings into the record before the next hearing?

2 MS. KNOX: Possibly.

3 CHAIRPERSON GRIFFIS: Okay. In the same
4 respects that you are being treated as a party, you
5 have not been established as a party in this case.

6 MS. KNOX: Certainly.

7 CHAIRPERSON GRIFFIS: We'll take that up
8 on the 5th.

9 MS. KNOX: Yes.

10 CHAIRPERSON GRIFFIS: But as you are being
11 treated as a party, you will be served all those
12 submissions by the applicant and the ANC that submit.
13 I would ask, I actually would require that you also
14 serve on all the others information that you will put
15 into the record. Is that understood?

16 MS. KNOX: Definitely.

17 CHAIRPERSON GRIFFIS: Excellent. Okay.
18 Before you all leave then, you need to change
19 addresses and notice of how you want to be served.

20 MS. DOUGLAS: I have something to say.

21 CHAIRPERSON GRIFFIS: If you have an
22 address where things should go and how that should go,
23 make sure that the applicant knows that, so that you
24 don't have any delay in getting that.

25 MS. KNOX: That's understood.

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1 CHAIRPERSON GRIFFIS: Very well. We'll
2 proceed in that fashion. Did you have one other
3 thing?

4 MS. DOUGLAS: Yes, I just wanted to say
5 that the posting at the Metro Center Station reads --
6 stated that specific -- there was no specific reason
7 for the next meeting. So that didn't -- also wasn't
8 clear or clarified in order for people to be notified
9 as well when the meeting was going to be.

10 CHAIRPERSON GRIFFIS: I'm not sure what
11 you are asking.

12 MS. DOUGLAS: Well, the posting, they put
13 a post up there saying when a hearing is supposed to
14 be for public notice.

15 CHAIRPERSON GRIFFIS: Sure, sure.

16 MS. DOUGLAS: Well, it didn't say when the
17 date of the hearing would be. So there was no
18 clarification on that.

19 CHAIRPERSON GRIFFIS: Oh, so the date of
20 the continued hearing wasn't on there? Is that what
21 you're saying?

22 MS. DOUGLAS: No, neither one. There was
23 nothing up there saying that.

24 CHAIRPERSON GRIFFIS: Okay. So that is
25 what you're saying?

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1 MS. DOUGLAS: Yes, and also I --

2 CHAIRPERSON GRIFFIS: Ms. Giordano, you're
3 going to repost this and you're going to establish, of
4 course, the relief that's being requested and also the
5 new date of the 5th of July in the afternoon and it
6 all will say as it should and it does where the Public
7 Hearing takes place. Excellent. Okay. Anything
8 else?

9 MS. DOUGLAS: I was wondering can I object
10 so that Mrs. Knox can continue and that you all won't
11 throw out the -- object the applicant's request that
12 they can accept what Ms. Knox is. Is that what you're
13 saying?

14 CHAIRPERSON GRIFFIS: I'm sorry, what?

15 MS. DOUGLAS: Are you saying that you're
16 accepting what Ms. Knox, her testimony?

17 CHAIRPERSON GRIFFIS: No. We haven't
18 established party status in this case, at this point.

19 MS. DOUGLAS: True.

20 CHAIRPERSON GRIFFIS: We're going to take
21 that up on the 5th.

22 MS. DOUGLAS: Well, we can read -- I think
23 I can object to that, because the applicant --

24 CHAIRPERSON GRIFFIS: Actually, we're not
25 going to take it up until the 5th.

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1 MS. DOUGLAS: Okay.

2 CHAIRPERSON GRIFFIS: So hold all those
3 statements.

4 MS. DOUGLAS: All right.

5 CHAIRPERSON GRIFFIS: Ms. Bailey, are you
6 aware of any other preliminary matters?

7 MS. BAILEY: Not at this time, Mr.
8 Chairman.

9 CHAIRPERSON GRIFFIS: Does anyone else
10 have any other preliminary matters for our attention?

11 MS. DOUGLAS: No.

12 CHAIRPERSON GRIFFIS: Very well. Ms.
13 Knox, thank you very much.

14 MS. KNOX: Thank you.

15 MS. DOUGLAS: Is this it?

16 CHAIRPERSON GRIFFIS: Did you have a
17 comment, sir?

18 MR. RANDALL: Yes, sir.

19 CHAIRPERSON GRIFFIS: Come up quickly.

20 MS. DOUGLAS: Did you want to say
21 something? Come forward.

22 CHAIRPERSON GRIFFIS: You have to speak
23 into the microphone.

24 MS. DOUGLAS: So we're leaving our
25 testimony until the next time?

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1 CHAIRPERSON GRIFFIS: That's right.

2 MS. DOUGLAS: Okay.

3 CHAIRPERSON GRIFFIS: That's right. So
4 for everyone's understanding, we are not hearing this
5 case this afternoon. We have now set this for the 5th
6 of July. And so we will continue with that and have
7 everyone come forward. But if there are procedural
8 questions?

9 UNIDENTIFIED SPEAKER: What time?

10 CHAIRPERSON GRIFFIS: An excellent
11 question, the question is what time. In the
12 afternoon, our afternoon session is scheduled to start
13 at 1:00. We do have two other cases that should be
14 short in that, so I would imagine by 3:00 we would
15 call this case. Yes, sir?

16 MR. RANDALL: Thank you, Mr. Chairman. My
17 name is Leo Randall.

18 CHAIRPERSON GRIFFIS: Yes.

19 MR. RANDALL: And I reside at 4546 Eads
20 Street, E-A-D-S Street, N.E., Washington, also in the
21 nearby area of this concern. I heard it mentioned
22 several times that we are concerned about people that
23 are 200 feet within the question, the thing that's in
24 question. Is that right?

25 CHAIRPERSON GRIFFIS: Right. And I'll

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1 clarify for you in terms of notification is a big
2 issue in every single case that we have. And this is
3 the bottom line. In our regulations, we have specific
4 requirements that the applicant must proceed with and
5 there are timings on that and two types. But the two
6 most important types that we do for notification is a
7 mailing and our regulations state that all property
8 owners within 200 feet of the property are mailed
9 notice of the hearing. And then we have the posters,
10 the big orange placards that are set on the property.

11 It has been my experience on this Board
12 that the placards are the most important notification
13 that we have, because that's what people walk by.
14 Whether they live right next door or not, that's what
15 people come and go, see and that tells you exactly the
16 relief and the date and where the hearing is going to
17 be.

18 MR. RANDALL: Thank you. Mr. Chairman,
19 the magnitude of this situation here would affect more
20 than just 200 feet.

21 CHAIRPERSON GRIFFIS: Exactly.

22 MR. RANDALL: That's my concern.

23 CHAIRPERSON GRIFFIS: Exactly. And let me
24 tell you also that we don't preclude anybody from
25 coming in and participating at hearings. You don't

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1 have to be within a 200 foot radius. If you have
2 testimony to provide that will inform this Board in
3 its decision, then we encourage everyone to come down.
4 So it does not directly link to the notification. I'm
5 going to take a couple more quick procedural questions
6 on this whole notification.

7 MR. PACE: It's just regarding the notice.

8 CHAIRPERSON GRIFFIS: Okay. You have to
9 be up at the table. You have to be on a microphone.
10 And then we have to move on. Thank you very much.

11 MR. RANDALL: Thank you, Mr. Chairman.

12 CHAIRPERSON GRIFFIS: I appreciate you
13 bringing that to our attention. Yes?

14 MR. PACE: Just a quick question about the
15 notification.

16 CHAIRPERSON GRIFFIS: Sure.

17 MR. PACE: Tracey Pace, 17 46th Street,
18 S.E. I just wanted to know how if it's stated, if
19 it's customary for the reason for the hearing to take
20 place to be posted at -- on these placards at the
21 Metro Station?

22 CHAIRPERSON GRIFFIS: You mean the zoning
23 relief that's being requested?

24 MR. PACE: Yes, I guess.

25 CHAIRPERSON GRIFFIS: Yes.

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1 MR. PACE: Whatever the reason for the --

2 CHAIRPERSON GRIFFIS: Absolutely.

3 MR. PACE: Because I think I recall
4 something about an office building as the reason for
5 the meeting. And that sort of is misleading about
6 what the actual hearing is going to be about.

7 AUDIENCE MEMBERS: Yes.

8 CHAIRPERSON GRIFFIS: Okay.

9 MR. PACE: I mean, we're clearly
10 discussing an offender services building. So why --

11 CHAIRPERSON GRIFFIS: This is what your
12 placard is going to read. It's going to say "Relief
13 sought pursuant to 11 DCMR 3104.1, for a special
14 exception to allow construction of an office building,
15 not meeting the parking requirements under section
16 2107, not meeting the roof structure setback
17 requirements under subsection 411.11 and parking lot
18 subsection 213 at premises 4500 Benning Road, N.E."

19 And what your statement is yes, what does
20 that mean to me?

21 AUDIENCE MEMBERS: Yes, right.

22 CHAIRPERSON GRIFFIS: Yes.

23 MR. PACE: And there may be some --

24 CHAIRPERSON GRIFFIS: I totally
25 understand.

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1 MR. PACE: -- regulatory language.

2 CHAIRPERSON GRIFFIS: Sure.

3 MR. PACE: That has to be as you read it.

4 CHAIRPERSON GRIFFIS: That's exactly
5 correct.

6 MR. PACE: Okay.

7 CHAIRPERSON GRIFFIS: That is the relief
8 that's being sought. That's the application. That's
9 the relief. That's the Zoning Regulations.

10 MR. PACE: Yes.

11 CHAIRPERSON GRIFFIS: We don't embellish
12 those. We don't editorialize. We don't say, you
13 know, this is the most stellar architecturally award
14 winning design proposed for this site or we don't say
15 this is the worst thing I could ever imagine ever
16 coming to my neighborhood. It is straight. I'm not
17 a lawyer, but, you know, it's just dry legal stuff
18 that we have to put on these placards and that's what
19 it is.

20 MR. PACE: And I guess the same applies
21 for the mailings?

22 CHAIRPERSON GRIFFIS: That's correct.

23 MR. PACE: Okay.

24 CHAIRPERSON GRIFFIS: That's correct.
25 Just think about it if we had to craft all these

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1 creatively and flourishing designs and narratives and
2 then write them all out and then people would object
3 that I didn't know exactly what it was. Okay.

4 MR. PACE: Okay. Thank you.

5 CHAIRPERSON GRIFFIS: Yes?

6 MS. MESIDOR: My name is Cleve Mesidor.
7 I live on 29 46th Street, S.E., literally less than a
8 one minute walk to the Metro Station.

9 CHAIRPERSON GRIFFIS: Okay. Okay.

10 MS. MESIDOR: And the only reason I knew
11 about this hearing was accidentally, because I was
12 dropping off a gift to a baby shower and happened to
13 hear talking. So I have never gotten any notice.
14 And, obviously, that's been talked to death. But what
15 is the penalty for the applicant, as you call them,
16 who want to come into my community for failing to
17 inform me?

18 Because it seems that they have got
19 tremendous continuances, but there has been no penalty
20 for them to not comply with the rules. And it seems
21 that the ANC, the burden of informing seems to fall on
22 the ANC, while they can be seen more in my community.
23 There has to be some penalties and are they being
24 implemented?

25 CHAIRPERSON GRIFFIS: Right. Believe me,

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1 I fully understand. In this application and a lot of
2 applications and applications in my own neighborhood
3 where there is frustration that people may not know
4 exactly what's going on. Firstly, we don't have the
5 authority or the ability to penalize somebody or fine
6 them. We can't necessarily flat out deny an
7 application without hearing it just based on the fact
8 that notification wasn't provided.

9 So what we do is we take that under great
10 advisement. A continuance is a penalty in most of
11 these cases. I don't know whether it is or not, but
12 you've heard the applicant's representative say that
13 the actual feasibility of this, the potential that
14 this will go or not go will depend on how long this
15 has to sit through all these processes. So there is
16 some penalty for not having it all together and not
17 being able to proceed in one day.

18 Other than that, we take it very seriously
19 and we do, as I said, why we have it noticed in
20 several ways, we also give notice to the ANC. The ANC
21 has a responsibility to, in representing its
22 community, spread the word further out than we will be
23 able to. So I think it's not perfect, but we have to
24 deal with what we have. And the important thing is
25 you did find out and you are going to participate.

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1 And so we're going to see you.

2 MS. MESIDOR: Accidentally, though.

3 CHAIRPERSON GRIFFIS: Well, on the 5th.

4 VICE CHAIR MILLER: Mr. Chairman?

5 MS. TINGLING-CLEMMONS: Mr. Griffis, my
6 question is actually it's a good segueway to my
7 question. I believe I remembered reading in the --
8 although you have the book of the Zoning Regulations
9 that, in fact, if the applicant fails to properly
10 notify all property owners within a 200 foot radius,
11 that that is, in fact, grounds for a denial of their
12 application.

13 And when we got the list from -- when we
14 went through the maps for maps and titles, we found
15 some 38 property owners that were listed, actually
16 it's a little more, I think it's 44, the applicant sat
17 here at the last hearing and attested that she was
18 certain that they had properly notified all property
19 owners.

20 CHAIRPERSON GRIFFIS: Right.

21 MS. TINGLING-CLEMMONS: In addition to not
22 notifying the property owners on the even side of the
23 block, some of whom purchased their properties from
24 Metro, they failed to notify the bank that's less than
25 25 yards from the proposed site, which is actually the

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1 bank from Marshall Heights. So I fail to see how they
2 could attest that they had properly notified the
3 property owners. And that appears to be more than
4 just a slight oversight. And I believe that your
5 regulations say that those are grounds for a denial of
6 their application.

7 UNIDENTIFIED SPEAKER: Right.

8 CHAIRPERSON GRIFFIS: Where? What section
9 in the regulations?

10 MS. TINGLING-CLEMMONS: I would have to
11 look in the book. I'm sure Mr. Moy has it.

12 CHAIRPERSON GRIFFIS: Right. I think you
13 may be confusing it in terms of the acceptance of the
14 application. When you put together all your paperwork
15 and it goes to the Office of Zoning, the Office of
16 Zoning has to check off certain things that are met.
17 The requirements that are met and one of the
18 requirements is posting and written notification. We
19 have affidavits of the posting and then we have the
20 entire text addresses put into the record. And so in
21 order for an application to be ready to go, ready to
22 be heard from the hearing, it would need to comply
23 with all of that.

24 MS. TINGLING-CLEMMONS: Actually, here it
25 is.

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1 CHAIRPERSON GRIFFIS: Okay. There it is.

2 MS. TINGLING-CLEMMONS: The instructions
3 of the application filed by WMATA specifically state
4 that "Any notice of application for action provided in
5 the District of Columbia Zoning Regulations 11 DCMR
6 Zoning, that is not completed in accordance with the
7 following instructions, shall not be accepted. And
8 required information to be submitted when making an
9 application submission includes: (F) The names and
10 mailing addresses of the owners of all property within
11 200 feet."

12 CHAIRPERSON GRIFFIS: The application is
13 ready or it isn't ready to go. It doesn't mean an
14 automatic denial.

15 UNIDENTIFIED SPEAKER: It said it shall
16 not be --

17 MS. TINGLING-CLEMMONS: It says shall not
18 be accepted.

19 UNIDENTIFIED SPEAKER: It shouldn't even
20 be accepted.

21 CHAIRPERSON GRIFFIS: Yes, I understand
22 that. I understand. There's a difference of opinion
23 in terms of --

24 AUDIENCE MEMBERS: (All talking.)

25 CHAIRPERSON GRIFFIS: Okay. Let me put it

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1 to you here. I'm not trying to get away with
2 anything. I'm not trying to move this along. Listen
3 to me and listen to me clearly. If you really want to
4 get into the substance of the facts of what's going on
5 here, then do. Look at the ANC and what they have
6 submitted in terms of their representation. There is
7 a difference of opinion from the applicant and the
8 community of what notification and what should have
9 been notified.

10 The Board has not definitively decided
11 what is correct or not correct. We haven't even
12 brought this up. What we're trying to do is make sure
13 that everyone is ready to go and we can get into this
14 issue and look at it. Look at where the notification
15 is sent from in the past procedure. If you want to be
16 informed and you want to actually hold a very strong
17 opinion on this, that's important to do and we will
18 pick this up.

19 But you need to be informed on each of the
20 sides and each of the issues that are being put up.
21 The ANC is making a case to the fact that their
22 notification is required to be 200 feet from the line
23 of the property, the property line. There is a strong
24 opinion that that is a correct reading of our rules
25 and regulations. The regulations of notification.

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1 There is past procedure that says that you pick a
2 point in the center of the property and you notify 200
3 feet with a radius of the property.

4 How do you establish a radius? If anyone
5 wants to argue definitively of what is the correct way
6 or not the correct way, I would be happy to hear it as
7 a preliminary matter. But to walk away from here
8 thinking that the Board or me, myself are trying to
9 push this in one direction or not, would be incorrect.
10 I want you to take a look at exactly what is being
11 submitted into us and we will make a decision. No
12 decision has been made on this issue, at this time.

13 What else do we have in terms of the
14 preliminary matter for this case that I can help
15 answer?

16 MS. TINGLING-CLEMMONS: Okay. Well, that
17 didn't really sound like an answer to me. The problem
18 is that they had to go past some of the effective
19 properties that they did not notify.

20 CHAIRPERSON GRIFFIS: I understand.

21 MS. TINGLING-CLEMMONS: And the notified
22 ones on the --

23 CHAIRPERSON GRIFFIS: I fully understand
24 the issue.

25 MS. TINGLING-CLEMMONS: And this matter

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1 was actually taken up at the last hearing.

2 CHAIRPERSON GRIFFIS: And understand that
3 the Board --

4 MS. TINGLING-CLEMMONS: When you denied
5 the ANC's application for a postponement of the
6 hearing on April 19th.

7 VICE CHAIR MILLER: Can I say something?
8 Can I just jump in here, because we haven't even had
9 a lunch break and we really need one. So what I want
10 to say -- no, and I know you have been waiting. What
11 I want to say is the applicant is going to be
12 notifying again, so all this discussion may be moot at
13 this point. The applicant is going to notify in
14 whatever manner it deems appropriate. And at the next
15 hearing, if you all think that notice is inadequate,
16 that would be the time to address the Board on that
17 subject.

18 It seems like, at this point, it's moot.
19 It's a waste of time. It doesn't matter. They are
20 going to be notifying again. We're not hearing the
21 case right now. We're continuing it until the next
22 time.

23 MS. TINGLING-CLEMMONS: Well, then maybe
24 the appropriate question is where do we go to insert
25 a condition that applies penalties to applicants who

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1 fraudulently submit applications and do not follow the
2 rules and regulations of the Zoning Commission?

3 CHAIRPERSON GRIFFIS: The Zoning
4 Commission, they would write it in the regulations.
5 I'm totally serious. There's no -- we would need the
6 regulations that would point to this Board that we
7 have the jurisdiction authority to, one, deny, to levy
8 penalties on. I want to do it. I don't know how I
9 could do it.

10 MS. TINGLING-CLEMMONS: But do I
11 understand that Mr. Jeffries is the Zoning Commission
12 representative?

13 CHAIRPERSON GRIFFIS: Yes.

14 MS. TINGLING-CLEMMONS: And that's who we
15 should contact?

16 CHAIRPERSON GRIFFIS: That's right.

17 MS. TINGLING-CLEMMONS: I would like to
18 get a card contact before we leave here. Thank you.

19 CHAIRPERSON GRIFFIS: It would be the
20 Office of Zoning. This is the last piece and then we
21 need to move on. Thank you, Ms. Knox.

22 MS. BROWN: My name is Yvette Brown and
23 I live at 4511 Dix Street within the radius that you
24 are talking about.

25 CHAIRPERSON GRIFFIS: Sure.

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1 MS. BROWN: In terms of notification why
2 can't it be specific of what they are putting up?

3 CHAIRPERSON GRIFFIS: Yes.

4 MS. BROWN: That's all. I mean, why can't
5 it be specific when they notify us or they notify
6 anybody, because we do have a lot of seniors who don't
7 read their mail. You know, they rely on children and
8 grandchildren to take care of their matters.

9 CHAIRPERSON GRIFFIS: Right.

10 MS. BROWN: They will show up for these
11 meetings.

12 CHAIRPERSON GRIFFIS: Right.

13 MS. BROWN: But other people take care of
14 their matters.

15 CHAIRPERSON GRIFFIS: What would be
16 suggested to fix that?

17 MS. BROWN: So if they see office building
18 -- well, if they see the notice is saying we want --
19 they want to put up an office building --

20 CHAIRPERSON GRIFFIS: Right.

21 MS. BROWN: -- most of us are going to
22 think probably a doctor's office or senior citizen
23 place.

24 CHAIRPERSON GRIFFIS: Sure, sure.

25 MS. BROWN: But anything you -- I mean,

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1 let's face it. It's not location, but when you say
2 anything that's concerning criminals, there is a fear
3 factor.

