

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY,

OCTOBER 18, 2005

+ + + + +

The public hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 11:20 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

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

ZONING COMMISSION MEMBER PRESENT:

JOHN PARSONS	Commissioner (NPS)
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OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Secretary
BEVERLEY BAILEY	Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL STAFF PRESENT:

LORI MONROE, ESQ.

This transcript constitutes the minutes from the public hearing held on October 18, 2005.

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

(11:20 a.m.)

CHAIRPERSON GRIFFIS: The only person I have not introduced, of course, is Mr. Mann, who is sitting on my left, who is representing the National Capital Planning Commission. I indicated that Mr. Parsons was joining us for the FMBZA. He is also with us. And it is our pleasure to have him with us this morning. He is representing the Zoning Commission.

Copies of the BZA hearing are available for you. They are located on the temporary small table where you entered into the hearing room. You can pick it up and see what we will accomplish this morning.

We are, as I went through a little bit for those who are here, getting adjusted to our situation in the room. Normally, of course, we would have live broadcasts on Zoning's Web site. We do not have that today. However, we do have, importantly, the record that is being credited by the court reporter, who is sitting to the right on the floor.

Attendant to that, there are several things. First of all, I would request that everyone fill out two witness cards prior to coming forward. Witness cards are available at the small table where

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1 you entered into off the table where you will provide  
2 testimony. You can give those to the recorder prior  
3 to coming forward to address the Board.

4 Then when you are prepared to provide  
5 testimony to the Board, if you would just state your  
6 name and address for the record once? And then we can  
7 move ahead with the proceedings.

8 The proceedings for special exception and  
9 variances will follow this order. First, we have the  
10 applicant present their case to us, the entire  
11 information and testimony.

12 Second, we will go to any government  
13 reports attendant to the application.

14 Third, we will hear from the Advisory  
15 Neighborhood Commission.

16 Fourth, we will hear all of those persons  
17 in support of an application.

18 And, fifth, we would hear all of those  
19 persons in opposition to an application.

20 Finally, we give the applicant another  
21 chance to rebut any of the testimony that is provided  
22 or to give inclusions or summation remarks.

23 Cross-examination is permitted by the  
24 applicant and parties that are established in the  
25 case. The ANC within which the property is located is

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1 automatically a party in the case and, therefore, will  
2 be able to conduct cross-examination.

3 The record will be closed at the  
4 conclusion of our hearings today except for any  
5 material that the Board believes is required for a  
6 full record. And we will be very specific if  
7 additional information is to be provided and when it  
8 is to be provided into the Office of Zoning.

9 The Sunshine Act requires that we hold all  
10 of our proceedings in the open and before the public.  
11 Our rules and regulations also require that. However,  
12 attendant to our rules and regulations and the  
13 Sunshine Act, the Board is permitted to enter into  
14 executive session. And executive sessions are used  
15 primarily for reviewing records of a case already  
16 heard and limited deliberation on the cases.

17 I think it's appropriate at this point to  
18 say a very good morning to Ms. Bailey, who is sitting  
19 on my very far right, with the Office of Zoning; Mr.  
20 Moy, closer on my right, also with the Office of  
21 Zoning. And Ms. Monroe, with the Office of the  
22 Attorney General is on the dias, with us this morning.

23 Let me say why don't we move ahead, then,  
24 to folks that are here that will be providing  
25 testimony in their cases on the agenda this morning.

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1 I would ask that you stand and give your attention to  
2 Ms. Bailey. And she is going to swear you in.

3 MS. BAILEY: Please stand to take the  
4 oath.

5 CHAIRPERSON GRIFFIS: Anyone who will  
6 address the Board. Excellent.

7 (Whereupon, witnesses were duly sworn.)

8 CHAIRPERSON GRIFFIS: Excellent. Thank  
9 you all very much.

10 With that, the persons who have been sworn  
11 in, we can move to preliminary matters. Preliminary  
12 matters are those which relate to whether a case will  
13 or should be heard today, requests for postponements,  
14 withdrawals, whether proper or adequate notice has  
15 been provided. These are elements of preliminary  
16 matters.

17 If you have a preliminary matter or you  
18 believe that there is a case scheduled for today that  
19 should not proceed, I would ask that you come forward  
20 and have a seat at the table in the case and have a  
21 preliminary matter. I'll ask Ms. Bailey if you are  
22 aware of any preliminary matters for the cases this  
23 morning.