4 CHAIRPERSON GRIFFIS: Okay. So you want--

5 MS. BROWN: So you want to put something
6 in our neighborhood, be specific.

7 CHAIRPERSON GRIFFIS: More specificity --

8 MS. BROWN: Yes, so that we can make an
9 honest opinion about what we really want.

10 CHAIRPERSON GRIFFIS: -- of use and what
11 is actually happening. I don't disagree with you.

12 MS. BROWN: And I think people, not just
13 our community, I think all the communities people
14 should be made to be specific. If I voted for you, I
15 would have to put Chair. I'm not going to say I'm
16 voting for you to be the President of the United
17 States. I have to be specific.

18 CHAIRPERSON GRIFFIS: I see.

19 MS. BROWN: If you're a D.C. Council
20 Member, I have to be specific. So it appears that we
21 have been dumped on or gotten over, because we are
22 supposed to accept something that's not stating what
23 the true purpose is.

24 CHAIRPERSON GRIFFIS: Sure. Good.

25 MS. BROWN: And I think that should be a

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1 part of their notification.

2 CHAIRPERSON GRIFFIS: I think that's an
3 excellent point. And I think we can certainly take
4 that into consideration.

5 MS. BROWN: Thank you.

6 CHAIRPERSON GRIFFIS: Thank you very much.
7 Okay. Very well. Ms. Bailey, I believe we have
8 established then we will set this for the 5th of July.
9 This will be the only notice from this Board as to the
10 next scheduled hearing. Obviously, it will be
11 factored in and additional mailings will go out and I
12 imagine some productive meetings will happen in the
13 community. There it is. Thank you all very much.
14 I'm going to have your questions answered
15 procedurally. The Board is going to take 30 minutes.
16 We're going to come back and we'll get to the only
17 case that's left for the afternoon.

18 (Whereupon, at 2:40 p.m. a recess until
19 3:44 p.m.)

20 CHAIRPERSON GRIFFIS: Very well. Let's
21 resume our afternoon and call the next case.

22 MS. BAILEY: Mr. Chairman, this is an
23 appeal and the number is 17285, it's of Patrick J.
24 Carome and, as you know, it has been heard on several
25 previous occasions, and it is pursuant to 11 DCMR 3100

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1 and 3101 from the administrative decision of the
2 Zoning Administrator of the Department of Consumer and
3 Regulatory Affairs.

4 The appellant alleges that the Zoning
5 Administrator erred by issuing Building Permit No.
6 B460927, dated April 23, 2004, allowing the
7 construction of a masonry retaining wall serving a
8 single-family detached dwelling. The appellant
9 contends that the retaining wall violates the Zoning
10 Regulations, including the side yard requirements at
11 section 405, rear yard requirements section 404 and
12 structures in open space requirements section 2503.
13 The property is located at 4825 Dexter Terrace, N.W.
14 It is zoned R-1-A. It is known as Square 1381, Lot
15 806.

16 CHAIRPERSON GRIFFIS: Good. Thank you
17 very much. Are we ready? It is my understanding, of
18 the notes the last time left, that we are here to
19 finish this up today. We are going to hear rebuttal
20 testimony and closings. Is that your understanding?

21 MR. CAROME: Yes, that it, Mr. Chairman.

22 CHAIRPERSON GRIFFIS: Good.

23 MR. CAROME: I guess maybe there are just
24 one or two preliminary matters, then I'm going to try
25 to very quickly put on some rebuttal evidence and try

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1 to get through that very quickly.

2 CHAIRPERSON GRIFFIS: We're very fond of
3 preliminary matters.

4 MR. CAROME: And then, yes, I will present
5 a closing argument.

6 CHAIRPERSON GRIFFIS: Okay. What do we
7 have?

8 MR. CAROME: The first preliminary matter,
9 I guess it doesn't -- well, is that I was disappointed
10 that the DCRA, which was directed to make some filings
11 a week ago --

12 CHAIRPERSON GRIFFIS: Submission late.

13 MR. CAROME: -- did submit one of them,
14 filed it with the Board just this morning, faxed it to
15 me late last night, which were the answers to my five
16 written questions. They only answered two of the five
17 questions. I think all five of the questions were
18 perfectly appropriate and I do think that Mr. Bello
19 ought to be directed to provide complete answers to
20 the remainder and that if there is something that is
21 said in those answers that I want to take issue with
22 that I be permitted to simply make a written
23 submission addressing those points, if I feel that
24 that's appropriate. I mean, I do think that those
25 five written questions were pretty straightforward and

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1 I'm very surprised that they were able to only answer
2 two of them.

3 CHAIRPERSON GRIFFIS: Well, I think we can
4 keep the record open for a submittal on your response
5 to their responses to the questions.

6 MR. CAROME: I'm prepared to deal with the
7 two questions that they did answer today.

8 CHAIRPERSON GRIFFIS: Okay.

9 MR. CAROME: It's just the three that they
10 didn't answer that troubles me.

11 CHAIRPERSON GRIFFIS: Well, there's not
12 much more that we could do in terms of requiring the
13 Zoning Administrator to answer the questions
14 differently than was posed to them.

15 MR. CAROME: Right. They didn't answer it
16 at all, that's the problem.

17 CHAIRPERSON GRIFFIS: They indicated that
18 they could not answer or would not answer a
19 hypothetical question.

20 MR. CAROME: That's correct. I think
21 hypotheticals actually are a very helpful way of
22 threshing out the issues.

23 CHAIRPERSON GRIFFIS: Right. I guess the
24 point is that you have what they have answered.

25 MR. CAROME: That's correct.

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1 CHAIRPERSON GRIFFIS: So you need to deal
2 with it as you will.

3 MR. CAROME: The second preliminary matter
4 is that Ms. Bell told me just a few minutes ago that
5 it's still her intent, she is the counsel for the
6 DCRA, to make some further written submission on other
7 points, a submission that was due last Tuesday, and I
8 would just simply object that the time has long since
9 expired. She sought an extension after the deadline.
10 She has now missed even the extension that she got.
11 I think it just is going to unnecessarily prolong this
12 matter for her to have yet another opportunity.

13 CHAIRPERSON GRIFFIS: You're talking about
14 the responses to the geotechnical engineer?

15 MR. CAROME: I'm not even sure what it is
16 that she wants to put out. She certain had -- she has
17 now had two full weeks since then. I would just ask
18 that the DCRA be closed off from further submissions,
19 other than answering my three questions if that's
20 something that the Board would permit.

21 CHAIRPERSON GRIFFIS: Let's get to the
22 bottom of it.

23 MS. BELL: Good afternoon, I'm Lisa Bell
24 with the Office of the General Counsel at DCRA. Mr.
25 Carome is correct. Unfortunately, we weren't able to

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1 provide the rebuttal statement. The Zoning
2 Administrator as well as the engineer that he had been
3 working on has been out of the office. One was sick
4 and one was having a baby. Not Mr. Bello having the
5 baby, but the engineer's wife had a baby, so they've
6 been out basically most of last week and they really
7 have just come back full speed today. So
8 unfortunately, I have not been able --

9 CHAIRPERSON GRIFFIS: How much time do you
10 need to respond?

11 MS. BELL: I can do that by Friday. And
12 by the way, that is why Mr. Bello's response was on
13 Tuesday, because he was out last week, because he was
14 sick. So I understand that it places the Board in an
15 awkward position, but we would appreciate the
16 additional time. I would like to remind the Board
17 that unfortunately we found out late, obviously, about
18 the testimony from the expert and we really do think
19 it would be important for the Board, as the trier of
20 fact, to hear what our engineer has to say with regard
21 to his testimony. We'll make it brief.

22 CHAIRPERSON GRIFFIS: Yes, I don't
23 necessarily agree. We did want to hear. I'm just
24 kind of worried about schedule now as we keep
25 prolonging this, because we'll need responses to your

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1 response. And you are anticipating the engineer is
2 going to respond to the testimony of the geotechnical
3 engineer, which would relate directly to what we're
4 looking at here. Is that correct?

5 MS. BELL: Yes, and actually, I can just
6 tell you, you know, our position is that, obviously,
7 there was some confusion about what building code
8 governed the appeal.

9 CHAIRPERSON GRIFFIS: Right.

10 MS. BELL: We would like to clear that up,
11 because there was a misrepresentation about what the
12 Zoning Administrator testified to. That's the first
13 issue whether the BOCA Code applies or not. The
14 second issue that the engineer raised --

15 CHAIRPERSON GRIFFIS: I thought we
16 answered that? But go ahead.

17 MS. BELL: Well, no, in his testimony.

18 CHAIRPERSON GRIFFIS: Oh.

19 MS. BELL: You know, there was that
20 confusion. Then he also raised the issue about the
21 fact that the Building Code didn't apply to this kind
22 of structure at all.

23 CHAIRPERSON GRIFFIS: I got you. Okay.

24 MS. BELL: And so those kinds of things is
25 something that our structural engineer is going to

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1 speak to.

2 MR. CAROME: Just so it's clear, I think,
3 this could potentially go on forever. If Ms. Bell is
4 now going to put in further expert testimony, I'm
5 going to then have to have a right to, you know, have
6 an expert comment on that. It will never end. She
7 had two weeks to do this. I think the record should
8 just close on this.

9 CHAIRPERSON GRIFFIS: Indeed. And I
10 understand.

11 MS. BELL: Well --

12 CHAIRPERSON GRIFFIS: But it won't go on
13 forever. You would have had the time to respond
14 anyway. This does elongate that schedule, but I think
15 we ought to leave it open until Friday. Friday we
16 will absolutely have it close of business, it will be
17 delivered and into the record. And let's move ahead.

18 MR. CAROME: And then --

19 CHAIRPERSON GRIFFIS: In that respect.

20 MS. BELL: Thank you.

21 MR. CAROME: And just so it's clear, then
22 I will have an opportunity to respond to that?

23 CHAIRPERSON GRIFFIS: Yes, yes,
24 absolutely. Anything that is written, put in by any
25 of the participants will be served on everybody and

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1 then responses. Let's try and keep it directly to
2 point.

3 MS. BELL: Well, actually, I guess, I need
4 some clarification about this, because I understand
5 that Mr. Carome believes that he should comment on
6 everything that has been presented, but what I
7 understand is it was the expert provided by an
8 intervenor.

9 CHAIRPERSON GRIFFIS: Right.

10 MS. BELL: And instead of the cross
11 examination, we're --

12 CHAIRPERSON GRIFFIS: Here's the way I
13 think about it. It's going to be a lot easier to do
14 this all in writing, even though it seems like a lot
15 more scheduling. But let's put it as if everyone was
16 here now. We've just heard the expert geotechnical
17 engineer.

18 MS. BELL: Right.

19 CHAIRPERSON GRIFFIS: You guys get your
20 engineer and cross examine.

21 MS. BELL: Well, I wouldn't be presenting
22 our engineer. I guess the point I'm trying to make is
23 we would just -- we were just going to draft our
24 objections in lieu of a cross examination of a
25 witness. We're not providing witness statements. I

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1 need --

2 CHAIRPERSON GRIFFIS: What would it be
3 then?

4 MS. BELL: Well, it would be our argument
5 or our objections to the testimony provided by him.

6 CHAIRPERSON GRIFFIS: So it's just a legal
7 objection?

8 MS. BELL: Would you like us to frame it
9 as -- yes. Would you like us to frame it as a
10 statement from our engineer?

11 CHAIRPERSON GRIFFIS: Well, that's what I
12 took it to be.

13 MR. CAROME: If it's merely objections, I
14 don't see why Ms. Bell couldn't just do it right now.

15 CHAIRPERSON GRIFFIS: Yes, that's what I
16 would have to say.

17 MS. BELL: Well, because some of it has to
18 do with the geogrid and the way the --

19 CHAIRPERSON GRIFFIS: But it seems like
20 you're stepping over -- you are objecting to the fact
21 that the substance was not correct, which is getting
22 into somewhat of testimony. You're going to have to
23 prove why it wasn't. Wouldn't you agree?

24 MS. BELL: Yes, but --

25 CHAIRPERSON GRIFFIS: If you stood up now

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1 and said --

2 MS. BELL: I wasn't -- I can provide a
3 statement from the engineer, but our plan was to have,
4 you know, his insight incorporated into our pleading.
5 Not necessarily a statement by him, but we can provide
6 a statement by him if you would like.

7 CHAIRPERSON GRIFFIS: Well --

8 MS. BELL: Do you see my -- am I confusing
9 you more?

10 CHAIRPERSON GRIFFIS: I do. No, you're
11 not confusing me at all.

12 MS. BELL: Oh.

13 CHAIRPERSON GRIFFIS: I'm afraid I'm not
14 being understood. This will be new information and
15 that information will be generated by an engineer in
16 DCRA. I can't see how I wouldn't be able to -- how I
17 could preclude Mr. Carome from responding to that or
18 rebutting any new information that was coming in.
19 Even though the nexus of that information comes from
20 a rebuttal of his initial testimony.

21 MS. BELL: Okay.

22 CHAIRPERSON GRIFFIS: Does that make
23 sense?

24 MS. BELL: Yes, but can I just say that
25 after the Board has an opportunity to take a look at

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1 our response, if you could just keep that in light
2 before, you know, he gets a response?

3 CHAIRPERSON GRIFFIS: Sure.

4 MS. BELL: Because I really --
5 unfortunately, we're getting into the situation where
6 he wouldn't be cross examining my cross examination of
7 a witness.

8 CHAIRPERSON GRIFFIS: Well, he would if he
9 was all here, if we were doing this in person and not
10 in writing.

11 MS. BELL: He would be cross examining the
12 witness not my cross examination of the witness.

13 CHAIRPERSON GRIFFIS: It depends if your
14 cross examination then went to you presenting some
15 sort of testimony in rebuttal or in part of your case,
16 it would be direct new information. Otherwise, it's
17 just a direct legal objection.

18 MS. BELL: Okay.

19 CHAIRPERSON GRIFFIS: Of which case, we
20 could take it up now and we could decide it.

21 MS. BELL: Okay. I think I understand
22 what you're saying.

23 CHAIRPERSON GRIFFIS: I understand what
24 you're saying and your objection to the substance of
25 which is part of their case presentation. And in

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1 order to persuade us on your objection of us believing
2 what they have said, you're going to provide
3 alternative information.

4 MS. BELL: Yes, yes.

5 CHAIRPERSON GRIFFIS: Well, that
6 alternative information is testimony in the record.

7 MS. BELL: Okay.

8 CHAIRPERSON GRIFFIS: I can't see how he
9 can't address it.

10 MS. BELL: Okay.

11 CHAIRPERSON GRIFFIS: And we're going to
12 do it all in writing in two pages or less. I'm like
13 a college professor that I require those things.

14 MS. BELL: All right. Thank you.

15 CHAIRPERSON GRIFFIS: Okay. So there it
16 is. So we're going to have it on Friday. Let's move
17 ahead and Ms. Bailey is doing hopefully notes as I am
18 on that aspect and then we'll set schedule for
19 decision and then walk back on all of the submissions
20 that we'll have. Are you the first rebuttal witness?

21 MR. BERNSTEIN: No, sir. I've got a
22 preliminary matter that I would like to address.

23 CHAIRPERSON GRIFFIS: Indeed.

24 MR. BERNSTEIN: I'm Jeff Bernstein and I
25 represent National Park Service. We had submitted a

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1 brief, I believe it was, last Thursday. Mr. Aguglia
2 has contended that it was actually due on Tuesday. It
3 was not clear to us, at the time, that the 17th date
4 was set, that that was addressing the supplemental
5 brief that Chairperson Miller had requested. We
6 thought that that was addressing the rebuttal issues
7 and those were two separate conversations. So we did
8 not get that in on the 17th. We had other reasons
9 though for delay and we would like to ask your
10 indulgence in allowing that brief to go forward.

11 CHAIRPERSON GRIFFIS: This is the one
12 received May 19th. Is that correct?

13 MR. BERNSTEIN: Correct.

14 CHAIRPERSON GRIFFIS: Yes, I'm a little
15 confused. Perhaps my notes aren't correct. Mr.
16 Aguglia, where is the 17th? Ms. Bailey, you can
17 assist also.

18 MR. AGUGLIA: Richard Aguglia for the
19 property owners. I think I can short circuit this and
20 we can just move forward.

21 CHAIRPERSON GRIFFIS: Okay.

22 MR. AGUGLIA: If you accept my rebuttal,
23 which was filed yesterday, then I will waive my
24 objection.

25 CHAIRPERSON GRIFFIS: Then everything is

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1 right with the world.

2 MR. AGUGLIA: Yes.

3 CHAIRPERSON GRIFFIS: Okay.

4 MR. AGUGLIA: All right?

5 CHAIRPERSON GRIFFIS: It makes it easy.

6 Any objections?

7 MR. BERNSTEIN: Well, I would like to add
8 though that there were some significant misstatements
9 of fact in the rebuttal. One of which goes to the
10 heart of one of the core legal arguments in that
11 brief.

12 CHAIRPERSON GRIFFIS: In your brief?

13 MR. BERNSTEIN: In my brief.

14 CHAIRPERSON GRIFFIS: Sure.

15 MR. BERNSTEIN: And I think it was a
16 mischaracterization of what is currently in the
17 record.

18 CHAIRPERSON GRIFFIS: Okay.

19 MR. BERNSTEIN: And I would like the
20 opportunity to either verbally or through written
21 submission clarify what the truth of that matter is.

22 CHAIRPERSON GRIFFIS: Some of this at some
23 point the door closes and you're going to have to rely
24 on the Board's great wisdom and understanding of all
25 this information that's in. So I wouldn't panic. You

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1 may not think that we see what we might end up seeing.
2 However, well, not however. To that though, the door
3 has got to close. I think we have had -- let's get
4 through the closings today and then we'll assess all
5 the other additional information.

6 You are requesting that the record be kept
7 open for an additional rebuttal to the latest
8 submission by Mr. Aguglia, of course, which he would
9 have to respond to and also Mr. Carome. Let's at the
10 end of day, let's see and I'm sorry, DCRA also and the
11 ANC. Anyone else? And the Park Service and everybody
12 else. Okay. So the point is not that that is a
13 problem. I mean, that's what we have set up and
14 that's the important aspect. But let's see if we
15 can't assemble all that at closing today and set the
16 schedule out.

17 We are also going to be asking for
18 findings of facts and conclusions of law at the end of
19 this. And those are also a basis of which your entire
20 argument comes together.

21 MR. BERNSTEIN: Yes.

22 CHAIRPERSON GRIFFIS: And I think that is
23 probably the more effective and efficient way to
24 assess elements like this if you can, obviously, state
25 a finding of fact in your proposed order and it then

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1 relates directly to that other element of decision
2 then.

3 MR. AGUGLIA: I think that's an excellent
4 suggestion to stop all the rebuttal and rebuttal and
5 I guess an excellent suggestion is handled through the
6 findings of fact and conclusions of law proposed by
7 the parties. They have their affidavits, exhibits and
8 everything else and the Board can check if it's
9 correct or not.

10 CHAIRPERSON GRIFFIS: Good.

11 MR. AGUGLIA: Thank you.

12 CHAIRPERSON GRIFFIS: And I'm tending to
13 agree, at this point, we're really closing on the
14 amount of additional information that we need. But
15 again, we'll assess that in a matter of moments, I
16 would hope. There it is. Anything else?

17 MR. CAROME: With the Board's permission,
18 I would just briefly present a small package of
19 exhibits. This is largely to fill out the record in
20 rebuttal to some points. One of my assistants will
21 pass this around. I don't intend to go through this
22 in detail.

23 CHAIRPERSON GRIFFIS: I'm sorry, if you
24 could put it in to Ms. Bailey, she will record them
25 in.

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1 MR. CAROME: What this is is there is
2 essentially a Table of Contents with some detail
3 that's three pages at the front of this. Then there
4 are six or seven categories of exhibits I'm putting
5 forward. I plan on talking about these at a very top
6 level. I want to get through this quickly.

7 CHAIRPERSON GRIFFIS: So these are new
8 exhibits?

9 MR. CAROME: Yes, these are rebuttal
10 materials.

11 CHAIRPERSON GRIFFIS: Materials.

12 MR. CAROME: Yes.

13 CHAIRPERSON GRIFFIS: Right. That's
14 right.

15 MR. CAROME: These are all new. At Tab A
16 are photographs of 27 other retaining walls within the
17 Wesley Heights Overlay District. These are photos of
18 the 27 walls that -- in the Wesley Heights District
19 that the owners council put forward as the 27 walls
20 that they could find in Wesley Heights that were more
21 than 4 feet high. In order to simply make clear what
22 we are talking about and frankly to make clear that
23 these are utterly different from the structure we are
24 talking about here, I have simply put in photographs
25 of those.

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1 One thing I would note is that most of the
2 walls there, and this is behind Tab A, are what I
3 refer to as driveway channels. They are like the
4 driveway behind my house where to put a garage below
5 grade, there has been a cut down into the preexisting
6 grade to allow the driveway to enter below grade. And
7 so what has happened in those situations, and that's
8 frankly most of the walls they pointed to,
9 substantially more than most, they are -- those walls
10 measured according to the relative Building Code
11 provision, since you measure from the preexisting
12 grade on the height where the grade was higher, those
13 actually are all, approximately, zero feet high
14 retaining walls, because they clearly are retaining
15 earth that was preexisting before the channel for the
16 driveway was cut.

17 CHAIRPERSON GRIFFIS: You're saying they
18 are mostly zero feet high? Is that what you said?

19 MR. CAROME: Yes.

20 CHAIRPERSON GRIFFIS: Okay. I understand.
21 Because they are cutting in.

22 MR. CAROME: So and that's really all.
23 The only other thing I would show is that at the -- as
24 to those photographs is that three from the back of
25 Exhibit A, and this photograph may have already been

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1 in the record or certainly one like it was, is a photo
2 of the one wall in the Wesley Heights area that the
3 owners have identified that is remotely akin to the
4 structure that we're dealing with here.

5 And I would simply point out, and there
6 was a prior affidavit from me on this point, that that
7 structure, whatever it is, is not in the -- is not
8 anywhere near within 25 feet from the back rear lot
9 line. And so I would submit it is not within the
10 required rear yard. That's all I have to say about
11 Tab A.

12 CHAIRPERSON GRIFFIS: You're not saying
13 this is an exhaustive record of retaining walls in
14 this area, are you?

15 MR. CAROME: No. What I'm saying though
16 is that the owners put in an affidavit from, I think,
17 a paralegal in their office, where they went through
18 all of the properties in Wesley Heights.

19 CHAIRPERSON GRIFFIS: Displayed in Wesley
20 Heights.

21 MR. CAROME: One by one.

22 CHAIRPERSON GRIFFIS: Okay.

23 MR. CAROME: And they identified 27 walls
24 that they asserted were more than 10 feet in height.

25 CHAIRPERSON GRIFFIS: Okay.

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1 MR. CAROME: And I think, you know, they
2 had all the time in the world to do that and they
3 found those 27 walls. I went driving around the
4 neighborhood and found them myself. I took photos
5 which they hadn't submitted. And all I'm simply
6 showing is that the great bulk of them actually are
7 zero foot retaining walls that don't present any
8 height issue. And that the only one that's remotely
9 similar in terms of what looks like a platform created
10 well above existing grade is one that's not anywhere
11 near approaching the rear of the property line.

12 CHAIRPERSON GRIFFIS: What about 4635
13 Dexter Street, N.W., rear, not in required rear yard?
14 Why is this different? Why is it not in the --

15 MR. CAROME: Which one is that?

16 CHAIRPERSON GRIFFIS: It's the one next to
17 the sheet you just showed, 22. It's actually the
18 third one back.

19 MR. CAROME: The 4635 Dexter?

20 CHAIRPERSON GRIFFIS: Yes.

21 MR. CAROME: That's the one I'm telling
22 you, that's the one I'm saying is the one that is
23 remotely similar.

24 CHAIRPERSON GRIFFIS: Oh, I was looking at
25 that one.

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1 MR. CAROME: And that is the one that is
2 not in the -- in my view, not in the required rear
3 yard.

4 CHAIRPERSON GRIFFIS: Why?

5 MR. CAROME: It's in --

6 CHAIRPERSON GRIFFIS: Why isn't it?

7 MR. CAROME: I paced it off. It's
8 something on the -- I have an affidavit that was
9 submitted earlier that spells out how far that is from
10 the park boundary marker, and I believe it is upwards
11 of 40 feet.

12 CHAIRPERSON GRIFFIS: How far away is it
13 from the rear of the building?

14 MR. CAROME: I think it's attached to the
15 rear of the building. I think it's part of the
16 building.

17 CHAIRPERSON GRIFFIS: You mean you can't
18 walk out of the back of that house?

19 MR. CAROME: Right. I think you can walk
20 -- that's essentially a terrace structure that's
21 attached to the back of the house. Just, frankly,
22 just the way this is a terrace structure that's
23 attached to the rear of the Economides House.

24 CHAIRPERSON GRIFFIS: But isn't that in
25 the required rear yard? Doesn't the rear yard start

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1 at the edge of the building?

2 MR. CAROME: Actually, and I'm going to
3 get to that actually, I think no. I think the
4 required rear yard is --

5 CHAIRPERSON GRIFFIS: At the lot line.

6 MR. CAROME: -- as this Board has
7 previously said in a number of cases, is, in fact, the
8 25 feet closest to the lot line. Frankly, which way
9 that comes out for this case, I'm going to show in my
10 closing, doesn't matter. We have mass of occupancy of
11 the required rear yard no matter what. But I think
12 that the proper reading, interpretation of where the
13 required rear yard is is the 25 feet closest to the
14 rear lot line. So the --

15 MR. AGUGLIA: Excuse me. May I make one,
16 please, point of procedure here? The reason all of
17 our pictures were taken from the front was because I
18 would not allow the paralegal to trespass and go onto
19 the backyards.

20 CHAIRPERSON GRIFFIS: Right. We
21 understand that.

22 MR. AGUGLIA: Thank you.

23 CHAIRPERSON GRIFFIS: We haven't lost that
24 thought and you actually introduced all of your
25 photographs that way and I think the Board certainly

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1 recalls.

2 UNIDENTIFIED SPEAKER: That's a safety
3 issue.

4 CHAIRPERSON GRIFFIS: Right. Exactly.
5 Self-preservation for paralegals. We don't want them
6 running into trouble out in the neighborhood. Okay.

7 MR. CAROME: Tab B, very briefly, is, I
8 believe, four photographs that I am simply putting in
9 to show the extremely bizarre nature of this structure
10 relative to the rest of the Wesley Heights
11 neighborhood. I think this goes to the Wesley Heights
12 Overlay issues among others. The first picture is
13 simply a picture of myself and my daughter standing at
14 the lower corner of the wall. I think I'm putting it
15 in simply to demonstrate the extreme height of the
16 structure. I'm standing in U.S. Parkland there.

17 The second picture is a photograph of Dan
18 Tate, the neighbor standing in his backyard, which
19 used to have, you know, a view out of -- at a forested
20 property and now has this enormous structure abutting
21 directly on the property line. The other two photos,
22 the other three photos, I'm sorry, are just simply
23 what I would say is the way slopes within the Wesley
24 Heights neighborhood are typically dealt with.

25 They are not, you know, converted from

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1 slopes into level platforms with huge exterior walls,
2 you know, right in the face of either people passing
3 to the front or to the rear of the house. They are,
4 you know, incorporated into the landscape and the
5 property at natural grade and people live and enjoy
6 that. So that's simply to -- I'm just showing the
7 extreme contrast between the Economides' walled
8 platform structure and typical Wesley Heights. And I
9 would represent to you that that's typical Wesley
10 Heights terrain.

11 CHAIRPERSON GRIFFIS: Okay. And that's
12 the typical residency height is what you are showing?

13 MR. CAROME: That's all.

14 CHAIRPERSON GRIFFIS: Is the graded --

15 MR. CAROME: I'm not -- I don't want to
16 overlay it.

17 CHAIRPERSON GRIFFIS: Good.

18 MR. CAROME: But I'm just trying to --

19 CHAIRPERSON GRIFFIS: No, I'm getting
20 clarification for one of the Board Members here. So
21 that's typical ways to deal with rather than putting
22 in a retaining wall and leveling out an area?

23 MR. CAROME: Yes. At Tab C, and these
24 probably are worth going over one by one, but I really
25 want to do it briefly, because I don't want to get

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1 bogged down in the detail, are seven charts that I
2 drew myself to show the yard occupancy and lot
3 occupancy calculations that I rely on for some of the
4 zoning violations that I'm contending are here.

5 In your packages is a half size version of
6 what's here on these boards and they are numbered 1
7 through 7. I would propose just very quickly for this
8 and they have on them the calculations that were used
9 and show how each of the occupancy issues was derived,
10 so that that's in the record. I don't think it's
11 worth getting into the detail here, unless the Board
12 wants to.

13 But so the first is simply a derivation of
14 how the geogrid layers, these layers, I'm pointing to
15 the model, are layered into behind the face of the
16 structure and into the -- those -- the green area
17 designates how far the geogrid, the geogrid layers go
18 in and how far the geogrid material come back from the
19 wall. And that's based entirely on Exhibit 24, which
20 is the Ryan and Associates plans, the final design
21 plans for the structure.

22 The footnotes there explain exactly how I
23 derived those areas where the geogrid is. So that's
24 all that that shows. You need to lay that out, so you
25 can then have that part of the multi-part structure in

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1 mind, and so you can figure out what is the occupancy
2 of those materials. All of those materials, all that
3 geogrid material is above the preconstruction grade
4 level.

5 Now, the second chart is doing the same
6 thing, but this time showing where the platform
7 extends, where the elevated platform is on the lot.
8 And the way that I constructed this as the bullets on
9 the left show is that I compared the preconstruction
10 elevation shown on the 2002 CAS plans that were
11 submitted to DCRA by the owners to the post-
12 construction elevations or proposed post-construction
13 elevations that were shown on the 2004 CAS plans,
14 which is Carome Exhibit 23. The 2002 plans are Carome
15 Exhibit 25 at page 7.

16 So all that I did here was to map onto one
17 single piece of tracing paper what those elevations
18 were. The elevations in yellow on here are the
19 elevations, are the preconstruction elevations, and
20 the numbers in bluish green off on the right are the
21 numbers of the elevation in feet above sea level or
22 from some base point. I'm not sure what they used as
23 a base point. But in any event, there is an apples to
24 apples comparison going on here.

25 Then you will see there are three brown

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1 lines, which show the proposed post-construction
2 elevation and there at 270, towards the top, 268 and
3 266, just showing here that this brown line and this
4 brown line, those are the -- you'll see they have
5 gotten it relatively flat. That is why there is only
6 three different levels here, so it's all basically
7 flat. There is a drop from 4 feet up at the top where
8 it's 270 of the post-construction platform level to
9 266 where in the past there had been a drop from 270
10 or 272 all the way to 232, a drop of I guess 38 feet.

11 So then what I did was, after getting the
12 two different preconstruction and post-construction
13 grade levels, I then figured out first where did the
14 grade get elevated by or where did the platform end
15 up, the top surface of this structure? Where did that
16 get at least 2 feet higher than before? I could have
17 gone one inch, but 2 feet sounded like a logical
18 place. And that is the black line that has all the
19 plus 2s. That's where from that point downward, all
20 parts of the platform are at least 2 feet above
21 preconstruction grade.

22 CHAIRPERSON GRIFFIS: Got you.

23 MR. CAROME: Just to give you a sense that
24 not really much turns as to whether you pick 2 feet or
25 a larger number. I also picked 6 feet, the height of

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1 an adult person.

2 CHAIRPERSON GRIFFIS: And the red line, 6
3 feet, shows that at least 6 feet or above from that
4 line all the way to the back of the property lines.
5 Is that right?

6 MR. CAROME: That is correct.

7 CHAIRPERSON GRIFFIS: Okay.

8 MR. CAROME: There has been -- the
9 platform is at least 6 feet above preexisting grade.
10 And when you get down towards the lower right corner,
11 I mean, you're about 30 feet above preexisting grade,
12 which is why you have got this enormous cliff or wall
13 at the end of the structure. That's all on 2.

14 Turning to 3, I then needed to map out
15 sort of what is the square footage of each of those
16 two areas, one, the geogrid, in case the Board -- I
17 think that really the whole structure, including the
18 geogrid, the platform, the mesa blocks, the whole
19 thing is the structure. But in case the Board wanted
20 to sort of cut it thinner and say well, the platform
21 isn't part of the structure, but the geogrid is, I
22 have figured, for the Board's benefit, the area of the
23 property that is the footprint of -- the area of the
24 footprint of the geogrid of this structure and that is
25 what Exhibit 3 is, and it shows the total area of that

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1 footprint on the property is 7,264.5 square feet.

2 And you'll see what -- one has to sort of
3 -- since it's a very irregular shape, one has to go
4 through a process of figuring out how geometrically to
5 measure it and I simply divided it into rectangles and
6 squared triangles to allow me to then just divide sub-
7 areas up and add it together. That seems to be a
8 simple and straightforward way mathematically to
9 figure the square footage, which is why there are all
10 these calculations. That's the sole purpose of it.
11 I think it's just simple, basic grade school math.

12 The number 4 shows the calculation of the
13 required rear yard area, and I have done it three ways
14 actually because I think, frankly, there are three
15 potential ways that one could look at what is the
16 "required rear yard." I think that there is one
17 correct way. I think that I have seen in cases at
18 least three different ways that it has been measured.

19 The most correct way, I assert, is what I
20 say here in the lower right hand corner is the code
21 required rear yard. That is what that, the markings
22 right here, means. That says code required rear yard.
23 That's what that's an abbreviation for and that is
24 simply the area 25 feet closest to the rear lot line.
25 I submit that's the correct interpretation of what the

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1 "required rear yard" is.

2 Another way you could look at it is to say
3 well, a yard is required for every building and
4 structure, and so in some sense the whole rear yard
5 that is there is required and I would think that that
6 is a potentially defensible way of thinking about what
7 is the "required rear yard" under the D.C. Zoning
8 Code, and that is all area 57 feet back. Now, where
9 does the 57 feet come from? That is what Mr. Bello
10 identified as his starting place for measuring the
11 required rear yard. That is the furthest point back
12 on the property of any building in their view.

13 I'm not pressing today the point that this
14 structure is a building, but just assume for the -- 57
15 feet from about here, Mr. Bello said that's about 57
16 feet from the rear yard, from the rear lot line, I'm
17 sorry, and he said that's where his starting point is
18 for the required rear yard.

19 I would submit that a second potential way
20 of reading it, and much more defensible than Mr.
21 Bello's, would be to say well, all right. The
22 required rear yard is the whole yard 57 feet back.
23 That's a second alternative. I'm not sure it's going
24 to really matter here, except perhaps at the remedy
25 stage. And that's why sort of in this orange part

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1 here I have said well, that's the rear yard and I
2 refer to that as the whole yard method of looking at
3 what is the required rear yard.

4 A third way to think about the required
5 rear yard, what it is, is what Mr. Bello has asserted
6 it is and perhaps there are instances out there where
7 the Zoning Administrator has or even this Board has,
8 on occasion, said that you measure a required rear
9 yard from the back of the building or dwelling 25 feet
10 towards the rear lot line. I refer to that here as
11 the Bello required rear yard method.

12 CHAIRPERSON GRIFFIS: Are you saying then
13 that you could measure the rear yard in this specific
14 case from the lot line just back 25 feet?

15 MR. CAROME: Yes, I believe --

16 CHAIRPERSON GRIFFIS: And so the extent of
17 the rear yard would end in a theoretical line across
18 the property?

19 MR. CAROME: That's correct. And
20 actually, it is the line that we were pointing to
21 before that the owner's drawings showed as the
22 building restriction line. And I submit and I will
23 point to some authorities on that, that that actually
24 is the correct way.

25 I don't get too bogged down over that

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1 point, because I think that we have a clear zoning
2 violation regardless of which of these three methods
3 we adopt. It may at the remedy stage matter though I
4 think and, therefore, I think it's important to be
5 clear in thinking about the three different ways. And
6 I will provide the Board with some authorities
7 momentarily that I think show why the closest to the
8 rear lot line is, in fact, what the Zoning Code, in
9 fact, calls for as the "required rear yard" for
10 purposes of the 50 percent calculation of maximum rear
11 yard occupancy.

12 And so all I have done here is to
13 calculate the total area of the required rear yard
14 under each of those three methods. Under the Code
15 method, the 25 feet closest to the rear lot line.
16 That is 5,813.5 square feet. Under the whole yard
17 method, it's 11,144.6 square feet and under the DCRA
18 or Bello method, at least for this case, it's 4,600
19 square feet. So that's the smallest of the required
20 rear yards from these. That's really resulting from
21 the irregular shape of the property. So that is what
22 4 shows.

23 Then the purpose of 5 is to simply figure
24 out how the footprint of the geogrid maps against the
25 required rear yards, and so this is just -- if we just

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1 looked at just the geogrid and the wall that the
2 geogrid attaches to and think what is the area of that
3 footprint, that is what is being measured here and
4 compared to each of the rear yards.

5 So the green here is the geogrid and under
6 the Code method, which is my shorthand for the 25 feet
7 closest to the rear lot line, there is occupancy of
8 86.7 percent of that required rear yard, so it's
9 occupying everything except sort of this panhandle
10 shaped thing at the top.

11 Under the whole yard method, that means
12 the 57 feet, so the back of the building all the way
13 back to the property line. And by the way, the
14 definition of rear yard is -- of rear yard, not
15 required rear yard, but the definition of rear yard is
16 from the property line all the way back to the rear
17 lot line, that, there is occupancy of 52.5 percent.

18 And then under the Bello method here there
19 is less than 50 percent. Visually, you can see that.
20 But again, this is just the geogrid. But so just for
21 purposes of, you know, being clear about what we're
22 talking about, under two of the three methods of
23 thinking about what is the rear yard here, there is in
24 excess of the 50 percent limitation of occupancy in
25 rear yard.

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1 Item 6, item 6 is now figuring out the
2 yard occupancy calculation taking into account the
3 entire platform structure and this actually is -- I
4 submit the only correct way to do it is to look at the
5 whole structure. It's the compacted earth. It's the
6 wall component. It's the geogrid. It's the gravel.
7 It's the whole system that we heard about and that is
8 what is drawn here. This is figuring out all the way
9 out to that 2 foot elevation line that we looked at on
10 one of the earlier charts.

11 And here, again, you have got the rear
12 yard is still showing here. That's the 57 foot lot
13 line. This down here is the 25 foot line again
14 measured from the back property line. Under all three
15 methods of occupancy, this shows that there is
16 actually occupancy of the rear yard, that is structure
17 above the preexisting ground level in excess of 94
18 percent. So it's a huge amount above the 50 percent
19 limitation.

20 I just note, I mean, I'll come to this in
21 my closing in a little bit more detail. I know that
22 during Mr. Bello's testimony, there was some confusion
23 about, you know, do you measure things for -- how do
24 you measure? I'll save that for my closing rather
25 than get into it twice. Then Exhibit 7 --

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1 CHAIRPERSON GRIFFIS: Before we get too
2 far into this.

3 MR. CAROME: Sure.

4 CHAIRPERSON GRIFFIS: Let's make sure
5 everybody is clear on all these numbers here. Can I
6 go back to 5 very quickly?

7 MR. CAROME: Yes.

8 CHAIRPERSON GRIFFIS: It's my
9 understanding that you have set up all these square
10 footages of the hatched areas in order to establish
11 how much square footage they actually occupy and what
12 you have now established as the rear yard.

13 MR. CAROME: Yes.

14 CHAIRPERSON GRIFFIS: Okay. Understand
15 that. So if we go to 5 and we look at occupancy,
16 because I like doing numbers, area occupied, total
17 area, your formula is A plus B plus C plus D.

18 MR. CAROME: I see.

19 CHAIRPERSON GRIFFIS: Am I supposed to
20 relate those letters to the numbers that are below?

21 MR. CAROME: Yes. This is what I was
22 saying earlier about one sort of has to get down to --

23 CHAIRPERSON GRIFFIS: Oh, I see. So A is
24 this small triangle.

25 MR. CAROME: I have divided the area into

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1 either square rectangles or square triangles.

2 CHAIRPERSON GRIFFIS: I see.

3 MR. CAROME: And then have used -- so that
4 I could have a way to just do a simple formula.

5 CHAIRPERSON GRIFFIS: Oh, I see.

6 MR. CAROME: And then measure each segment
7 and that's what --

8 CHAIRPERSON GRIFFIS: I got it now.

9 MR. CAROME: All right.

10 CHAIRPERSON GRIFFIS: And then the next
11 one actually, A through N, that's all. I got you. I
12 couldn't find the As and Bs.

13 MR. CAROME: I'm sorry.

14 CHAIRPERSON GRIFFIS: No, that's my fault.

15 MR. CAROME: All right.

16 CHAIRPERSON GRIFFIS: Let's move ahead.

17 We're at 7.

18 MR. CAROME: 7 is simply to measure the --
19 if one was concerned that that 2 feet elevated
20 platform, is that really structure at that point or
21 not? If one uses the 6 foot differential, so that
22 actually the platform is now, you know, my height,
23 which is 6 feet, above the preexisting ground level,
24 and then obviously you have a somewhat smaller
25 platform, but it still is a platform that is far in

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1 excess of 50 percent rear yard occupancy under the
2 Code method which is, you know, everything except
3 actually this little corner, this little triangle here
4 at the back, which is not covered at all by the
5 property.