24 MS. BAILEY: Mr. Chairman, members of the  
25 Board, good morning. No, sir, staff is not aware of

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1 any at this point. There is one, but it is  
2 case-specific.

3 CHAIRPERSON GRIFFIS: We'll take it up  
4 during the case. Why don't we move ahead, then, and  
5 call the first case for this morning.

6 MS. BAILEY: And that is application  
7 number 17369 of Kenneth and Andrea Pogue, pursuant to  
8 11 DCMR section 3103.2, for a variance from the  
9 nonconforming structure provisions to allow an  
10 addition to an existing accessory garage under  
11 subsection 2001.3, a variance to allow an accessory  
12 garage exceeding one story in height under subsection  
13 2500.4, a use variance to allow living quarters on the  
14 second level of an accessory garage under subsection  
15 2500.5, and a variance from the side yard accessory  
16 building set-back requirements under subsection  
17 2500.6, to allow a second story addition of living  
18 quarters on an existing accessory garage in the R-4  
19 district. The property is located at 1029 4th Street,  
20 Northeast, square 806, lot 23.

21 There is a request, Mr. Chairman, members  
22 of the Board, to amend this application, the relief  
23 that is requested.

24 CHAIRPERSON GRIFFIS: Excellent. Thank  
25 you very much. Let's move ahead, then. We'll have

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1 the applicant introduce themselves.

2 MR. POGUE: Good morning. My name is Ken  
3 Pogue. I am the owner of the property in question.

4 CHAIRPERSON GRIFFIS: And you are  
5 represented today?

6 MR. FREEMAN: Cyrus Freeman, Holland and  
7 Knight. I have been retained to help with the hearing  
8 today.

9 CHAIRPERSON GRIFFIS: Okay. Well, I think  
10 the first assistance will be can you clarify the  
11 requested amendment to the application and then  
12 actually clarify what we would be moving ahead with?

13 MR. FREEMAN: In March of 2005, the  
14 applicant met with the DCRA Zoning Review Branch.  
15 They reviewed a set of plans, which were filed with  
16 you guys on May 20th, 2005.

17 That original application included four  
18 areas of relief: a variance pursuant to section  
19 2001.3, a variance pursuant to section 2500.4, a  
20 variance pursuant to section 2500.5, and a variance  
21 pursuant to section 2500.6.

22 The applicant upon meeting with the Office  
23 of Planning has revised their proposed plans and has  
24 submitted an amended set of plans dated September  
25 30th, 2005.

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1           Their revised plans removed the first  
2 three areas of relief. And the applicant is currently  
3 only seeking one variance. And that is a variance  
4 pursuant to section 2500.6 from the side yard  
5 requirement.

6           And the plans filed on September 30th,  
7 2003, the attachments show the proposed floor plan and  
8 layout of the current set of plans. And there's also  
9 an elevation. The Office of Planning report dated  
10 October 11th, 2005 further describes the applicant's  
11 meeting with the Office of Planning to refine the  
12 plans and present fewer areas of relief before the  
13 Board.

14           CHAIRPERSON GRIFFIS: Okay. Let's get  
15 everything clarified so we all know that we're looking  
16 at the same issues. My understanding is you have  
17 indicated the plans have been revised. And I am  
18 looking at the last submission, which is exhibit  
19 number 25. Does that coincide? You said that they  
20 were dated a September date. Are they dated on the --

21           MR. FREEMAN: The date on the cover memo  
22 from that, September 30th, I don't have the exact  
23 exhibit number. But it was filed on September 30th.

24           CHAIRPERSON GRIFFIS: September? Is that  
25 what you have?

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1 MS. BAILEY: Yes.

2 CHAIRPERSON GRIFFIS: Okay. I believe I'm  
3 looking at the same thing, then. It would be exhibit  
4 number 25. And I believe that's the most recent  
5 submission. We'll make sure that that is correct.

6 I guess the next question I have for  
7 clarification is all the amended aspects and the  
8 documentation that are being put in, you're still  
9 under 2500, which is talking about an accessory  
10 structure. Am I mistaken?

11 I'm looking at this and some of the  
12 testimony that is being provided as this is combining  
13 into a single structure.

14 MR. FREEMAN: It will be a single  
15 structure.

16 CHAIRPERSON GRIFFIS: So where is the  
17 accessory structure, then. And how are we getting  
18 relief for a single structure under 2500?