6 The whole rest of what I would say is the
7 required rear yard is completely covered and that's
8 94.6 percent of the required rear yard. Under the
9 whole yard method, everything except this little piece
10 here, is occupied. That's 82 percent occupancy of the
11 whole yard method of thinking of what is the required
12 rear yard. And the Bello method of just the 25 feet
13 closest to the back of the building, you have got 63.5
14 percent lot occupancy.

15 So under any of -- even if one, you know,
16 gives the owners a lot of slack and say well, we'll
17 just worry about the stuff that's actually 6 feet
18 high, where the structure is 6 feet high and only
19 worry about that, you still get, depending on which
20 yard area you use for this purpose, somewhere between
21 63.5 and 94.5 yard occupancy. So that's all I have
22 got on those charts.

23 So the other stuff should go even faster.
24 D is simply, as the table of contents says, authority
25 showing that the area of the required rear yard should

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1 be measured from the rear lot line inward rather than
2 the other methods, and I have put forward there six.
3 So this is, I suppose, legal authority as opposed to
4 evidence in some sense.

5 I have put forward five BZA decisions,
6 including a very recent one from last September that
7 this Board handled in the application of Deborah
8 Miles, which there was a finding which specified what
9 was the occupancy of a -- I believe it was a garage of
10 a required rear yard. And there was a reference to a
11 finding that that garage, which was at the very, very
12 back of the property, the finding said that it
13 occupied 97 percent of the -- this was an application,
14 of the rear yard.

15 I don't want to overplay these
16 authorities, because I think, you know, this was an
17 application that was denied, but it was -- I think it
18 shows that actually, in common parlance, when people
19 talk about the required rear yard and when even this
20 Board talks about the required rear yard, it talks
21 about the 25 feet closest to the rear lot line.

22 I mean, so there is also a D.C. Court of
23 Appeals case also actually in the Tye Barre
24 proceeding. That's the Davidson versus Board of
25 Zoning Adjustment stating that in an R-1-A Zone

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1 District dwellings must be set back 25 feet from the
2 rear property line, which confirms that the required
3 rear yard is measured from the rear property line.
4 You're not measuring it from the other direction and
5 worrying about whether there is something else,
6 another structure that's close to it. You're always
7 measuring it from the rear property line. So that's
8 the D.C. Court of Appeals, which would be the ultimate
9 arbiter of that issue.

10 So then that takes me to Tab E, which are
11 in rebuttal to the proposition that I think DCRA has
12 asserted, that earth is not a building material and,
13 therefore, you don't think about it as the occupancy
14 of the structure. There are just two texts that I
15 have submitted there, which clearly indicate that in
16 normal engineering parlance, earth is a building
17 material. The first one behind E actually is a
18 Dictionary of Civil Engineering and its definition of
19 structure, and I'm not submitting this as the
20 controlling definition of structure, that's what's --
21 there is a definition in the Zoning Code.

22 But the civil engineering definition of
23 structure defines a structure as "Anything built by
24 people from a hydraulic fill dam built of earth or a
25 pyramid of stone to a hydroelectric power station or

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1 an earth satellite," and noting that a structure is
2 not necessarily roofed. A building is what has to be
3 roofed. And just from the Basic Dictionary of Civil
4 Engineering, it's clear that something built of earth
5 is a structure.

6 That's the same point generally being made
7 in the -- it's really just from the title of this
8 second book. It's Earth Structures Engineering and
9 there is just a quote from the preface. The whole
10 preface is in the back. "Earth Structures Engineering
11 involves the analysis, design and construction of
12 structures, such as slopes and dams, that are composed
13 mainly of earth materials and this is a growth area in
14 geotechnical engineering practice. So that is simply
15 in rebuttal to the proposition that earth is not a
16 building material and earthen structures are, for some
17 reason, not structures so we don't need to worry about
18 their imposition on neighboring properties and the
19 like.

20 Then second last are some additional
21 authorities dealing with the subject of Mechanically
22 Stabilized Earth Structures or MSES, which is a topic
23 that the National Park Service engineer, Robert, I'm
24 blanking on his last name, Pinciotti, presented when
25 we were here last time and there was some attempt, I

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1 think, to derogate that testimony and say it was
2 irrelevant or off base.

3 These four authorities I am submitting and
4 there are excerpts from them attached really to show
5 that Mechanically Stabilized Earth Structures, MSES,
6 are a well-recognized category of structures and that
7 it's, in fact, a structure that is distinct from a
8 retaining wall. And so that's what that is.

9 Just reading the last one, this is from a
10 Federal Highway Administration publication, 2001.
11 "Mechanically stabilized Earth Wall, MSEW, is a
12 generic term that includes reinforced soil, a term
13 used when multiple layers of inclusions act as
14 reinforcement in soils placed as fill." Then it goes
15 on to say that "The facing," which here is what
16 everyone is claiming is a retaining wall, "The facing
17 is a component of the reinforced soil system used to
18 prevent the soil from raveling out between the rows of
19 enforcement." So that is what F is about and so I'm
20 submitting those texts simply to rebut the notion that
21 this is not, you know, properly referred to as a
22 Mechanically Stabilized Earth Wall system as opposed
23 to merely a retaining wall.

24 Lastly, and this goes to the confusion
25 that has existed here over the relative role between

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1 the BOCA Code and its definition of retaining wall and
2 the International Building Code, which is now in
3 effect in the District. And I have simply presented
4 here at G just three pages from those codes, the 1996
5 BOCA Code, the 1999 BOCA Code and then the
6 International Building Code 2000.

7 And my point is simply this, is that the
8 BOCA Code, which was in effect in the District for a
9 very long time, but it stopped being in effect
10 sometime around 2001 or 2002, had a definition of a
11 retaining wall. Actually, it's the definition of a
12 retaining wall that Mr. Bello and DCRA himself most
13 relied upon. In their PowerPoint presentation, it was
14 the one that was in bold as their most important
15 working definition of retaining wall, and that is the
16 one that's used. It's not just in the 1996 BOCA Code.
17 It was also in the 1999 BOCA Code, which was in effect
18 in the District and that is a wall that is not
19 laterally supported at the top designed to resist
20 lateral soil load.

21 And the Park Service engineering expert,
22 you know, said, you know, one reason why this --
23 frankly, many reasons why the structure we're dealing
24 with here is not a "retaining wall," at least under
25 the BOCA approach is that it is laterally supported at

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1 the top with these great big geogrid -- these things,
2 looking at the model, the geogrid that comes back and
3 is actually attached to the wall and pulls back
4 through the soil in multiple layers.

5 So why am I pointing to the 1996 and 1999
6 code? One, it's the one that the DCRA itself said was
7 its most relevant working definition of retaining wall
8 by bolding it in its PowerPoint presentation. Second,
9 it's the last time that, for purposes of a building
10 code in the District, there was a definition of
11 retaining wall.

12 The IBC Code does not have a definition of
13 retaining wall in it, although the owners and the DCRA
14 have tried to pretend that it does. If one looks at
15 the definition section of the IBC, we have put in the
16 relevant pages where retaining wall would be defined
17 if it were there. It's not there. There is not a
18 definition of retaining wall in the IBC Code. So what
19 does that mean?

20 All I'm saying, I don't want to overplay
21 it, I think the last time there was, for purposes of
22 the Building Code just a couple of years ago, an
23 official definition of what a retaining wall was it
24 was a definition that, in fact, excluded the sort of
25 structure that we're dealing with here.

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1 That's the end of my rebuttal
2 presentation, and I'm prepared, you know -- what I'm
3 next ready to do is to present closing argument.

4 CHAIRPERSON GRIFFIS: Free of questions?

5 MR. CAROME: If there are questions, I
6 would be delighted to entertain them.

7 CHAIRPERSON GRIFFIS: Indeed. Are there
8 questions from the Board? Ms. Miller?

9 VICE CHAIR MILLER: You know, you threw a
10 lot at us in these exhibits and I want to make sure I
11 understand it, because I don't think I totally do.
12 Did you make a distinction between an earth structure
13 and an earth wall?

14 MR. CAROME: If I did, I'm not sure in
15 what context I said that. I mean, what I, obviously--

16 VICE CHAIR MILLER: I mean, the answer may
17 be no.

18 MR. CAROME: I don't think I meant to.

19 VICE CHAIR MILLER: Okay.

20 MR. CAROME: I mean, I think that this is
21 a multi-component structure, largely earth,
22 compressed, compacted earth, you know, that completely
23 replaces an area that was not there before, and so
24 earth is a part of it. My point about earth was to
25 simply say that just because it happens to be partly

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1 made of dirt doesn't make it not -- doesn't make the
2 dirt part of it not a structure within the definition
3 of structure in the Code, which I will get to in my
4 closing presentation.

5 VICE CHAIR MILLER: Well, so were you
6 referring to the platform?

7 MR. CAROME: Yes.

8 VICE CHAIR MILLER: Okay.

9 MR. CAROME: I submit, and from the very
10 beginning of this proceeding, as the Board has so
11 patiently dealt with it, I submit that what I'm
12 holding in my hands here, the top part of the model,
13 is the structure that has been erected here. It's
14 entirely new. It wasn't there before. What was there
15 before was, you know, a much smaller house than the
16 one that is presently there now and a forested hill.

17 This is what is now there. What I'm
18 holding up is the model, the top. This is the
19 platform. This is what the owners wanted. Now there
20 is a fence running around, not on top of the wall, but
21 a few feet inside the wall that's there. Now it has
22 got grass on top of it. It's right at the level.
23 It's connected to the house. You walk out the back
24 door of the house and instead of walking down the
25 hill, you walk onto this platform.

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1 It's largely earth. Obviously, it has got
2 -- I'm taking this veneer wall off and it has got
3 these geogrids, which are between layers of earth, all
4 the way through here going back and that's -- it's a
5 multi-part systematic structure where there before was
6 just air.

7 VICE CHAIR MILLER: Okay. So basically,
8 you're saying that the whole thing is an earth
9 structure, the whole thing being the wall going around
10 all the earth? Is that correct?

11 MR. CAROME: Yes.

12 VICE CHAIR MILLER: Okay.

13 MR. CAROME: Yes.

14 VICE CHAIR MILLER: Thank you.

15 CHAIRPERSON GRIFFIS: Mr. Hildebrand?

16 COMMISSIONER HILDEBRAND: I have one
17 question. I'm looking at your exhibit, your last
18 exhibit under Tab F and there's a page 3 that has the
19 mechanically stabilized earth mass. Is that the basis
20 of how you generated your area calculations on what
21 was structure and what wasn't?

22 MR. CAROME: F. You're probably ahead of
23 me on that.

24 COMMISSIONER HILDEBRAND: It's your
25 Exhibit F4.

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1 MR. CAROME: I see, yes. The mechanically
2 stabilized earth mass, I think that equates, based on
3 the way that drawing is done, with the geogrid
4 footprint, the green footprint.

5 I submit that that's obviously a very
6 important part of the structure, but that I further
7 submit that the -- and it's a zoning violation if you
8 just looked at that in many ways. But I submit that
9 the whole structure actually goes back to everything
10 that is creating a platform that is above the original
11 surface and this flat platform.

12 CHAIRPERSON GRIFFIS: Anything else?

13 COMMISSIONER HILDEBRAND: No.

14 CHAIRPERSON GRIFFIS: Any other questions
15 from the Board? Ms. Miller?

16 VICE CHAIR MILLER: Well, I just want to
17 clarify why I came up with this earth wall, earth
18 structure. I think you have answered the question.
19 It sounds like they are the same thing, but basically
20 in your rebuttal submission, page 3, F3 and 4. Number
21 3 refers to an earth structure and number 4 refers to
22 earth walls.

23 MR. CAROME: I see. You know, I think
24 that there are slight differences in terminology here,
25 but I think what the key point here is is that, you

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1 know, this whole system is very different than a
2 retaining wall and also that earth, as a building
3 material, has to be taken into account in thinking
4 about what is a structure.

5 And so I think that these -- and these
6 were just a selection of materials that were able to--
7 you know, we only got -- the owners put in a text in
8 their submission last Tuesday. We went out and just
9 in a quick survey found what we could find on the
10 topic and we were glad to see, as we thought we would,
11 that there is nothing bizarre about calling the whole
12 platform a structure. There's actually engineering
13 science behind it and that's what it is. It's an
14 earthen platform structure.

15 CHAIRPERSON GRIFFIS: Is that the same
16 area or definition that you read that said the veneer,
17 of which this masonry is, is holding back the earth
18 from spilling out from its grid?

19 MR. CAROME: Yes. I mean, that's one of
20 the sources here. I mean, at some technical level,
21 you may find people who will refer to this veneer wall
22 as a retaining wall in the sense that it, you know, at
23 the margins is retaining that last bit of earth from
24 eroding out and unraveling out as one of the -- but
25 this, even if this wall were -- even if the veneer,

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1 you know, somebody thought of it as a retaining wall,
2 obviously that's not the whole of what has been
3 constructed here. It is one component of an overall
4 system or structure that, you know, has gotten whole
5 textbooks written about what it is.

6 CHAIRPERSON GRIFFIS: Understood.

7 MR. CAROME: And so I don't need to, for
8 purposes of prevailing on this appeal, prove to the
9 Board that this facade or veneer is not a retaining
10 wall, although I don't think it is for a lot of
11 reasons. I simply need to prove that the structure is
12 a lot more than just this facade or veneer. Namely,
13 it's this whole earthen reinforced structure that has,
14 you know, textbooks written about what it is.

15 CHAIRPERSON GRIFFIS: Excellent. Thank
16 you. The problem is the textbooks aren't under Zoning
17 Regulations to bring clarity to all these issues that
18 we're talking about. An awful lot, as Ms. Miller
19 said, you have brought in today. So let's run through
20 a couple more additional questions very quickly.

21 You gave some photographs to begin with
22 and moving on from Ms. Miller of what is typically
23 done, you said, or what is often done in the
24 neighborhood and it's kind of a sloping front yard.
25 Is that an MSEW, in your idea, in your presentation?

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1 MR. CAROME: No, it's not a structure at
2 all.

3 CHAIRPERSON GRIFFIS: It's burmed out?

4 MR. CAROME: It's just the natural
5 terrain.

6 CHAIRPERSON GRIFFIS: So you say that
7 isn't natural or is that one of the definitions? Is
8 that a threshold we're supposed to look at? What is
9 natural? What was windblown, swept or what was
10 actually graded into those naturally terraced areas?
11 It may look nice and natural, but is it natural or
12 how --

13 MR. CAROME: I think --

14 CHAIRPERSON GRIFFIS: Isn't it something
15 we would have to determine in terms of what it
16 actually is for the Building Code?

17 MR. CAROME: I mean, I think, Mr.
18 Chairperson, that and I know that you most of all want
19 to go to the Zoning Code, I think here your answer is
20 in the Zoning Code.

21 CHAIRPERSON GRIFFIS: I think we all want
22 to just go to that.

23 MR. CAROME: It's in the definition.

24 CHAIRPERSON GRIFFIS: I'm not going
25 anywhere else.

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1 MR. CAROME: It's in the definition of
2 structure. Structure is anything constructed,
3 including a building, the use of which requires
4 permanent location on the ground or anything attached
5 to something having a permanent location on the
6 ground.

7 CHAIRPERSON GRIFFIS: Right.

8 MR. CAROME: And then it gives a
9 nonexclusive list of examples.

10 CHAIRPERSON GRIFFIS: But when you start
11 piling up dirt, and I'm going to get to the more
12 specific question, but when you start piling up dirt
13 that becomes a structure, because you have determined
14 today in your rebuttal testimony that earth is a
15 building material, then more building material pulled
16 together, poured on top of each other creates a
17 structure. So I'm saying looking at your actual
18 submissions and whatever exhibit that was of the
19 natural, as you have said it, the natural slope, the
20 typical, what happens in this neighborhood.

21 MR. CAROME: Right.

22 CHAIRPERSON GRIFFIS: We would have to
23 determine that that was naturally there not burmed up
24 with a Bobcat and terraced perfectly, is that correct,
25 or would that then be an earth retaining system or an

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1 MSEW or is it actually a retaining wall? Does that
2 become a retaining wall?

3 MR. CAROME: Well, I mean, I think the
4 issue comes up. You know, it doesn't come up as to --

5 CHAIRPERSON GRIFFIS: Is that natural?

6 MR. CAROME: The issue comes up when
7 someone comes in for a building permit and says here's
8 what I'm going to do. I'm going to permanently change
9 my property. I'm going to build a house. I'm going
10 to -- no, I'm not going to build a house. I'm going
11 to build a terrace. I'm going to build a platform in
12 my backyard. It's going to be huge. And then you
13 look at it and you say well, okay, what is happening
14 here?

15 CHAIRPERSON GRIFFIS: Okay. Good. I
16 understand. Let's not answer that one then. So show
17 me then what is the threshold. We have to make a
18 judgment here. So what is the threshold? Let's take
19 one of the thresholds, because you talk about height.
20 You know, there is 6 feet added, there's 4 feet added,
21 there's 2 feet added. Actually, you never said 4
22 feet, which probably would have been a more pertinent
23 dimension. But where is the height? Where is
24 dimensions given in the regulations as you would look
25 at it?

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1 MR. CAROME: Just as -- well, the
2 dimensions is simply looking at what is the height
3 above preexisting grade. I mean, that's how we
4 measure.

5 CHAIRPERSON GRIFFIS: That's how you
6 measured it. I understand how you measured it.

7 MR. CAROME: And that's how the Code says
8 it's to be measured.

9 CHAIRPERSON GRIFFIS: Which code?

10 MR. CAROME: The 2503.

11 CHAIRPERSON GRIFFIS: The Zoning Code?

12 MR. CAROME: Yes, the Zoning Code.

13 CHAIRPERSON GRIFFIS: Okay. So now we
14 have the Zoning Code.

15 MR. CAROME: 2503 will say that you will
16 measure the height of a structure --

17 CHAIRPERSON GRIFFIS: The portion above
18 grade.

19 MR. CAROME: -- from grade.

20 CHAIRPERSON GRIFFIS: That's right. Any
21 structure below 4 feet is allowed to occupy any open
22 yard.

23 MR. CAROME: That's correct.

24 CHAIRPERSON GRIFFIS: That's fine. Now,
25 the next section of which we are here to deal with

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1 deals with retaining walls. So tell me where the 4
2 foot dimension or any dimension, because there's two
3 important aspects of what you presented today.

4 First of all, you're saying look, you
5 filled this up. You have seen a couple that is not --
6 you know, in the neighborhood that aren't necessarily
7 cut in perhaps, but they are probably more
8 proportional or appropriate in your mind. This is
9 inappropriate in your mind and in your words and in
10 your direct testimony.

11 What is the defining, deciding measuring
12 dimension that makes it inappropriate and, therefore,
13 illegal or not according to our Zoning Regulations?
14 And on top of that then, let's go to another piece
15 that you're going to in reading the BOCA Code
16 definitions of what makes a retaining wall, and that
17 is not a structure on top. Where is the top of that?

18 MR. CAROME: All right. Let me try to
19 take these one at a time and try to keep them in my
20 head.

21 CHAIRPERSON GRIFFIS: They are related.

22 MR. CAROME: All right. First of all, I
23 would say there are many violations of the Zoning
24 Code, which arise from the permitting of this
25 structure.

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1 CHAIRPERSON GRIFFIS: I understand that.

2 MR. CAROME: And I'm going to focus on
3 five of them in my closing as I did at the beginning.

4 CHAIRPERSON GRIFFIS: That's fine, but my
5 question is dimension, dimension. You keep throwing
6 dimensions at us.

7 MR. CAROME: On dimension, to the extent
8 the platform, every point of the platform that is more
9 than 4 feet above preexisting grade --

10 CHAIRPERSON GRIFFIS: Right.

11 MR. CAROME: -- and that is in the
12 required rear yard is a violation of 2503, because it
13 is not --

14 CHAIRPERSON GRIFFIS: Except for --

15 MR. CAROME: Because that platform is not
16 a retaining wall. That platform is a reinforced --
17 you know, that platform is not a retaining wall even
18 if the veneer you might call a retaining wall. You
19 obviously cannot refer to the whole platform as a
20 retaining wall. So my position --

21 CHAIRPERSON GRIFFIS: Your position is
22 then when it rises above 4 feet, because it's not a
23 fence or a retaining wall, violates the open yard, the
24 rear yard?

25 MR. CAROME: That's right.

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1 CHAIRPERSON GRIFFIS: Okay. So that makes
2 sense.

3 MR. CAROME: That's one. To the extent
4 that the veneer part -- if the veneer part is not a
5 retaining wall, and I have many reasons why it's not,
6 then it too cannot be higher than 4 feet above grade.

7 If it is a retaining wall, it can't be
8 higher than 7 feet, because now we're incorporating
9 the Building Code, which I recognize that maybe
10 there's some controversy about, but I think that
11 that's the only correct way to do it. So that as to
12 if the veneer part is a retaining wall, then every
13 part of it, which is more than 7 feet above a
14 preexisting grade, is a violation of the Building Code
15 and a violation of the Zoning Code, because the
16 Building Code is incorporated into 2503.3.

17 And those are -- then there are going to
18 be other violations associated with -- there is the
19 Wesley Heights occupancy, lot occupancy, which is
20 obviously different than yard occupancy. I submit
21 that the Wesley Heights Overlay District's treatment
22 of occupancy, which applies just -- which says it is
23 applicable to structures not just buildings, does
24 apply to this structure and it does include this and
25 that this platform is -- I think I probably forgot to

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1 point it out. The platform is far in excess of the 30
2 percent lot occupancy requirement of the Wesley
3 Heights Overlay District.

4 CHAIRPERSON GRIFFIS: Right.

5 VICE CHAIR MILLER: Could I just ask a
6 question, because I'm stuck on this now? In your
7 opinion, is a burm a structure?

8 MR. CAROME: I think it could be, yes. It
9 may well be.

10 VICE CHAIR MILLER: If it's over 4 feet?

11 MR. CAROME: Yes. Well, I think if the
12 burm is -- I mean, it has to be something that has a
13 use, anything constructed, including a building, the
14 use of which requires permanent location on the
15 ground. If that burm is something that has a use and
16 its use requires that it be permanently located on the
17 ground or it's attached to something having a
18 permanent location on the ground, then it is a
19 structure.

20 Now, it's not going to be a problem if
21 it's not in the required rear yard. It's not going to
22 be a problem even if it's in the required rear yard
23 and it's just 4 feet above grade. I mean, 4 feet is
24 a lot. I mean, think about how often you have seen
25 someone in their backyard putting up something that is

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1 4 feet, particularly right against your property line.
2 I mean, you know, fences can be 7 feet, but can't be
3 higher near the property line. So we're not talking
4 about -- this is not -- well, I'm sorry.

5 VICE CHAIR MILLER: So basically, that's
6 it. According to your reading, if you have earth that
7 is higher than 4 feet, it's a structure. Is there any
8 other distinguishing factor to make it a structure or
9 is that it?

10 MR. CAROME: Well, I mean, I think that
11 this is -- at some point there is going to be a line
12 that may not be a bright line for you. I know that
13 you want a bright line, everybody does, but at some
14 point there is going to be some close cases where is
15 that a structure or is that just grading or something
16 else?

17 This is a highly sophisticated, enormously
18 expensive, huge constructed thing that a team of
19 people, you know, a construction crew worked on for I
20 don't know how long. And it's a whole system.
21 There's whole books written about it. This is not
22 close to whatever the line is for where something that
23 is principally earth stops being a structure. But
24 there may be -- there are going to be hard cases at
25 the edges. This is not a hard case.

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1 CHAIRPERSON GRIFFIS: Okay.

2 COMMISSIONER HILDEBRAND: I just want to
3 ask one follow-up question. You said just a moment
4 ago I believe, unless I misunderstood you, that the
5 Building Code limits the construction of a retaining
6 wall to 7 feet.

7 MR. CAROME: It limits the fences or --

8 COMMISSIONER HILDEBRAND: Can you give me
9 an example of that?

10 MR. CAROME: -- fences or fence walls.

11 COMMISSIONER HILDEBRAND: Right, but you
12 said retaining walls.

13 MR. CAROME: All right. I was -- I
14 overstepped. The Building Code does not use the term
15 retaining wall. It uses the term fence wall. I
16 submit that at least in this circumstance, this wall,
17 because it's right at the perimeter and the function
18 that it plays, is also a fence, and so it's subject to
19 that.

20 I will also note that when the Zoning
21 Commission, if I have that right, adopted the section
22 2503 back in 1977, the legislative history of that
23 provision that I have previously referred to during
24 these hearings specifically spells out if there is --
25 I think I quoted in my closing that fences and

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1 retaining walls will be subject to the height
2 limitations in the Building Code, and that 7 foot
3 limitation was in the Building Code.

4 As of 1977 there wasn't a specific
5 limitation on retaining walls at the time and so
6 clearly, the zoning drafters in '77, they understood
7 that what they were talking about was that there was
8 a height limitation, rather than creating a new one
9 that they would borrow the existing one. And so they
10 assumed that fence walls and retaining walls for these
11 purposes, I think, were the same. I mean, maybe there
12 is some potential confusion about that. I mean, it's
13 not crystal clear, but I think that that's the most
14 logical reading.

15 Clearly, it's very clear that the drafters
16 of section 2503 understood that there was a height
17 limitation of retaining walls in the Building Code,
18 and the only thing that I think they could have been
19 thinking about was the 7 foot limitation on fences and
20 fence walls and trellises and screens. There's a long
21 list of things that are all subject to that.

22 It's sensible, as well, I would suggest,
23 that it would be kind of odd to say that, you know, a
24 translucent or virtually transparent wire mesh fence
25 right along the lot line is limited to 7 feet, but

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1 that you can replace air with a wall up to 30 feet
2 and, frankly, the DCRA's position would be up to 1,000
3 feet if you use masonry blocks and fill it in behind
4 with dirt. That would just be completely absurd.

5 But so I think for all those reasons that
6 the best reading of what the Zoning Code drafters
7 intended was that the 7 foot height limitation on
8 fences and fence walls would apply to retaining walls.

9 COMMISSIONER HILDEBRAND: That wasn't my
10 question. My question was did you find a reference in
11 the Building Code that limits the height of retaining
12 walls to 7 feet?

13 MR. CAROME: Not using the term retaining
14 wall.

15 COMMISSIONER HILDEBRAND: Thank you.

16 CHAIRPERSON GRIFFIS: Okay. Let's move
17 ahead. Any other questions? Very well. Start with
18 cross, Mr. Aguglia?

19 MR. AGUGLIA: I don't want to regurgitate
20 this. This will be in our findings of fact and
21 conclusions of law. We obviously have a material
22 difference in the analysis of the regulations.

23 CHAIRPERSON GRIFFIS: Okay.

24 MR. AGUGLIA: So why don't we just save it
25 for that?

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1 CHAIRPERSON GRIFFIS: Appropriately so.

2 Very well. Does DCRA have any cross?

3 MS. BELL: No.

4 CHAIRPERSON GRIFFIS: No?

5 MS. BELL: We have the same position.

6 CHAIRPERSON GRIFFIS: Okay. ANC, Park
7 Service? Let's move ahead.

8 MR. CAROME: For my closing, my plan is to
9 use the PowerPoint, and so we're going to need just a
10 second. It's set up and ready to go. We just need to
11 move.

12 CHAIRPERSON GRIFFIS: Okay. And just to
13 be clear, of course, we're not going to be seeing
14 anything that's new that then would need to be
15 crossed. This is your closing. You won't be crossed
16 on this. Is that correct?

17 MR. CAROME: That's right. That's
18 correct. Everything here is in the record. Would it
19 make sense to dim the lights? I don't know whether
20 that's what you ordinarily do here.

21 CHAIRPERSON GRIFFIS: And you have copies
22 of this, correct?

23 MR. CAROME: Yes.

24 CHAIRPERSON GRIFFIS: Okay. Good. Yes,
25 we can get the lights.

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1 MR. CAROME: Thank you. I want to again
2 thank the Board for its patience in what I know has
3 been an unusually long proceeding. This is my closing
4 presentation. It will cover some of the same issues
5 that we have been talking about because of the
6 direction of the questions, but I think we really have
7 crystallized things quite a bit here.

8 In overview, my submission is that the
9 DCRA made two kinds of errors here. First, an
10 overarching error of fact, which is that it completely
11 misjudged what kind of structure it was authorizing.
12 It called it a retaining wall and nothing more and, as
13 I have attempted to demonstrate here, this structure
14 is far more than just a retaining wall.

15 Then it made another kind of error, which
16 is that it misinterpreted several provisions of the
17 Zoning Code, I would submit. In combination, the big
18 factual error, this overarching factual error and
19 those errors of law, produced many clear violations of
20 the Zoning Code. We have talked about a whole bunch
21 of different ways in which this, frankly,
22 extraordinary structure violates the Code. And in the
23 papers, I would submit, there are in excess of 20
24 different, separate ways in which the Zoning Code has
25 been violated by this enormous structure, which is

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1 unlike anything we have seen in Wesley Heights before.

2 I'm going to focus, as I did at the
3 beginning, on five violations so that I think we can--
4 which I think are the clearest, easy to get one's mind
5 around. And of course, we only need to prove one to
6 show that the DCRA's administrative decision here was
7 incorrect, but I'm going to focus on the top five.

8 So what was the overarching error, the
9 overarching factual error? It was accepting the
10 owner's claim that this thing is just a retaining
11 wall, this thing which, you know, has replaced what
12 was a forested slope entirely where there was nothing
13 but air before and trees. It's enormous. I mean, it
14 is unlike anything in the neighborhood and it's 30
15 feet tall and it's right on the lot line of the park
16 and of neighboring properties. This is another view,
17 which we looked at before. That is what the Tates now
18 have as their backyard. It abuts right up against
19 that wall, the veneer face of the whole structure.

20 This is just another picture taken this
21 weekend. I'm just trying to give the Board some
22 essence, some sense of -- if you just see a photo
23 without somebody like a person in it, one doesn't
24 really understand what the scale is we're talking
25 about. I'm standing there at the foot of the corner

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1 with my daughter and that thing is just towering above
2 and that's just one corner of a structure that has got
3 400 feet of veneer wall around it, 600 -- I'm sorry,
4 6,000 cubic feet of earth was trucked in with hundreds
5 of truckloads of material and, yet, the Government,
6 the DCRA, referred to this as just a retaining wall.

7 So what was wrong about that
8 interpretation? Why are they wrong? Well, one big
9 way in which this factual error occurred was that the
10 Zoning Administrator, the Zoning Administrator's
11 Office, assumed that this structure would consist of
12 nothing more than just the exterior masonry blocks.
13 That was what Mr. Bello testified when he was here,
14 that this structure is nothing more than just the
15 exterior masonry blocks.

16 So what did the Zoning Administrator
17 ignore in thinking about this structure? Well, they
18 completely ignored the geogrid sheets that layer
19 through this whole earthen structure. They completely
20 ignored the layers of specially compacted, engineered
21 dirt or earth that was built up where nothing was
22 before. That's 6,000. Here it erroneously says cubic
23 feet. It's 6,000 plus cubic yards of fill. The
24 Economides construction mason said, you know, there
25 were hundreds of truckloads of fill that were brought

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1 in to build this.

2 And so what did DCRA ignore? What did the
3 Zoning Administrator ignore? The whole platform, the
4 part of the model that I was holding up before, the
5 dog. And I would submit that the veneer wall is the
6 tail of this dog, but they just looked at the tail and
7 they missed the whole dog.

8 So what did the owners do? They owners,
9 they didn't want a retaining wall. They wanted a
10 terrace or a platform at their back doorstep that they
11 could walk on to and have a huge, new, flat area
12 outside the house that they had lived in for 12 years.
13 So they went and they decided we're going to have, it
14 turns out to be, more than a quarter acre flat terrace
15 where once there was just air and trees.

16 Now, the Economides' own engineering
17 expert didn't make the same mistake or he honestly
18 told some facts in his affidavit, the Statler
19 affidavit, which is BZA Exhibit 57. He got it right.
20 He said the mesa wall is a structure comprised of
21 blocks, geogrid, gravel and compacted soils. It is a
22 "unified mass exerting pressure downward," I note not
23 laterally, "exerting pressure downward onto the
24 Economides' property." He understood that it wasn't
25 just a wall. He understood, as I have been trying to

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1 point out here, that it is a huge quarter acre
2 platform built up of at least four of five different
3 kinds of construction materials, including earth.

4 So as I said earlier during my rebuttal,
5 I really think that this comes down to this factual
6 question. What is it and is the platform properly
7 considered part of the structure? As I say, it must
8 be. Let's go to the definition in the Zoning Code for
9 the term "structure." It's a very, very broad
10 definition, extremely broad.

11 "Anything constructed, including a
12 building," so obviously it doesn't have to be a
13 building, "Anything constructed, including a building,
14 the use of which requires permanent location on the
15 ground or anything attached to something having a
16 permanent location on the ground and including, among
17 other things," so this is not even an exclusive list,
18 this is just an example of the huge breadth of what
19 structures can be, "among other things, radio and
20 television towers, reviewing stands, platforms,
21 flagpoles, tanks, bins, gas holders, chimneys, bridges
22 and retaining walls."

23 So I mean, this is -- the notion, which
24 the owners and the DCRA suggests is absurd that I'm
25 saying that, you know, calling the whole earthen thing

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1 a structure for purposes of the Zoning Code actually
2 isn't bizarre at all. The word platform is one of the
3 specific examples of what is a structure for purposes
4 of the Zoning Code.

5 And then there is not a definition of
6 platform in the Zoning Code and so what do we do? We
7 look to Webster's. Webster's defines platform as "A
8 natural or constructed terrace." Webster's also goes
9 on to define terrace in turn as "A relatively level,
10 paved or planted area adjoining a building and, in
11 formal settings, often surrounded by a balustrade,"
12 whatever that is.

13 Now, I'm sorry. This is a platform
14 adjoining this building. It is what the back door of
15 this property opens on to. And so the Economides
16 structure, this huge quarter acre platform, actually
17 fits neatly within the definition of terrace and of
18 platform, and so it's obviously -- and just going back
19 to the definition.

20 Obviously, it's constructed. It's
21 combined of all of these different disparate
22 materials. A construction crew put it together. It's
23 held up through engineering science and the use of it
24 requires permanent location on the ground. Of course
25 it does. You cannot use that platform if it's going

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1 to slide down the hill or if it's going to move
2 around.

3 Obviously, to use that, and the
4 Economides, in fact, I think their plans suggested
5 they wanted to use it in part to put a swimming pool
6 up there, as well, it was -- of course that platform,
7 it's use requires permanent location on the ground and
8 also it's certainly something that's attached to
9 something having a permanent location on the ground.

10 Why do I say that? Well, of course, the
11 geogrid reinforcement layers, they tie directly
12 against, up to the veneer wall, which the veneer wall
13 clearly, it's got footers. It's set into this
14 foundation. The Park Service has got lots of issues
15 about it actually being over onto the park land. It
16 is attached to that wall, which has a permanent
17 location on the ground.

18 And while it may be novel here for the
19 Board to be thinking about something like this,
20 whether it's a structure or not, I think it's only
21 because, frankly, not many folks have had the chutzpah
22 to do this in a residential area, to put up something
23 so huge and construct it right on the neighboring
24 property and park land.

25 So still talking about this overarching

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1 factual error. Imagine that the owners, instead of
2 doing what they did, instead of using the material,
3 the construction materials that they did use here, the
4 geogrid, the compacted earth, instead of using those,
5 imagine that they had achieved the same effect with
6 concrete or steel posts and girders, for example.
7 That was one of the hypotheticals that I posed to Mr.
8 Bello in my written questions.

9 Written question number four said how
10 would the consideration, the zoning application, have
11 changed if the entire structure, using the model to
12 illustrate, if this entire structure, instead of being
13 the multi-earth, compacted earth and geogrid,
14 etcetera, if it instead were 100 percent concrete that
15 had been poured, would that change the zoning
16 analysis?

17 And what did Mr. Bello do in response to
18 that question? Not only did he not answer it, unlike
19 all the other questions, he hated the questions so
20 much he didn't even repeat the question back in his
21 letter. He was so flummoxed by it that he completely
22 ignored the question.

23 So here is what the owners began with. I
24 wish I could claim the artistic talent that drew that.
25 It was actually one of my family members. The owners

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1 began with this. They began with -- in 2004 when the
2 permit was issued, they had recently built this
3 enormous new house there, but they had this big
4 forested slope. They had this big slope that has been
5 forested behind it. This is the sort of
6 preconstruction situation.

7 And then this is what the owners wanted.
8 They wanted to have a nice, flat platform or terrace
9 at their back door of their house to walk on to and
10 they wanted to fence it, and so this is what they
11 wanted. Of course, they couldn't just do that without
12 more than just a wall at the end and sort of grass on
13 top. You have to hold that up, right? And so this is
14 what the owners built.

15 This is a side view. There's one of the
16 hundreds of dump trucks that had brought in dirt up on
17 the left. And so they created this MSE structure,
18 earthen reinforced structure, to support that
19 platform, to make it a useable constructed object in
20 their back yard in place of what was not there before.

21 So if the space below the platform had
22 been filled to the top -- this is the hypothetical
23 that so flummoxed Mr. Bello. If the space below the
24 platform were filled to the top with concrete, we
25 wouldn't refer to that as just a retaining wall, I

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1 don't think. I think we would refer to it as
2 obviously -- we would have no doubt that it was a
3 structure.

4 If the elevated surface were held up by
5 beams and girders in this fashion, I don't think we
6 would be having a hard time with the notion of whether
7 that whole thing was not just a retaining wall, but in
8 fact a much larger and much more different structure
9 far in excess of 4 feet above grade and there is no
10 way the Zoning Code would have permitted that. So why
11 should this be deemed just a retaining wall? How is
12 this so fundamentally different? I submit that it's
13 not. It is another way of achieving the goal of
14 having a huge quarter acre elevated platform instead
15 of what was there before.

16 So engineering evidence from both sides
17 confirms that the structure as a whole is not just a
18 retaining wall, and I think it's important. I mean,
19 I guess I said this before. I don't believe that the
20 veneer facade is a retaining wall either, but I don't
21 -- this doesn't really rise and fall on that, because
22 obviously this whole systematic structure, as I have
23 said before, is much more than that. And when you
24 look at the structure as a whole, it's not merely, not
25 just a retaining wall even if I were to concede, which

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1 I don't, that the veneer is a retaining wall.

2 So the owners' engineer, as I said before
3 and as I pointed out on that chart that we put up
4 here, that's straight. Those are the words of the
5 engineer. The zoner's engineer, the general manager
6 of Ryan and Associates, says that the structure here
7 is "a unified mass," not just the masonry blocks as
8 Mr. Bello said was all that mattered. It's comprised
9 of the blocks, the geogrid, gravel and the compacted
10 soils.

11 That is really, essentially, what the
12 National Park Service engineer said and testified to
13 in talking about this being a mechanically stabilized
14 earth retaining system. Regardless of what you think
15 of the veneer or facade as, the whole thing is much,
16 much more than just a "retaining wall" and the
17 industry text that we looked at before, I think, make
18 the same point.

19 And here's where I will more than quibble.
20 I believe that even the exterior wall itself, if you
21 were just looking at that, that that is not a
22 retaining wall within the meaning of the definitions,
23 either the Webster's definition or I think the next
24 most relevant definition would be the last definition
25 from any D.C. Building Code that we have, which is the

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1 BOCA definition.

2 And so the NPS engineer, Robert Pinciotti,
3 and the industry texts, including those I have put in,
4 say that the wall components of MSE structures or
5 earth reinforced structures, whatever you want to call
6 them, are mainly facades to prevent erosion at the
7 front edge. That, for example, is my rebuttal exhibit
8 F4, makes that point.

9 The wall here does not do the main thing
10 that the owners and DCRA say is the essence of a
11 retaining wall. What do they say is the essence of a
12 retaining wall? It's resistance against lateral
13 pressure of earth. The texts, one of the texts that
14 I have submitted, says that "The facing of an MSE only
15 plays," this is a quote, "plays a minor structural
16 role in the stability of the structure" unlike a
17 retaining wall, which is the whole -- the wall is
18 obviously playing a major structural role in resisting
19 the lateral pressure of the earth. It's really
20 actually the geogrid and the huge pressure and the
21 weight of the compacted soils on top of the geogrid,
22 that's what gives this thing its stability.

23 It's unrebutted testimony in the record
24 here from Mr. Pinciotti that you could take the wall
25 away here and while you would get some erosion at the

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1 face of it, the vast bulk of the structure would still
2 remain the way an earthen dam would and he even said
3 that he knows of an example of an earthen dam
4 structure that doesn't have a face, doesn't have the
5 veneer.

6 It is that enormously strong geogrid
7 material with enormous pressure of many, many layers
8 of compacted soil. That is what together mainly holds
9 this thing together, as I said, and that the bulk of
10 the structure would stand even without the exterior
11 wall. So these walls are not even under the owners'
12 and the DCRA's definition of, you know, resisting
13 lateral pressure. That's not what this does. In
14 fact, the owners' engineer talks about it exerting
15 downward pressure onto the Economides' property.

16 So very quickly, we did this in our early
17 briefs and pointed out that courts have ruled, not
18 from the District of Columbia, but from other
19 jurisdictions have ruled that erecting a wall then
20 filling behind it with earth where previously there
21 was none at all does not create a retaining wall.