19 It's 2500.6 you indicated was the only  
20 thing left that you needed relief from, but that is a  
21 two-story accessory building allowed under 2500.5 to  
22 not exceed 20 feet. We can get into what the relief  
23 is under 2500.6, but how are we even there?

1 MR. FREEMAN: I'm sorry. When I reviewed  
2 the areas of relief, I misspoke. The only area of

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1 relief that the Applicant is currently seeking is a  
2 variance, pursuant to Section 2001.3, for an addition  
3 of a living quarters in the existing accessory garage,  
4 which is shown.

5 CHAIRPERSON GRIFFIS: 2001.3 is additions  
6 to nonconforming structures, correct?

7 MR. FREEMAN: Right.

8 CHAIRPERSON GRIFFIS: The aspect of which  
9 he doesn't meet in that is which?

10 MR. FREEMAN: The addition does not meet  
11 what is being referred to as the side yard required.

12 CHAIRPERSON GRIFFIS: Okay. So the  
13 nonconformity is the side yard.

14 MR. FREEMAN: Yes.

15 CHAIRPERSON GRIFFIS: Okay. That I  
16 understand, and it seems to make some sense, perhaps.  
17 But let's get to even then the other issue. We're  
18 just going to get clarification here, and then we'll  
19 know exactly what we're doing. Otherwise, we're going  
20 to waste everybody's time. And I'm confused, and so  
21 I'm assuming there's probably one other person in the  
22 room that's also confused.

23 If we combine this into a single  
24 structure, is your legal -- tell me what your legal  
25 understanding is. Is a rear yard then required, and

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1 does this now not conform with a rear yard? And,  
2 therefore, would relief from the rear yard now be  
3 required? Because we had an accessory structure; no  
4 one's questioning that. The accessory structure is  
5 allowed to occupy a percentage of a rear yard, but  
6 once you combine it into a single structure, how do we  
7 deal with it?

8 MR. POGUE: The notion for the rear yard,  
9 or the extra 18 inches that I was requesting,  
10 basically move the garage 18 inches into the property  
11 line, was to accommodate trash trucks and anything  
12 like that from striking the back of the property.  
13 That was a gimme that I was simply offering up, but if  
14 it presents an issue, then I'm willing to just leave  
15 the existing structure where it is and expand on it  
16 accordingly.

17 Right now the garage sits right at the  
18 alley.

19 CHAIRPERSON GRIFFIS: Right on the  
20 property line.

21 MR. POGUE: Right there.

22 CHAIRPERSON GRIFFIS: Okay.

23 MR. POGUE: And I was just willing to do  
24 that --

25 CHAIRPERSON GRIFFIS: Sure.

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1 MR. POGUE: -- and then maybe install some  
2 of those balusters, cement balusters, to protect the  
3 investment of the structure.

4 CHAIRPERSON GRIFFIS: Right. I think  
5 that's a great point, and I think that's valuable to  
6 do. I don't think that goes directly to my question,  
7 because I'm on a more dry level, just straight  
8 regulations here, which goes to the fact that if you  
9 built this new, you would have to provide a conforming  
10 rear yard in that dimension based on the zone district  
11 that you're in. That a rear yard was a provided and  
12 in that rear yard you had your garage, which is an  
13 accessory structure allowable in the rear yard, but  
14 now you're saying you're going to combine them all  
15 into a single structure. The garage for zoning  
16 purposes goes away, and now you're occupying your rear  
17 yard, but you have to provide a rear yard in an R-4  
18 District.

19 So my question is, are we looking at an  
20 application that adds in a relief for the rear yard  
21 requirement or how am I supposed to deal with this  
22 information? How are we supposed to process this now?  
23 And I guess that's what I'm asking for a legal  
24 interpretation of.

25 MR. FREEMAN: Based on the plans that were

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1 submitted on September 30, 2005, the first exhibit  
2 shows that the property will not be set back, and thus  
3 he accordingly needs relief from the rear yard  
4 requirement.

5 CHAIRPERSON GRIFFIS: The 20-foot rear  
6 yard requirement in the R-4 is not met in this  
7 situation.

8 MR. FREEMAN: No, sir.

9 CHAIRPERSON GRIFFIS: So that's one of the  
10 conformities that actually leads you to 2001.3. And  
11 the other, as you indicated, was a side yard?

12 MR. FREEMAN: I misspoke. I should have  
13 said rear yard instead of side yard, I'm sorry.

14 CHAIRPERSON GRIFFIS: Okay. Any other  
15 nonconformities?

16 MR. FREEMAN: It currently exceeds the lot  
17 occupancy of 60 percent, but the existing structure is  
18 79.5 percent.