22 That's the Ranson case from West Virginia,
23 the Adler case from New Jersey in each instance where
24 owners were not allowed to get out from underneath the
25 height restrictions on fences and claiming that

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1 something is a retaining wall, not subject to a height
2 limitation under those codes by putting up a wall then
3 filling behind it with dirt, which is essentially what
4 happened here.

5 So my point here is simply that there is
6 significant judicial support for the proposition that
7 even putting aside the geogrid and the compacted earth
8 and everything that went on here, the sophisticated
9 nature of this structure, even if you put that aside,
10 the notion of putting up a wall, filling it, where
11 there was nothing before, filling it behind dirt and
12 creating a whole new entity that wasn't there before,
13 that is not just a retaining wall.

14 I think that the courts are properly
15 recognizing that when there was nothing there before
16 and you just filled in behind it with soil or
17 whatever, you created something new that was more than
18 just the wall that was holding up the new stuff you
19 put in, namely the fill dirt in these simpler examples
20 from West Virginia and New Jersey.

21 The owners have gone to great lengths to
22 say that our own expert, Mr. Kilsheimer, himself had
23 characterized this as a retaining wall. In fact,
24 that's wrong. Mr. Kilsheimer did not use the word
25 retaining wall. His statement was "The structure is

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1 a large geostructure type wall relying on earth
2 characteristics and gravity for support in an
3 acceptable bootstraps approach." He did not
4 characterize it as a retaining wall and there I think,
5 frankly, he is actually just talking about the wall
6 component of the larger platform structure.

7 So this may be a little repetitive,
8 because we talked about it during my rebuttal and the
9 questions but, as I noted before, DCRA's own favored,
10 they call it working definition of retaining wall,
11 they are the ones who look to the BOCA Code. There
12 was I think some extremely unfair suggestions made by
13 the cross examination of Mr. Pinciotti to suggest that
14 he was attempting to mislead the Board by referring to
15 the BOCA 1996 definition and maybe he could have been
16 somewhat clearer about that, but I believe that he
17 simply, in good faith, was going to the working
18 definition that DCRA itself had said it was using as
19 the definition for a retaining wall, the BOCA
20 definition, and then simply pointing out that the BOCA
21 definition doesn't apply.

22 I submit it doesn't apply here for two
23 reasons. One, that this wall is laterally supported
24 at the top with the geogrids pulling it back towards
25 the wall, those geogrids are attached directly to it

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1 as the plan documents show, and also that the wall's
2 function is principally not to resist lateral soil
3 load. The whole structure together is exerting a
4 downward pressure and it's those geogrids that are the
5 main thing holding it together.

6 So this screen is simply -- actually, this
7 is a Xerox copy of the way DCRA presented this in its
8 PowerPoint presentation. There you can see that this
9 is where they came up with their definitions of
10 retaining walls, and the one that they chose to put in
11 bold as the one, which I assume meant it was the one
12 that they found most compelling or important, is the
13 BOCA 1996 definition and that is a direct copy out of
14 the DCRA's PowerPoint presentation during Mr. Bello's
15 testimony.

16 And as I have said before, the DCRA and
17 NPS experts, I think they were correct to focus on the
18 BOCA definition for the reasons I said before, that
19 the BOCA definition is the last definition we had as
20 a matter of D.C. Building Code here very recently
21 where there was a definition of retaining wall and
22 that was it. The current IBC Code does not contain a
23 definition of the retaining wall.

24 So that completed the segment of my
25 closing that's talking about the big overarching

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1 factual error, namely was this structure just a
2 retaining wall or was it something much more? And I
3 submit that it clearly is much more than that. It's
4 a platform structure with a veneer wall.

5 So now one at a time I'll go through the
6 top five zoning violations and, again, emphasizing
7 that these are simply the top five. There are a
8 number of others as to which there's clear records to
9 support that there are other ways in which this also
10 violates the code.

11 Number one is that the elevated platform
12 is located in a required rear yard, yet fits within no
13 exception to section 2503, which is the provision of
14 the code, which spells out the exclusive categories of
15 structures that can be erected in a required yard. So
16 just quickly, what are the governing provisions here?
17 One is the definition of yard and that definition
18 actually includes a prohibition, which is "A yard
19 required by the provisions of this title shall be open
20 to the sky from the ground up."

21 And I submit that what that means for
22 these purposes is this was the yard, I'm just looking
23 at the model, and what we had before, that is the
24 yard. It was a rather steeply sloping rear yard. And
25 what does the definition of yard, which gets used in

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1 part of 2503 -- it actually specifically says "A yard
2 required by the provisions of this title shall be open
3 to the sky from the ground up."

4 That was the ground. It is no longer open
5 from the ground up. It now is covered with an
6 enormous quarter acre platform, 6,000 plus cubic tons
7 of earth brought in by the hundreds of truckloads.
8 "And shall not be occupied by any building or
9 structure, except as specifically provided in this
10 title." That's the rest of the definition.

11 So then there is a definition of the rear
12 yard. That is "A yard between the rear line of a
13 building or other structure and the rear lot line,
14 except as provided elsewhere in this title." Once
15 again, this prohibition, "The rear yard shall be for
16 the full width of the lot and shall be unoccupied,
17 except as specifically authorized in this title."

18 Then there's 404.1, which sets up the
19 required rear yard. "A rear yard shall be provided
20 for each structure located in a Residence District,
21 the minimum depth of which shall be 25 feet in R-1-A."
22 These are the relevant provisions of 2503. I think
23 the Board is quite familiar with them at this point.
24 The two relevant ones here are what are you allowed to
25 put in a rear yard? A structure, not including a

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1 building, no part of which is more than 4 feet above
2 the grade at any point.

3 So that's a general prohibition for all
4 structures, you know, that don't fit into one of the
5 other categories. If they don't fit into one of the
6 other categories like stairways or fences or retaining
7 walls, then they are subject to this and they can't be
8 any higher than 4 feet above the grade at any point.

9 And it was very clear that what was going
10 on here was an intent to measure the height of
11 structures from preconstruction grade and not as was
12 in the past, from the -- as one does for normal lot
13 occupancy where you measure the height of a structure
14 and figure out its occupancy from the floor of the
15 main, of the first floor of the dwelling on the
16 property. And so you can put in structures in your
17 required rear yard. If they don't fit into, you know,
18 the fence or stairway or antenna exception, they have
19 to be entirely less than 4 feet above the grade at
20 every point.

21 And then there's the 2503.3, the one that
22 the DCRA relied on here, which is for fences or
23 retaining walls, of course, constructed in -- they
24 have to be not just fences or retaining walls. That's
25 not enough. According to the Zoning Code, they also

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1 have to be constructed in accordance with the D.C.
2 Building Code. Those may occupy a required yard.

3 So I submit that the violation here,
4 Violation No. 1, impermissible structure in the
5 required rear yard, is clear cut. The platform is in
6 a required yard. There is no doubt about it. It's
7 not just in the required yard, but however you look at
8 the -- at which version of the required yard, whether
9 you look at what I call the code version, the 25 feet
10 closest to the rear line, the whole yard version,
11 everything back from the dwelling, or the Bello
12 version, the first 25 feet back from the building.

13 In any case, the platform is not just in
14 the yard. It's occupying more than 90 percent of the
15 yard, and so that's a clear cut violation. And so the
16 platform component of this structure, obviously, is
17 not a fence or retaining wall and the platform
18 structure is in numerous parts. Most of it is more
19 than 4 feet above the preexisting grade. In fact,
20 parts of it are 30 feet above or more above the
21 preexisting grade. And yet, the DCRA erroneously
22 treated the platform as irrelevant to the zoning
23 decision. That's Violation No. 1, impermissible
24 structure in required yard.

25 Violation No. 2 is the structure, even if

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1 it was otherwise something that could be put in a
2 required rear yard, it can't occupy more than 50
3 percent of the required rear yard. And where does
4 that 50 percent limitation come from? That comes from
5 the last sentence of the definition of yard. I love
6 it how the zoning drafters put some of the most
7 important prohibitions into the definitions. It makes
8 life interesting. No offense intended to any present
9 company.

10 So the elevated platform occupies the
11 great majority of the rear yard. We looked at that
12 before. It occupies an area of nearly 15,000 square
13 feet and that figure includes all portions that are
14 elevated more than 2 feet above existing grade. It's
15 a similarly huge portion of the rear yard, well in
16 excess of 50 percent if you just, you know, cut the
17 owners a great deal of slack and DCRA a great deal of
18 slack and just say we'll look at things that are
19 actually 6 feet more than -- elevated more than 6 feet
20 above the preexisting grade.

21 And even more so if, as Chairperson
22 Griffis suggested, you know, 4 feet being a relevant
23 benchmark, it's even more than the 6 feet, obviously,
24 if that was what one was going to look at for what is
25 the structure part of this whole thing. So just very

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1 quickly. I probably made this point before. No
2 matter which view of the required rear yard one takes,
3 the platform occupies a huge proportion of it, in
4 every case in excess of 94 percent of the required
5 rear yard no matter which way you look at it.

6 This is my pitch for why the -- which I
7 really think is the only one that makes sense, why the
8 required rear yard is the proper way to look at it for
9 purposes of just clarity and thinking about it, is it
10 extends from the rear property line inward toward the
11 building box, that's the first box on the prior slide,
12 so the 25 feet closest to the property line. I think
13 that's the right way to look at it. Again, as this
14 drawing shows, it doesn't matter which of the three
15 you use for this purpose, but I actually think that
16 that's the one that is most consistent with the Zoning
17 Code.

18 And as my rebuttal exhibits, D1 through
19 D6, show both the BZA decisions and the D.C. Court of
20 Appeal decision, which I submit assume and treat the
21 required rear yard as being that 25 feet closest to
22 the rear property line. And this conforms to the
23 language of the code. Why do I think that that's
24 right? 404.1 of the Zoning Code creates the minimum
25 depth of the yard. It is the open part of the yard

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1 that must always be there.

2 You can never -- if you have a building,
3 that's the point of the building to which you could
4 extend. You could put an addition on to that building
5 up to that point. And it's when you cross that line
6 and get closer than 25 feet to the rear line, that's
7 when you have encroached upon, intruded upon
8 impermissibly on a rear yard. That is the required --
9 that minimum 25 foot buffer zone is the required rear
10 yard.

11 And I would submit that this also conforms
12 most to common sense, the same point. This repeats
13 the point I just made that one can extend a building
14 out to that 25 foot line, but not further, and it's
15 that area between the lot line and 25 feet in the lot
16 line in R-1-A District that's the sacred no build zone
17 and where there is a need for the special regulation.
18 That's the area that you cannot absorb with your
19 dwelling. That is, in some sense, the required rear
20 yard.

21 It's also -- you know, looking at just,
22 you know, my method of looking at the rear yard is
23 most consistent with the purposes of the Zoning Code,
24 which I submit it's what this Board I think most
25 worries about in zoning decisions, is what is going to

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1 be the impact of a structure or a building on the
2 neighboring properties? That is foremost and,
3 obviously, proximity to the neighboring properties is
4 very important and you only are really going to take
5 that consideration into account, I submit, if you view
6 the required rear yard, essentially, as a buffer
7 that's the last 25 feet of the property.

8 But as I said, and maybe I'm dwelling on
9 this too long, it doesn't really matter which of those
10 three, at least for determining the violation. I
11 think it might matter for purposes of how we're going
12 to remedy the situation.

13 So the legal analysis here is
14 straightforward. "No building or structure shall
15 occupy in excess of 50 percent of a yard required by
16 this title." That is the code language of the
17 definition of yard. Interestingly enough, and this
18 came up in Mr. Bello's -- one of the questions that he
19 did answer. I asked him does the 50 percent yard
20 occupancy limit, does that apply to 2503.3 structures,
21 namely fences and walls? And he said that he couldn't
22 answer that question yes or no, which I found quite
23 perplexing.

24 The DCRA conceded that the 50 percent
25 occupancy, yard occupancy limitation, applies to

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1 structures authorized under 2503.2, that is structures
2 that are less than 4 feet above grade. But curiously,
3 in response to my question, Mr. Bello said that he
4 couldn't answer yes or no whether the 50 percent yard
5 limitation applies to things that meet the exception
6 for fences and walls.

7 It doesn't matter here I think because, as
8 I said, the platform component of this structure is
9 not a fence or a wall. But in any event, I submit
10 that it couldn't be clearer from the language of the
11 code and from the legislative history of 2503.3 that
12 the same 50 percent limitation on yard occupancy
13 applies to all structures regardless of which
14 exception of 2503 they fit within. There is no
15 possible way that, from the text of the Zoning Code,
16 you could get to saying that the 50 percent limitation
17 applies to structures that are all less than 4 feet
18 above grade, but for some reason doesn't apply to the
19 other accepted categories of 2503.

20 There was a lot of confusion during Mr.
21 Bello's testimony. I guess maybe his confusion about
22 this question of how the 50 percent limitation applies
23 is why it was so confusing. I will concede that for
24 purposes of lot occupancy under the basic lot
25 occupancy statute, under the basic lot occupancy

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1 provisions of the Zoning Code, not the Wesley Heights
2 Overlay though, that you do only look at the portions
3 of the structure that are above the floor of the main
4 level of the dwelling. That is how lot occupancy is
5 calculated.

6 And so for purposes of lot occupancy, as
7 opposed to yard occupancy, it may well be that the
8 platform, for purposes of general lot occupancy not
9 Wesley Heights Overlay, it may well be that the below
10 grade, below level of the first floor of the building
11 nature of the platform makes it not count for purposes
12 of measuring lot occupancy. There is a very different
13 approach to measuring yard occupancy than there is
14 from lot occupancy, I have now learned by studying the
15 code.

16 But it couldn't be clearer that for
17 purposes of yard occupancy, and this actually was the
18 whole point of the 1997 amendments, which put the 2503
19 provisions into the code, was to spell out that for
20 purposes of yard occupancy and rear yard occupancy,
21 you measure not from the level of the first floor of
22 the building. You measure, you know, directly down to
23 what the preexisting grade was.

24 And so I think it's worth pointing that
25 out really just so that there is not confusion as the

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1 Board thinks about this. I think it's going to be
2 important for the Board to keep separate in its mind
3 yard occupancy for purposes of 2503 and the definition
4 of yard and lot occupancy. We'll come back to that,
5 because I do have a wrinkle on that when we get to the
6 Wesley Heights Overlay lot occupancy calculation.

7 So I guess this slide of the PowerPoint
8 just makes the point I was just making, which is that
9 the 50 percent yard occupancy limit was adopted in
10 1997 simultaneously with section 2503 specifically to
11 restrict the size of low structures in rear yards.
12 Now, this is a quote here from the drafting history,
13 which I think completely answers the question that Mr.
14 Bello, for some reason, is not sure about, which is
15 are fences and retaining walls, if that's what this
16 were, are they subject to a 50 percent yard occupancy
17 limitation?

18 This sentence here makes clear that low
19 structures, i.e., structures below 4 feet, fences and
20 stairs and yards as a matter-of-right, the thrust of
21 2503 is to allow low structures, fences and stairs in
22 yards as a matter-of-right with a restriction on
23 occupancy to ensure that at least 50 percent of a yard
24 is left open. So even there something in 2503.3,
25 namely fences, is spelled out as being also subject to

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1 the 50 percent yard limitation. So that is Zoning
2 Violation No. 2.

3 Zoning Violation No. 3. Even if we were
4 to buy into the proposition that this whole platform
5 structure was nothing but a retaining wall, it still
6 would not be permitted under the Zoning Code, section
7 2503.3 in particular, because it violates the Building
8 Code's 7 foot height limitation. I think there are
9 two issues that I sense trouble the Board about this,
10 and maybe rather than focusing on the PowerPoint I
11 will just try to just -- I sense the Board having two
12 problems with this.

13 One is well, it says the Building Code and
14 is that outside our jurisdiction as the BZA? The
15 second is the Zoning Code uses retaining walls and is
16 this thing -- and the Building Code uses the term
17 fence wall, and does that somehow take it to mean that
18 the 7 foot limitation doesn't apply? Let me just try
19 to address those directly.

20 The DCRA says this is not a zoning issue
21 at all, because zoning doesn't look to the Building
22 Code and I submit that that is incorrect, because it
23 reads out of the Zoning Code provision. It reads out
24 of 2503.3 the words in red here that obviously the
25 drafters of the Zoning Code understood was an

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1 additional limitation as a matter of zoning that it
2 not just be a fence or retaining wall, but that it be
3 a fence or a retaining wall constructed in accordance
4 with the D.C. Building Code.

5 If you say well, that's not a matter of
6 zoning, then you have written those words completely
7 out of the code and that is contrary to a basic
8 principle of statutory or regulatory interpretation,
9 which is you should never interpret a statute or a
10 regulatory provision to render some words meaningless.
11 Of course, all structures that the DCRA permits have
12 to be in accordance with the Building Code, but most
13 of the time that's not a zoning issue.

14 It becomes a zoning issue, and this is
15 only one of two or three places that this happens in
16 the whole Zoning Code where there is a cross reference
17 to the Building Code, it becomes a zoning issue when
18 the drafters of the Zoning Code spell it out in the
19 statute and say to meet zoning criteria, it has to be
20 constructed in accordance with the D.C. Building Code.

21 And so to take the DCRA position here, it
22 would render that limitation meaningless, because that
23 limitation is -- the general limitation has to be
24 constructed for the building, but that is true for all
25 structures. Obviously, the zoning drafters, the

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1 drafters of the code, intended that to have some
2 meaning.

3 The one case that we have been able to
4 find from this Board that talks about the Building
5 Code, how the Building Code interplays with the Zoning
6 Code with respect to 2503, is the Grinstead decision,
7 which we have cited in our briefs. In that case there
8 was an allegation that a structure, I think it was a
9 fence, did not meet -- there was a question about
10 whether it fell within 2503.

11 And this Board repeatedly in that decision
12 said that since no evidence has been presented of a
13 Building Code violation, we don't need to worry about
14 noncompliance with section 2503.3. In that case at
15 least the Board appeared to be recognizing that
16 reference to the Building, for purposes of 2503.3, was
17 relevant and appropriate.

18 Now, I would also note that in other
19 jurisdictions, the heights of fences and walls are a
20 routine zoning issue. So we're not asking -- at least
21 as to the height question, we're not asking this Board
22 or the Zoning Administrator to do something that is
23 not typically a matter of zoning, which is the height
24 of a fence or a fence wall or a retaining wall
25 abutting or near to lot lines.

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1 Now, we believe that there are many other
2 respects in which this structure does not conform to
3 the Building Code and I know that the Board has not
4 been thrilled with my going into detail about that.
5 I'm not going to go into the detail about that now.
6 There is a lot in the record, including things that
7 the Park Service has pointed out, about, you know,
8 encroachment which brings into play, you know,
9 actually part of the wall literally being across the
10 property line.

11 That brings into play the Building Codes,
12 special restrictions on party walls and I'm not going
13 to go there, because I think that the excess of height
14 above the 7 feet is so clear that why do we need to
15 get bogged down in more complicated things? I think
16 it would be appropriate for the Board to consider
17 those things if we didn't have, you know, a clear
18 violation of the height limitation. But since we have
19 that, I don't think we need to dwell more on that.

20 In answer to one of the earlier questions
21 about the legislative history of 2503, that quote on
22 the bottom is the quote that I referred to as at the
23 time of the 1977 adoption of the 2503.3 limitations.
24 And the Director of the Municipal Planning Office,
25 which I believe is the predecessor to the Zoning

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1 Office, described section 2503.3 as allowing as a
2 matter-of-right "a fence or retaining wall up to the
3 heights established by the Building Code."

4 And I point that out simply to say that,
5 at the time this provision was adopted, there was a
6 clear understanding that fences and retaining walls
7 would be subject to the Building Code Height
8 Limitation. So I don't think we're suggesting
9 anything surprising there.

10 This simply just points out, this slide,
11 that we are undoubtedly in violation of the 7 foot
12 limitation. This structure is more than five times
13 the maximum height at its highest points where it's 30
14 feet and the newly added fence adds another 6 feet on
15 top of that, so we're talking about a 36 foot high
16 structure and it's above preconstruction grade.

17 Now, I don't know whether it's intentional
18 or by accident, but at different times the owner's
19 counsel, Mr. Aguglia, has suggested that we don't --
20 this is below grade and that this wall doesn't violate
21 the 7 foot height limitation, because it's all lower
22 than I guess the front of the property, the way the
23 house is and with the lot line in front of the house
24 or something.

25 That is fundamentally wrong in terms of

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1 what do you measure, how do you measure the height of
2 a fence or a fence wall. You measure it, according to
3 the Building Code, section 3110.1.3. It states that
4 the height is measured from the top of the fence to
5 grade on the side of the fence where grade level is
6 higher. Obviously, you know, this is a determination
7 made at the permitting stage, and so grade obviously
8 is what existed.

9 At the time that the permit was issued,
10 grade was obviously down here at the bottom of the
11 hill 30 feet below where the top of the platform
12 structure was proposed to end up. And so it has got
13 nothing to do with the grade at any other part of the
14 property. It has to do with the grade at the point
15 where the fence or the wall is to be put up.

16 So just finishing up Violation No. 3, the
17 7 feet height limitation. The vast majority of other
18 walls in the Wesley Heights Overlay District, as cited
19 by the owners as I pointed out earlier, support
20 preexisting earth and, therefore, they are below
21 grade. They are below the grade where the wall was
22 put in because, you know, someone is digging a channel
23 to put in a below level garage, for example. Such
24 walls have a height of zero as measured by the
25 Building Code.

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1 The 7 foot height limit on retaining walls
2 or fence walls only comes into play in very rare
3 circumstances when the wall rises above, you know, if
4 it's a retaining wall as well as a fence wall, when it
5 rises above preexisting grade, so that -- I think that
6 the Board has been worried that what's going to be the
7 consequence if it, you know, agrees with me and says
8 that the 7 foot height limitation is a problem here.
9 Is that going to get in the way of what property
10 owners need to do in terms of, you know, dealing with
11 slopes on their land and all or putting in, you know,
12 a channel or a cut so that they can put a driveway in
13 below grade?

14 It's not going to affect those situations.
15 It only affects situations where somebody wants to put
16 in a whole new level above preexisting grade. It's
17 only there that you begin to start to even get above
18 zero level for purposes of measuring the height of a
19 retaining wall if it's also a fence wall.

20 And so the only situation is if someone is
21 going to put in -- you can do this up to 4 feet above
22 preexisting grade. You know, that's pretty high and
23 we're only talking about the last 25 feet of your
24 property, not much more than the distance from where
25 the Board is sitting to where, you know, the first or

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1 second rows are. In that area you can't put up a
2 structure, including a wall, that is -- actually it's
3 not 4 feet. You can go up to 7 feet if it's just a
4 retaining wall.

5 You're given a lot of -- you can put up a
6 platform up to 4 feet. You can put up a retaining
7 wall up to 7 feet above preexisting grade, so this is
8 not my -- the position I'm urging the Board to accept
9 here is not one that is going to have any significant
10 impact on normal things that you and I and other
11 residents of the District who own property want to do
12 with their property.

13 This is just illustrating, as I did
14 before, what I'm talking about, about the driveway
15 channels. I mean, that wall is obviously supporting.
16 It's on both sides of that channel. It's obviously
17 supporting preexisting grade. That's a zero foot
18 height wall. So same for this. I don't want to
19 belabor the point.

20 I just think, and I know this has come up
21 in some of the Board questioning, that the owners and
22 the DCRA's position here that there is no height
23 limitation on retaining walls really does produce just
24 absurd results. It would allow retaining walls of
25 unlimited height. I know that the Board didn't like

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1 it when I said well, 500 feet, 1,000 feet.

2 Yes, they are extreme, but that is the
3 consequence of what the position of the Government and
4 the owners is here, is that there is simply no height
5 limitation, you know, so long as the engineering
6 technology exists. This didn't exist, you know, a few
7 years ago to do this. I mean, if someone is going to
8 dream up another technology, you will have, you know,
9 mile high structures arising out of the backyards of
10 people's properties.

11 You know, that is the consequence of the
12 DCRA and owners' position here that there is simply no
13 height limitation on these structures, and it's
14 obviously contrary to the clear purpose of the height
15 restrictions and what the zoning authorities
16 understood was happening when 2503.3 was being adopted
17 to subject retaining walls to the height limitations
18 of -- fences and retaining walls to the height
19 limitations specified in the Building Code. That's
20 the end of Violation No. 3. We got two more.

21 Violation No. 4 is that the structure
22 violates the Wesley Heights Overlay District's core
23 purposes. And here, I do recognize that there is, to
24 a certain extent, a subjective element that the Zoning
25 Administrator and the Board is called upon to play

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1 here if it has to get to this violation, which we
2 would really only need to do if it didn't agree with
3 one of my three prior propositions, but this wall
4 platform structure is totally anathema to the
5 overlay's core purposes, which are spelled out.

6 I quote them here, two of three core
7 purposes. One is to preserve the current density of
8 the neighborhood. Another is to preserve existing
9 trees, access to air and light and the harmonious
10 design and attractive appearance of the neighborhood.
11 I was just stunned when I first saw this picture.
12 This is just sort of what one has to do to trees in
13 order to erect a quarter acre platform or terrace 30
14 feet above grade in an area like this, like Wesley
15 Heights. That before picture, one can barely point --
16 pick out --

17 CHAIRPERSON GRIFFIS: Tell you what.
18 We're going on to 6:00. We're going to pick up the
19 speed a little bit.

20 MR. CAROME: All right.

21 CHAIRPERSON GRIFFIS: As this is your
22 entire case now again.

23 MR. CAROME: All right.

24 CHAIRPERSON GRIFFIS: And also in written.

25 MR. CAROME: All right.

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1 CHAIRPERSON GRIFFIS: We have seen these,
2 so we --

3 MR. CAROME: Okay. But obviously, one,
4 it's hard to imagine a destruction of trees --

5 CHAIRPERSON GRIFFIS: Yes.

6 MR. CAROME: -- of more than what has
7 happened here.

8 CHAIRPERSON GRIFFIS: It speaks for
9 itself.

10 MR. CAROME: I think it's stunning.

11 CHAIRPERSON GRIFFIS: Let's move ahead.

12 MR. CAROME: All right.

13 CHAIRPERSON GRIFFIS: The Park Service has
14 actually --

15 MR. CAROME: I have talked about this. I
16 made this point earlier. This is how slopes are
17 ordinarily handled in Wesley Heights. This is the
18 language, you know, the harmonious design and
19 attractive appearance of the neighborhood. It's that
20 and that. It's not that. It's not what Mr. Tate has
21 to get up and look at every morning in his backyard
22 and it's not what my kids have to look at when -- you
23 know, in the winter when this is what we see from our
24 front yard. So that's the end of No. 4.

25 The last one, which is the Wesley Heights

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1 Overlay District lot occupancy limit. No structure,
2 not just buildings, no structure, including accessory
3 buildings, shall occupy an area in excess of 30
4 percent of the lot. Now, the DCRA's position on this
5 was even though it says structure, it really means
6 building. Of course, there are different definitions
7 in the code for structure and building and buildings
8 are a subset of structure.

9 Obviously, it would have been very easy
10 for the zoning, for the people who drafted the Wesley
11 Heights Overlay, to say no building, including
12 accessory buildings, shall occupy an area in excess of
13 30 percent. If that's what they intended to happen,
14 I can't imagine why they chose the word structure
15 rather than building here.

16 So the elevated platform occupies more
17 than -- actually, these numbers are not, I think, as
18 accurate as they should be. It's closer to 15,000
19 square feet when I carefully measured it and it's not
20 just more than 54 percent. Now, we're talking lot
21 occupancy not yard occupancy, which is -- I didn't
22 talk about this during my rebuttal. This is in Chart
23 6.

24 The area that is occupied by the platform
25 structure plus the bit of geogrid that is actually

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1 outside where the platform structure is 2 feet high,
2 according to the plans, is 14,975.1 square feet. That
3 is 58 percent of the entire lot. If you just map the
4 platform and/or geogrid against the whole lot, it
5 occupies more than 54 percent of the whole lot. The
6 number for the whole lot, the 25,811, that's from D.C.
7 tax records.

8 So the DCRA, of course, just deemed the
9 Wesley Heights Overlay provisions of the Zoning Code
10 as just irrelevant. That was wrong, because they said
11 it only applies to buildings. I have already
12 discussed that it actually applies to structures, et
13 al, which includes platforms and retaining walls for
14 that matter. There is no basis that I can think of
15 that would permit the DCRA's reading, which is to say
16 that the Wesley Heights Overlay lot occupancy doesn't
17 apply to all structures, it just applies to buildings.

18 Now, I conceded before, because I think
19 it's important to be clear about this, that under
20 normal lot occupancy measurement, under the main part
21 of the code which is Zoning Code section 403, it uses
22 different language in describing how one measures the
23 percentage of lot occupancy.

24 In fact, that is the title of the
25 provision and it's the term that's defined in the

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1 Zoning Code. They use the term percentage of lot
2 occupancy. And through a series of interlocking
3 definitions, Mr. Bello, I think correctly, points out
4 that the area of structures that are below the first
5 floor of the main level don't get counted in
6 percentage of lot occupancy, which is a defined term
7 in the code.

8 And so why do I say that that doesn't
9 apply in the Wesley Heights Overlay District? It's
10 because the Wesley Heights Overlay District language
11 doesn't use that defined term. It doesn't use the
12 term defined in the Zoning Code of percentage of lot
13 occupancy and, instead -- and it doesn't use the term
14 building area, which is the term that Mr. Bello relies
15 upon for why you exclude below grade portions of
16 structures, below grade for these purposes as being
17 measured from the first floor of the building.

18 So the Wesley Heights Overlay
19 conspicuously doesn't use either of those terms. It
20 instead says that it applies to all structures.
21 Here's a comparison of 403 versus the relevant
22 provision in the Wesley Heights Overlay. 403, the
23 main way of doing it, no structure, including its
24 accessory buildings, shall occupy its lot in excess of
25 the "percentage of lot occupancy" and percentage of

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1 lot occupancy, as I said before, is a defined term and
2 it is solely from the cumbersome -- the interlocking
3 definitions of percentage of lot occupancy and
4 building area, which is used in lot occupancy, it's
5 only through that cumbersome process that one can
6 exclude structures such as this from lot occupancy
7 measurements under section 403.

8 Those terms are not in 1543.2, which
9 simply says "No structure, including accessory
10 buildings, shall occupy an area in excess of 30
11 percent of the lot." I think that particularly taking
12 into account the Wesley Heights Overlay District's
13 clear purpose is to retain the nature of this area, it
14 makes sense to adopt a common sense reading of what
15 lot occupancy means here.

16 And we're not encumbered by this strange
17 term, percentage of lot occupancy, which isn't used in
18 the Wesley Heights Overlay. And, therefore, I think
19 just the more normal form of lot occupancy really akin
20 to measurement the way we do it for yard occupancy,
21 which is to just look at the whole footprint, is the
22 appropriate way to measure lot occupancy for purposes
23 of the Wesley Heights Overlay.

24 CHAIRPERSON GRIFFIS: Can I just interrupt
25 you for a minute? There seems to be some confusion on

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1 your assertion of this note, and you have made it
2 before, but you're saying that the drafters of the
3 Wesley Heights Overlay abandoned all of the
4 prescriptive language of the regulations to make their
5 own term up?

6 MR. CAROME: Yes.

7 CHAIRPERSON GRIFFIS: Okay.

8 MR. CAROME: And I don't think that that's
9 actually surprising. The drafters were, you know,
10 intent on really strictly prohibiting what could
11 happen here, and I think a broader interpretation of
12 lot occupancy makes sense. It's the --

13 CHAIRPERSON GRIFFIS: No, I understand
14 your point.

15 MR. CAROME: It's the same. It's the way
16 we do it for yard occupancy and even DCRA concedes
17 that, so I don't think it's too surprising. So that's
18 the end of Violation No. 5. I just have a few final
19 closing thoughts.

20 One is that the ANC, obviously, has
21 supported this appeal from the outset. There has been
22 no doubt about its support as I gather there sometimes
23 can be. It's very clear there was a clear meeting, a
24 vote without dissent, supporting the appeal, broadly
25 supporting many of the arguments that I have made here

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1 including the argument that this is an impermissible
2 structure in their rear yard, the violation of the 7
3 foot height restriction, the violation of the core
4 purposes of the Wesley Heights Overlay District and
5 violation of the Wesley Heights Overlay District
6 occupancy limitation. Obviously, the Board is well
7 familiar with the requirement that it give great
8 weight to the ANC's written report here and that is
9 obviously further support for the outcome that I am
10 advancing here.

11 Another final consideration. I'm sure
12 that the Board is -- it has heard a lot about this
13 case and there has been some what maybe sometimes
14 sounds like hyperbole from me about this. I really
15 can't be more serious though about it. The stakes are
16 really high, because this is not just a question about
17 this particular structure on this particular lot.

18 We are going to be making a decision which
19 is going to set some precedent here for what can and
20 cannot be done under the current Zoning Code. And I
21 can't stress enough that affirming what the DCRA did
22 here would present a great, a really great threat to
23 the community and not just Wesley Heights, but the
24 whole District of Columbia. It would, among other
25 things, put every homeowner at risk of walls and

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1 platforms of unlimited height abutting their property.
2 That is the consequence of this.

3 And it's -- and I think the reason that
4 it's very unusual for the Park Service, I know that
5 they play a role in applications, but for them to
6 actually have intervened in this appeal, I understand
7 it's quite unusual. And why did that happen? I think
8 that the Park Service understands that in our city, a
9 great deal of the scarce park land sits in these
10 valleys where the creeks and streams flow through.
11 And so they are going to be as this park land here is,
12 they're going to be at the bottom of a V where there
13 is a high property on either side and sloping down
14 into the streams.

15 There is a lot of private land,
16 residences, including many that are on either side of
17 the property here, and that there must be 10 or 15
18 houses just across the way on this park land here in
19 one block stretch. If this is allowed, then what is
20 open space and a slope could be -- and just a park
21 like setting, which is what the Wesley Heights Overlay
22 intended, but what I think is appropriate for this
23 community could be completely converted into these
24 huge platform structures with these, you know, cement
25 or masonry cliffs on either side creating kind of a

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1 grand canyon effect where once there was park land
2 right up against the parks.

3 This could happen in huge numbers of
4 places along the Rock Creek Park system. And so
5 that's why the Park Service, I think, intervened and
6 park land is scarce in this city. It's of great
7 value. And if this Board affirms what DCRA did here
8 and allows this to happen, I mean, I think it's bad
9 enough what's happening. There's enormous damage just
10 on this one lot. But we're talking about a precedent
11 that would put at grave risk much of the whole city's
12 park land.

13 I, frankly, don't know at what point the
14 Board wants to talk about remedy. This is my last
15 slide. And maybe there is another point where this
16 comes up. In my appeal, obviously, the main thing is
17 that that permit is going to be invalidated if the
18 Board agrees with me. But the remedy here, in my
19 view, and the law, I believe, supports me in this,
20 must include an order directing the owners to
21 dismantle the structure and to restore the rear yard
22 at least to the slope.

23 And only such a remedy will cure this
24 violation. I submit to carry out its decision in the
25 -- that the Board has the power to do that. Zoning

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1 Code section 3100.4 says that this Board has the
2 authority to issue any order -- in carrying out its
3 decisions has the authority to issue any order that
4 DCRA would have the power to issue. The permit here
5 was issued by the prior head of DCRA. It was issued.
6 That is the decision. It is Mr. Clark's ultimate
7 decision, which includes, obviously, the Zoning
8 Administrator's Office that I'm challenging here.

9 The DCRA, the head of the DCRA certainly
10 has the authority to issue such an order and by virtue
11 of Zoning Code section 3100.4, this Board in reviewing
12 that decision of Mr. Clark has that authority. And I
13 would just point out that the DCRA has recently itself
14 asserted the authority to order the dismantling of a
15 structure after the rescission of a permit, that's the
16 huge radio tower up on Wisconsin Avenue that got half
17 built there.

18 There was a recent letter from Mr. Bello
19 to the owners of that structure ordering the
20 dismantling of that. So if DCRA can do it and
21 actually that was from Mr. Bello, the Zoning
22 Administrator, if they can do it, this Board has the
23 authority to do it. And I submit that that is the
24 only appropriate remedy here. It is among the
25 necessary remedies here and is fully appropriate.

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1 That is the end of my closing.

2 I do want to again thank the Board for the
3 enormous patience in hearing this. This has been an
4 extremely long presentation. I've submitted a very
5 large amount of material. I think the issues are very
6 important. I really am amazed at the time and effort
7 that the Board puts into these matters and I just want
8 to thank you for that. Thank you.

9 CHAIRPERSON GRIFFIS: Thank you very much.
10 And this has been a fascinating case. Like much of
11 our appeals, we get into what I find is often times on
12 the surface of things very simple and we, obviously,
13 so down to depths that aren't as clear. And I think
14 you made a very pertinent point that the stakes are
15 very high here. I'll save some more of my words.
16 There are a few questions.

17 (Whereupon, at 6:00 p.m. the Public
18 Hearing continued into the evening session.)

19
20
21
22
23
24
25

1 E-V-E-N-I-N-G S-E-S-S-I-O-N

2 (6:00 P.M.)

3 But I wanted to just address, first of
4 all, 3100.4. You are asserting, which I don't agree
5 with, that we would have the full powers of DCRA. You
6 know, it's interesting anecdotally, I have heard that
7 DCRA has these inspectors now that actually arrest
8 general contractors that go on site when there are
9 stop work orders issued. Certainly, within their
10 realm, but I'm not sure we can call the force of the
11 arresting agents to do our bidding.

12 3100.4, in all seriousness, goes to
13 assuming the powers of that office or body of which
14 the appeal is taken, and that's the Zoning
15 Administrator, not the full DCRA.

16 MR. CAROME: Well, the permit was issued
17 by the full DCRA. And I would note that it was Mr.
18 Bello, himself, the Zoning Administrator, who wrote
19 this dismantle order. He wrote that. That was from
20 him to the, I'll submit it for the record, I had
21 intended to, owners of that.

22 CHAIRPERSON GRIFFIS: Okay.

23 MR. CAROME: And I'm --

24 CHAIRPERSON GRIFFIS: I understand your
25 point. And it's all in one agency and they couldn't

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1 have gotten a permit, zoning or not, without it. I'm
2 not going to argue against it. If you want to spread
3 the word that we have those powers, that would be
4 fine. Let's move on though to other questions. Ms.
5 Miller?

6 VICE CHAIR MILLER: I just have a few
7 quick questions, I think. I just want to clarify what
8 I guess we can refer to as the fill in this case.
9 Does that contain artificial fill or is it all earth?

10 MR. CAROME: Well, obviously, the geogrid
11 is artificial.

12 VICE CHAIR MILLER: But is the geogrid in
13 the fill or is the geogrid a part of the veneer?

14 MR. CAROME: The geogrid is not part of
15 the veneer. The geogrid is sort of a cut away if you
16 can imagine. It is layers of material, high tension
17 strength material, that is not part of the veneer. It
18 goes back into the platform at various levels all the
19 way through.

20 VICE CHAIR MILLER: Just on the border or
21 throughout?

22 MR. CAROME: Throughout. I mean, if we
23 looked at --

24 VICE CHAIR MILLER: I don't need a lot of
25 detail, but basically you cited some cases

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1 specifically with respect to the retaining walls.

2 MR. CAROME: Yes.

3 VICE CHAIR MILLER: And from your outline,
4 those cases dealt with artificial fill. So I want to
5 know --

6 MR. CAROME: I see. Well, in that sense,
7 it's artificial in the sense that the vast bulk of
8 this fill is fill that was trucked in through these
9 hundreds of trucks.

10 CHAIRPERSON GRIFFIS: Gotcha.

11 MR. CAROME: From other sites. Is that
12 what you mean?

13 VICE CHAIR MILLER: No. I mean, if you
14 trucked in --

15 MR. CAROME: You mean is it something --

16 VICE CHAIR MILLER: If you trucked in
17 soil, for instance, or potting soil or something, I
18 think it's --

19 CHAIRPERSON GRIFFIS: You can carry that
20 in.

21 VICE CHAIR MILLER: -- different from
22 artificial components.

23 MR. CAROME: I see. Well, it's not. I
24 mean, this was soil largely from another site. I know
25 the ANC is very concerned about it, because it's a

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1 site where there was arsenic and other issues in
2 Spring Valley, which is now seeping into the park.
3 But in the sense of it is that part of it, I mean,
4 it's not -- it was soil --

5 CHAIRPERSON GRIFFIS: She's trying to
6 figure out what the difference is.

7 MR. CAROME: -- dug out from another part
8 of the earth.

9 CHAIRPERSON GRIFFIS: But what's the
10 difference between artificial and natural?

11 MR. CAROME: I'm not sure.

12 CHAIRPERSON GRIFFIS: If there is
13 anything.

14 MR. CAROME: I mean, it's certainly
15 foreign in the sense that it's foreign to this site.

16 VICE CHAIR MILLER: I know it's from
17 another place. But is it different materials other
18 than natural soil?

19 MR. CAROME: It has been compacted through
20 special methods to special levels of compaction. But
21 it is earth. I mean, it's soil and it's soil from a
22 neighboring area of the District. So it's D.C. soil.

23 VICE CHAIR MILLER: Okay. So --

24 MR. CAROME: That part of it. Specially
25 compacted layered through with the geogrid. This

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1 maybe goes to the question if it's built --

2 VICE CHAIR MILLER: No, my question --

3 MR. CAROME: I'm sorry.

4 VICE CHAIR MILLER: -- is -- okay. If
5 it's layered with geogrid, which I don't know exactly
6 what geogrid is yet, but that sounds like something
7 unnatural or non-soil.