19 CHAIRPERSON GRIFFIS: Okay. I think I'm  
20 getting an understanding of this now. Maybe I'm just  
21 slower this morning. But the 2001.3 then actually  
22 we're looking at -- of course there'd be a certain  
23 amount of matter-of-right modifications and  
24 alterations that you could make, but that you don't  
25 meet the lot occupancy requirements of 2001.3(a) is

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1 then invoked and the variance from 2001.3(a) is  
2 required. Although, are you increasing the lot  
3 occupancy in this? You would be, correct?

4 MR. FREEMAN: That Applicant is not  
5 increasing the lot occupancy; they're just adding to  
6 the existing structure.

7 CHAIRPERSON GRIFFIS: Okay. Anything else  
8 then? Clarifications from the Board? Questions?  
9 Yes, Mr. Parsons?

10 MR. PARSONS: Well, I'm having difficulty  
11 with the temporary nature of this hardship. Could you  
12 describe -- I mean, are you going to demolish the  
13 entire interior of this house?

14 MR. POGUE: I have to. We've owned that  
15 house since 1992, and we've never done any  
16 renovations. Over time, floors are sagging, the  
17 basement is full of water no matter what the  
18 precipitation is outside. I've been told I have to  
19 trench the entire basement in order to put in a sump  
20 pump system. Once we looked behind and found the  
21 crawl space, we also discovered that my kitchen and/or  
22 about 30 percent of the downstairs living area was  
23 never put on 2 by 10; they're on 2 by 6s, which  
24 accounts for the slope.

25 We have mold, and I have documents from my

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1 insurance company that they will not cover, they will  
2 not deal with. I have to basically go shave the wall  
3 and spray with bleach on like a weekly basis, and now  
4 we have an infestation of rats and mice that are  
5 coming in somehow. Last night, on two large strips,  
6 I removed five rodents. And my wife's going crazy.

7 I'm told by contractors that are bidding  
8 prices from \$1 million to around an average of  
9 \$200,000, \$250,000 to \$400,000. That's the range of  
10 prices, and I have their estimates here, that they're  
11 going to have to tear up all the floors. There's a  
12 lot of old plaster and stuff.

13 The house has to be demoed from the  
14 footers all the way up, and I'm asking this relief so  
15 that I can be in that dwelling while they demo that  
16 house and then use that dwelling for my in-laws that  
17 are now staying in Stafford with our other in-laws  
18 that already have four children.

19 MR. PARSONS: Okay. Well, I can't imagine  
20 the circumstances you just described. I do have to  
21 reference the Capitol Hill Restoration Society who has  
22 --

23 MR. POGUE: Please do.

24 MR. PARSONS: -- an opinion about where  
25 you're living that is beyond our jurisdiction but is

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1 in the record. So why don't you comment on that?

2 MR. POGUE: In the Justice Department, we  
3 have a saying called, "false and misleading  
4 statements," and I met with that Society I had every  
5 intention of giving them the facts. They summoned me,  
6 I came. I brought my ANC Commissioner with me, Mr.  
7 Purnell, and I asked them a couple questions. One  
8 was, "Do you record your minutes of your minutes?"  
9 "No, we do a summary, a report." I said, "Well, very  
10 well," and I proceeded to give them my answers to  
11 questions about, "Well, where do you live?" I said,  
12 "I live at 1029 4th Street."

13 I submitted to them a list of support from  
14 the community, signatures from my neighbors in support  
15 of my petition, and they said, "Well, we noticed  
16 nobody has signed anything from 1027," my next door  
17 neighbor. I said, "That's because I own that." And  
18 from that they derived that I lived there.

19 So I felt it need be that I bring in  
20 receipts from my management company from September  
21 back of this year through 2004, which indicate that it  
22 is a rental unit, and I've always rented it. I have  
23 never lived next door. In fact, I wish I could live  
24 next door, because next door is a lot better than my  
25 house. But I have to keep it that way under the DCRA.

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1           And I can go back many, many years. I  
2 just brought you a sample of these receipts, which  
3 I'll allow you to pass amongst you. So they're in  
4 error, sir.