8 MR. CAROME: Yes, the geogrid is certainly
9 unnatural. It is high strength rubber stuff that --
10 there were some -- the Park Service folks had it in
11 their photographs of it in the record. It's this
12 black material.

13 CHAIRPERSON GRIFFIS: We'll make sure she
14 looks at it. We've got tons of photos.

15 VICE CHAIR MILLER: Okay. Right. I
16 remember that. Okay. So this goes to just two
17 questions. One is then does this fall into the
18 category of artificial fill, which is referenced in
19 those court cases? Do you think?

20 MR. CAROME: Yes, it was, yes, clearly.
21 They're talking about the same sort of -- in fact,
22 it's much more artificial than those court cases.
23 Those court cases didn't have, you know, geogrids,
24 special compaction, etcetera.

25 VICE CHAIR MILLER: Okay.

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1 MR. CAROME: It was artificial and,
2 obviously, it was just soil or dirt in those cases as
3 well. From reading the cases, there's no reason to
4 think it was anything different than ordinary soil
5 taken from another location as occurred here.

6 VICE CHAIR MILLER: I thought those cases
7 dealt with artificial fill.

8 MR. CAROME: No. I mean, artificial, I
9 think in the sense that it wasn't there as a matter of
10 -- you know, that's not the way God made it. That's
11 not the way God made this. It's artificial in that
12 it's an artificially created formation.

13 VICE CHAIR MILLER: Oh.

14 MR. CAROME: Rather than, you know, the
15 way the grand canyon got made.

16 VICE CHAIR MILLER: Okay. Got it. So but
17 in this case, for us to rule in your favor, we
18 wouldn't have to go as far as saying that a burm
19 couldn't be more than 4 feet then, because a burm, if
20 that was just made of soil, would be different from
21 the situation here. Is that right?

22 MR. CAROME: If the -- I think probably
23 the answer is yes. Obviously, that would only be in
24 a required rear yard, so you wouldn't have that
25 situation except in a required rear yard. And if the

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1 burm -- if for its function it required that permanent
2 location, which is part of what the definition of
3 structure is, then, yes. So I think most burms -- I
4 mean, I'm not sure what a burm is actually. But I
5 think that for the most part a burm is a structure,
6 yes.

7 VICE CHAIR MILLER: Okay. My point was is
8 it a distinguishing factor in this case, this
9 artificial material combined?

10 MR. CAROME: Yes, I think that that helps.
11 If the Board is looking for what makes this not be a
12 close case, not close to the line between structure
13 and non-structure, the fact that there are multiple
14 components that have been put together including the
15 artificial geogrid, I think that's one of the things
16 that makes this no where the line that you are worried
17 about.

18 VICE CHAIR MILLER: Okay. And another
19 point. I think you said that the history of 2503.3
20 was that the Zoning Commission thought that the 7 foot
21 height limit applied to walls, because they,
22 generally, referenced the height limitations in the
23 Building Code.

24 MR. CAROME: Yes.

25 VICE CHAIR MILLER: Do you have anything

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1 else to go on besides that? I mean, maybe they were
2 just deferring to whatever the Building Code decided
3 was appropriate. And in this case, there was nothing.

4 MR. CAROME: I'm not sure I've got
5 anything more to go on than that. I think clearly
6 they understood that the whole point of 2503 was
7 worrying about height of structures in rear yards.
8 That's one of the main points is height of structures
9 and could it be more than 50 percent. And they
10 certainly understood that there was a height
11 limitation on retaining walls and as such.

12 VICE CHAIR MILLER: They said they
13 understood there was a height limitation?

14 MR. CAROME: Well, I just think there's no
15 other way to read that quote that says that, you know,
16 the purpose of 2503.3, I'm going to paraphrase a
17 little bit, but essentially is to subject fences and
18 retaining walls to the height limitations in the
19 Building Code.

20 CHAIRPERSON GRIFFIS: It was the director
21 of Municipal Planning Office that said that.

22 MR. CAROME: Yes, that's correct.

23 CHAIRPERSON GRIFFIS: And not the Zoning
24 Commission, but the director.

25 MR. CAROME: Well, I --

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1 CHAIRPERSON GRIFFIS: I think you said it
2 was the precursor to the Director of Zoning.

3 MR. CAROME: I may be wrong with my D.C.
4 history there. But that is --

5 CHAIRPERSON GRIFFIS: Did you mean zoning
6 or did you mean actually the Director of the Office of
7 Planning?

8 MR. CAROME: I'm not sure.

9 CHAIRPERSON GRIFFIS: Okay. It doesn't
10 matter. I just wanted to see.

11 MR. CAROME: It seem to me to be an
12 important authority.

13 CHAIRPERSON GRIFFIS: That would have been
14 a recommending agency to the Zoning Commission in
15 writing that. Is that correct?

16 MR. CAROME: Yes, I think so.

17 CHAIRPERSON GRIFFIS: Okay.

18 COMMISSIONER HILDEBRAND: But do you find
19 it persuasive that the Zoning Commission didn't choose
20 to include that language specifically, but they wrote
21 the language that they did?

22 MR. CAROME: Well, obviously, they under--
23 we're talking about the language being constructed in
24 accordance with the --

25 COMMISSIONER HILDEBRAND: Right. They

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1 didn't say specifically according to the height
2 limitations in the Building Code.

3 MR. CAROME: Frankly, I think that they
4 intended it to mean more than just the height
5 limitations. I think they meant to incorporate the
6 party wall restrictions. And, frankly, to incorporate
7 the entire Building Code. I mean, I think that they--

8 CHAIRPERSON GRIFFIS: Why wouldn't they
9 have?

10 MR. CAROME: Pardon me?

11 CHAIRPERSON GRIFFIS: Why wouldn't they
12 have? I mean, here you have the Director of the
13 Office of Planning saying this is what you should do
14 and the Commission saying that's all well and good,
15 but that's not what we write or did the lawyers
16 mention that?

17 MR. CAROME: Well, they were talking about
18 the code. That quote is talking about the zoning
19 provision as an act. It's explaining the reasoning
20 for that office's support for the provision as it was
21 drafted and as it was -- I believe. That's my clear
22 understanding.

23 CHAIRPERSON GRIFFIS: Okay.

24 VICE CHAIR MILLER: I think you made a
25 reference to other jurisdictions addressing the height

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1 of retaining walls. Where did they do that? Did they
2 do that in their Zoning Code?

3 MR. CAROME: Yes.

4 VICE CHAIR MILLER: Or their Building
5 Code? It's in their Zoning Code?

6 MR. CAROME: Yes.

7 VICE CHAIR MILLER: Did you reference any?

8 MR. CAROME: I think that it happens to be
9 the case in each of the -- in both the West Virginia
10 case and the New Jersey case. The codes involved
11 there, the Zoning Codes involved there did have those
12 height restrictions.

13 VICE CHAIR MILLER: Are you aware of any
14 D.C. Regulations that regulate regrading of property?

15 MR. CAROME: They may -- I don't know is
16 the answer.

17 VICE CHAIR MILLER: Okay. What's the date
18 of the permit that's being --

19 MR. CAROME: I believe it's April 22,
20 2004.

21 VICE CHAIR MILLER: Okay.

22 MR. CAROME: It's April 2004 and that date
23 is sticking in my head, but it's April.

24 VICE CHAIR MILLER: Well, I don't need the
25 exact date. I'm sure you put it in. And the reason

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1 I'm asking this and it's somewhat tangential to what
2 we do, what we're doing, but when you talked about the
3 destruction of trees, it just seemed to me that the
4 District recently enacted Tree Regulations and I'm
5 wondering if you are appealing this case to another
6 body with respect to the Tree Regulations?

7 MR. CAROME: I am not, no. The
8 destruction of the trees, I think that, you know,
9 although the retaining wall permit was not issued
10 until April of 2004, the destruction of trees happened
11 in 2002.

12 VICE CHAIR MILLER: Oh, okay.

13 MR. CAROME: Obviously, no one knew it at
14 the time. It was obviously a precursor to what was
15 happening here. That actually was done without --
16 illegally without a permit. There is a criminal case
17 going on involving that still.

18 VICE CHAIR MILLER: Okay. This is my last
19 question and it's also a little bit tangential, I
20 think, but the appellee showed pictures of retaining
21 walls in their presentation and one of them was a
22 retaining wall that didn't look too bad, because it
23 had all this beautiful ivy on it. And I'm wondering
24 if you are aware of any regulations that would require
25 camouflaging the wall to mitigate any adverse impact

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1 on neighboring properties or whether the applicant in
2 this case or the owner of the property made any offers
3 to do that?

4 MR. CAROME: One, I'm not aware of any
5 regulations that bear on that, but I haven't looked.
6 There might be. Two, I'm tangentially aware, the Park
7 Service probably could answer that question, there
8 have been some discussions surrounding both the
9 criminal proceeding and this proceeding, I think,
10 about, you know, camouflaging. That's obviously going
11 to add to the structure. It's not going to cure the
12 problem remotely from my viewpoint.

13 Also, just in terms of this picture.
14 There was a photograph of some sort of ivy and I
15 recall it being described as a computer simulated
16 picture. I'm not sure that anybody has actually in
17 real life managed to make that ivy look like that on
18 a 30 foot wall.

19 VICE CHAIR MILLER: Thank you.

20 MR. CAROME: You're welcome.

21 COMMISSIONER HILDEBRAND: I just have one
22 question. In your closing on your page 45 of your
23 PowerPoint you make a distinction about preexisting
24 grade having an impact on the measuring height of
25 retaining walls.

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1 MR. CAROME: Yes.

2 COMMISSIONER HILDEBRAND: Where do you
3 find references in the Building Code or Zoning Code
4 that support that?

5 MR. CAROME: It's partly common sense. I
6 can't say that --

7 COMMISSIONER HILDEBRAND: I need a
8 specific reference.

9 MR. CAROME: I don't think I have one. I
10 think that clearly what is being -- I believe that
11 what has to be discussed there is a grade at the time
12 that the permit is being issued, which is --

13 COMMISSIONER HILDEBRAND: Have you found
14 code language that supports that assertion?

15 MR. CAROME: I haven't found code language
16 that either supports or undermines it, I guess would
17 be my best answer, you know.

18 COMMISSIONER HILDEBRAND: Okay. Thank
19 you.

20 CHAIRPERSON GRIFFIS: Anything else?

21 MR. CAROME: I guess I will note in
22 further answer to Mr. Hildebrand's question that that
23 clearly is the way that for purposes of 2503 the
24 Zoning Code for measuring the height of a structure
25 it's from preexisting grade, that couldn't be clearer

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1 for purposes of, you know, a deck that you would
2 measure from preexisting grade. And the illustrations
3 to the 1977 zoning history that are in the record, you
4 have pictures, that specifically show that height is
5 being measured from preexisting grade.

6 Now, I don't have something similar to
7 that for purposes of measuring the height. I mean, it
8 seems to be the natural way that one would measure it.
9 But mainly, I'm pointing out it's certainly not what
10 the owners' counsel has sometimes suggested that it's
11 grade up at the front of the property the way you
12 would for purposes of -- that that actually -- it's
13 definitely not that. You're measuring it on one side
14 or the other of whichever side the grade is higher on.

15 CHAIRPERSON GRIFFIS: Are there any other
16 questions? If there's nothing further, very well.
17 Again, thank you very much. It has been, indeed, a
18 record that I think is the fullest I have ever been
19 involved in. It's going to take us some time to get
20 through it. But, first, what we need to do is
21 establish a schedule. Let's set this for decision
22 making and then we'll step back into our final
23 submissions.

24 Of course, I'm hoping that we can
25 consolidate all this down to the last filings and that

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1 would be findings and conclusions. I will reiterate,
2 I think, one of your statements this afternoon was the
3 fact that the stakes are very high with this and they
4 are. In terms of what our decision will be and how it
5 actually impacts all of those elements that we are
6 looking at, one can step into this in the beginning
7 and think, you know, retaining wall, not retaining
8 wall, what's the big deal.

9 I think that this Board is very
10 understanding of the impact of anything that we would
11 decide in this. And appeals aren't decided on their
12 forward and perhaps rippling impacts, but on the facts
13 and basis that are established before us. But we have
14 an awful lot of evidence that does go technically to
15 that. It would be nonsensical to think that that
16 isn't something that we will take fully in mind.

17 And that it goes from each of the extremes
18 as you have indicated, you know, what is to stop some
19 wall, for goodness sakes, if neighbors don't like each
20 other, building up 70 or 80 feet high never to see
21 each other again. To the opposite where one could
22 actually go and enforce to not be able to regrade a
23 nice backyard or build flower beds, because you are
24 somehow rising above 4 feet or some other dimension
25 that would essentially be established.

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1 You know, appeals always give me trouble.
2 And because we often rise to such level of detail with
3 these because of the lack of detail that we find in
4 all that we are supposed to be judging. And I have a
5 great understanding of all participants in this, as I
6 know we all do, and civically the Zoning Administrator
7 in reviewing these aspects of what are they to rely on
8 in making these decisions as busy as they are.

9 And then when it comes to us where we can
10 spend weeks and months dealing with these decisions,
11 it's pretty clear this, you know, isn't an easy snap
12 decision. However, I do believe that we will come
13 together and make a very good fair and judicial
14 decision on this.

15 Let's move ahead. I think for the filing,
16 I would like to see if it is at all possible, I think
17 we're going to have to do this on the 5th of July,
18 which would make it the first Public Meeting of the
19 Board. We, of course, make our decisions on the first
20 meeting of every month. The next would be the 7th.
21 I don't think that is going to be time enough, one, to
22 get the submissions in and, two, for the Board
23 actually to revisit this with enough substance and
24 time and additionally, we already have eight decisions
25 on the 7th to do in two hours or less.

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1 So if there's no major objection from the
2 Board, why don't we do that? In which case we, Ms.
3 Bailey, would like our findings two weeks prior. Is
4 that correct?

5 MS. BAILEY: Yes, Mr. Chairman. You had
6 asked that DCRA file their submission by this coming
7 Friday, which is the 27th of May.

8 CHAIRPERSON GRIFFIS: Right.

9 MS. BAILEY: So with that said, Mr. Carome
10 had asked to respond to it and I believe National Park
11 Service also requested to file something in the
12 record. So would it be appropriate to have those
13 submissions to come in by June the 10th?

14 CHAIRPERSON GRIFFIS: The responses to
15 DCRA?

16 MS. BAILEY: Yes, and the National Park
17 Service.

18 CHAIRPERSON GRIFFIS: If there's no
19 difficulty.

20 MS. BAILEY: They also asked to have
21 something come in the record as well.

22 CHAIRPERSON GRIFFIS: Come on up. Let's
23 get all these answered quickly. We've got the
24 schedule. Two weeks before July 5th, which is I'm
25 sorry, what date, Ms. Bailey?

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1 MS. BAILEY: June 10th.

2 CHAIRPERSON GRIFFIS: June 10th. June 10th
3 is the end, the record closes then. It comes to us
4 and we get two weeks to reread everything, which is
5 now measuring in feet not inches any more. Okay.

6 MS. BAILEY: Then the findings of fact and
7 conclusions of law, you had indicated that you wanted
8 that, Mr. Chairman?

9 CHAIRPERSON GRIFFIS: Yes.

10 MS. BAILEY: June 27th.

11 CHAIRPERSON GRIFFIS: Oh, I'm sorry, 27th
12 is when the record closes. 27th is two weeks prior to
13 the 5th?

14 MS. BAILEY: No, it's one week prior to
15 then.

16 CHAIRPERSON GRIFFIS: Right. No, I need
17 it two weeks.

18 MS. BAILEY: That would be --

19 MR. CAROME: Is that for a -- that's
20 working towards a decision on -- in July?

21 CHAIRPERSON GRIFFIS: The 5th.

22 MR. CAROME: I had the impression that
23 perhaps you were going to -- I gather you're not in
24 session in August, so that are we -- if it's not July,
25 are we talking about the beginning of September?

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1 CHAIRPERSON GRIFFIS: It's not going to
2 September.

3 MR. CAROME: Oh, good, good.

4 CHAIRPERSON GRIFFIS: We can make the 5th.
5 I don't see any difficulty. What do we have the 27th
6 of June is two weeks prior for the findings and
7 conclusions, right?

8 MS. BAILEY: No, sir.

9 CHAIRPERSON GRIFFIS: Okay.

10 MS. BAILEY: That would be one week, June
11 20th.

12 CHAIRPERSON GRIFFIS: Oh, the 20th. It's
13 a good date. It's my birthday. So we'll have the
14 filings on the 20th?

15 MS. BAILEY: The findings of fact and
16 conclusions of law.

17 CHAIRPERSON GRIFFIS: The responses to
18 DCRA, which is due on the 7th, is when?

19 MS. BAILEY: June 10th. Let me go over
20 that one more time, Mr. Chairman.

21 CHAIRPERSON GRIFFIS: We're not having --
22 from DCRA, the responses from DCRA were not being
23 responded to, correct?

24 MR. CAROME: I guess that's one thing that
25 perhaps has not been fully clarified.

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1 CHAIRPERSON GRIFFIS: Right. They're not.
2 Now, it's clear. We're all going to roll it into the
3 findings and conclusions, which is what my point was,
4 which I missed the date.

5 MS. BAILEY: Okay.

6 CHAIRPERSON GRIFFIS: Well, let's have
7 DCRA submit theirs in right now, Friday, end of
8 business. Then you guys have the rest of the time
9 until the 20th to pull everything that is needed,
10 focus on one document, one submission, and that's
11 findings and conclusions, it's, essentially, your
12 draft order that's coming into the Board.

13 MR. CAROME: My only concern there, if I
14 may, is to the extent that the Zoning Administrator
15 now puts in something other than argument, if they put
16 in evidence, whether it's testimony or other evidence,
17 I think it's only fair, if that would happen, I could
18 have today as part of my rebuttal have put in evidence
19 in rebuttal. I don't think I should be -- findings
20 and conclusions of law and findings of fact is not an
21 opportunity for me to put in rebuttal evidence. I
22 have to work with the evidence that's in the record.

23 CHAIRPERSON GRIFFIS: Right.

24 MR. CAROME: So I do think it's only fair
25 to give me an opportunity. And I can -- we can

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1 compress my time a little bit. I mean, it seems like
2 June 10th would be fine, that would give me probably
3 less time than DCRA took to do its own, to put in, you
4 know, evidence in rebuttal to any evidence that they
5 put in now.

6 CHAIRPERSON GRIFFIS: As long as we have
7 a consensus that we're not having response to your
8 responses to their responses.

9 MR. CAROME: Yes, I think that that's only
10 fair. Just as if, you know -- provide that there is
11 a rebuttal, it doesn't provide for more than that.

12 CHAIRPERSON GRIFFIS: Right. Far be for
13 me to preclude anybody from doing more submissions.
14 I do think it would be efficient and effective in your
15 last closings, but if there's no major concern by
16 other participants, we can do that. We can keep the
17 record open until a week after the 7th. No.

18 MR. CAROME: The DCRA is due on the 27th.

19 CHAIRPERSON GRIFFIS: No, I thought --

20 MR. CAROME: The DCRA does it on the 27th.
21 I would then have two weeks, I guess, to the 10th.
22 That would then close the record and then we would
23 have an additional 10 days to put together conclusions
24 of law and findings of fact.

25 CHAIRPERSON GRIFFIS: I'm going to give

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1 you a week after DCRA. They are responding to a
2 couple of things and they are responding to your
3 testimony. They are just rebutting your testimony.

4 MR. CAROME: All right.

5 CHAIRPERSON GRIFFIS: And hopefully it
6 won't be rebuttal, but I don't know what it actually
7 is going to be. A week. So it's coming in this
8 Friday, which is what date, the 27th?

9 MS. BAILEY: The 27th.

10 CHAIRPERSON GRIFFIS: Which means the
11 following Friday, which is what date?

12 MS. BAILEY: 3rd of June.

13 CHAIRPERSON GRIFFIS: Excellent. So there
14 it is. The record is open for the 3rd for everyone to
15 respond to that. And then we go to the 20th which is
16 the last filings. Whew. Good. Okay. Questions?
17 Everyone clear on dates? Submissions? All set?

18 MR. AGUGLIA: Yes, thank you.

19 CHAIRPERSON GRIFFIS: Very well.

20 MR. AGUGLIA: Thank you.

21 CHAIRPERSON GRIFFIS: Thank you all very
22 much. I do appreciate it. And, Ms. Bailey, is there
23 any other business for the Board this afternoon?

24 MS. BAILEY: No, Mr. Chairman.

25 CHAIRPERSON GRIFFIS: Very well. If

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1 there's no other business, let's adjourn the afternoon
2 session of the 24th of May.

3 (Whereupon, the Public Hearing was
4 concluded at 6:42 p.m.)

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