5           MR. PARSONS: I think your testimony is  
6 adequate for me.

7           MR. POGUE: Okay.

8           MR. PARSONS: We don't need to fill the  
9 record with your receipts.

10          MR. POGUE: Thank you. Please excuse my  
11 temperament.

12          MR. PARSONS: Understand. Thank you.

13          MR. POGUE: Thank you.

14          CHAIRPERSON GRIFFIS: Just an excellent  
15 point, Mr. Parsons. Mr. Parsons was correct, we don't  
16 need to establish whether you own or not, but it does  
17 go into a little bit, and I think you've addressed the  
18 fact, that obviously the Capitol Hill Restoration  
19 Society, your application is being based on the fact  
20 that you have to move within the site in order to  
21 accommodate work that's happening. So I think it's  
22 all there at this point.

23                 Rather than getting too far ahead with  
24 questions and all that, why don't we let you offer a  
25 brief testimony or offer your application, and then we

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1 can get further into the substance of this now that we  
2 are clear that we are under 2001.3 for lot occupancy  
3 and rear yard.

4 MR. POGUE: About a year and almost a half  
5 ago, as my house has been deteriorating steadily, we  
6 had some snows and that really exacerbated things, so  
7 I looked around for solutions. And as I was walking  
8 through the Hill, closer to the Restoration Society,  
9 I got this notion for a carriage house sort of thing,  
10 that given the rents in the District shooting up to  
11 about \$1,500 to \$2,000 to accommodate our living style  
12 what I could do. And then I saw this carriage house  
13 -- well, a series of them. And I have their addresses  
14 and I have photos, which were pretty much in line with  
15 what I am proposing here.

16 I immediately went to my councilperson,  
17 Ms. Ambrose's office, to say, "How do you do this?  
18 How does this work?" I was referred to the Office of  
19 Planning, the 801 -- not the 801 Office but the 941  
20 Office, and went in there, got the requisite  
21 documentation, got in the process and then I  
22 discovered that in filing paperwork at this address  
23 that you need ANC support or you have to get their  
24 buy-in or comments.

25 And I met with Mr. Purnell and Mr. Rivera

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1 and Mr. Skip Coburne outside of my garage. This took  
2 place in, I think, early March, February. This was  
3 after I had sent several communications to Mr.  
4 Coburne's office to find out, and those documents are  
5 here as well, what the process was. We met, I  
6 proposed to them that I move the garage. They were in  
7 favor of that. I laid out everything, and at first  
8 they were apprehensive, but they said, "Well, let's  
9 see it and see what you're planning to do." Once we  
10 sat and met, all parties agreed.

11 I found what the ANC process involved. I  
12 went to the hearings, I presented my documentation,  
13 but I also contacted Ms. Steingasser of the Office of  
14 Planning, and Ms. Steingasser advised that, "This will  
15 not fly." I said, "Well, what's the problem?" "You  
16 have to have a single structure." And when I told  
17 that to the ANC folks, the ANC folks said, "Oh, no,  
18 no, no, no. You don't need that." So I marched  
19 dutifully through ANC, got approval and everything  
20 with the existing documentation.

21 Then I got a call from the Office of  
22 Planning, Mr. Travis Parsons? Parker, sorry. And the  
23 issue of a consistent structure was revisited, and it  
24 was at that time that I said, "Look, I've got animals  
25 in my house. I've got to do something." And it

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1 didn't seem to affect my neighbors; they were still  
2 supportive, even though e-mails were sent across to  
3 them from friends and colleagues of the Capitol Hill  
4 Historical Society trying to undermine my efforts.  
5 And I have copies of those e-mails. They were nice  
6 enough to share that with me at a dinner party.

7           Basically, through the process, I got ANC  
8 approval, I've gotten a letter of support from the  
9 Office of Planning, my neighbors support with  
10 signature and a letter my application. Three of them  
11 couldn't make it this morning because morning hours  
12 most of us work for a living. And I think I've done  
13 everything that I was supposed to do in the order best  
14 possible to try to just capitalize on the equity that  
15 I've never had living in that neighborhood in the '90s  
16 to make my house as livable as my rental property and  
17 as nice as my neighbors. That's it.

18           CHAIRPERSON GRIFFIS: Good. Thank you  
19 very much. We appreciate that. And you've learned,  
20 hopefully, a valuable process lesson that you should  
21 write down and share with your neighbors so they don't  
22 have to reinvent it. It is cumbersome, indeed, for  
23 those --

24           MR. POGUE: If I may, I would like to say  
25 that throughout the whole process, everybody from your

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1 staff here to the folks at ANC and what not have been  
2 very supportive and very helpful. They know their  
3 jobs well.

4 CHAIRPERSON GRIFFIS: Good.

5 MR. POGUE: And I don't begrudge the  
6 Capitol Hill Historical Society. I understand they  
7 have an important job to do. Just get your facts  
8 straight.

9 CHAIRPERSON GRIFFIS: Right. Good. And  
10 appreciate that comment. I think I tend to agree that  
11 everyone involved in these processes are well equipped  
12 and adequate in doing their jobs and serve the public.  
13 However, it gets to this point and you've seen just in  
14 your own testimony this morning that there are a lot  
15 of different audiences and a lot of different issues  
16 that need to be dealt with. But when you come down  
17 here, and I think this is where Office of Planning in  
18 your testimony was directing you, we are drier in  
19 terms of the issues that we look at.

20 And looking directly at the regulations,  
21 as your counsel has probably indicated to you, what  
22 we're looking for is the test in order to grant a  
23 variance, and that test incorporates what is the  
24 unique or special circumstances involved in this. And  
25 that's an outgrowth of, well, special circumstances or

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1 uniqueness in the lot. And then of those, what is it  
2 that created the practical difficulty in complying  
3 with the regulations. And then, lastly, of course,  
4 would it impair the intent and integrity of the zone  
5 plan or go against the public good?

6 So I guess what I haven't heard yet is the  
7 address of the actual test for the variance, and maybe  
8 we want to focus on that a little bit.

9 MR. FREEMAN: If I may, just to summarize  
10 the testimony of the Applicant here, as you know, the  
11 existence of a condition, the existence of a building  
12 and its condition -- really, the existence of a  
13 building on a piece of property can satisfy the first  
14 prong of the three-part variance test, as a court held  
15 in Clerics of St. Viator v. D.C. Board of Zoning  
16 Adjustment.

17 CHAIRPERSON GRIFFIS: So you're indicating  
18 that the existing structure is the existing condition  
19 and --

20 MR. FREEMAN: Existing two structures.

21 CHAIRPERSON GRIFFIS: Two structures.

22 MR. FREEMAN: The main residence and the  
23 actual rear garage.

24 CHAIRPERSON GRIFFIS: Okay.

25 VICE CHAIRPERSON MILLER: I'm sorry. I

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1 understand your point except which prong of the test  
2 are you using that?

3 MR. FREEMAN: The first prong.

4 VICE CHAIRPERSON MILLER: That it's unique  
5 because there's an existing building?

6 MR. FREEMAN: The uniqueness of the lot is  
7 the existence of the two buildings on the property,  
8 yes.

9 VICE CHAIRPERSON MILLER: I don't know if  
10 you intend to elaborate that any further.

11 MR. FREEMAN: That leads to the practical  
12 difficulty.

13 VICE CHAIRPERSON MILLER: I mean, is it  
14 unique in that there aren't others in the area that  
15 have the two buildings on a lot?

16 MR. POGUE: Not occupied, no. Persons  
17 have had of demolition their garages because of the  
18 high drug and prostitution activity in the  
19 neighborhood. We have no finished garages in the  
20 immediate vicinity. One may be five blocks away at  
21 the corner of --

22 CHAIRPERSON GRIFFIS: Nowhere do we survey  
23 the surrounding area to see whether it was unique. I  
24 think what Ms. Miller was going to is, if that's the  
25 unique characteristic of this, then what's the nexus

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1 to get to the next step of the practical difficulty?  
2 What is it creating? What kind of practical  
3 difficulty is it creating?

4 MR. FREEMAN: The practical difficulty is  
5 that at least with respect to lot occupancy, the  
6 existing structures already exceed the lot occupancy.  
7 The lot occupancy requirement is 60 percent. In this  
8 case, the existing lot occupancy is 79.5 percent. So  
9 in order to bring the building into compliance with  
10 the zoning regulations, the Applicant would have to  
11 demolish approximately 20 percent of the existing  
12 structures.

13 CHAIRPERSON GRIFFIS: No one's asking you  
14 to bring it into compliance but rather to tell us why  
15 what's being proposed becomes practically difficult to  
16 comply, I mean with the proposed, not with the  
17 existing?

18 MR. FREEMAN: In order to comply, for  
19 example, with the rear yard setback requirement, the  
20 existing garage already sits within the rear yard. So  
21 in order to comply with that, they would have to  
22 demolish the existing garage in order to meet that  
23 setback requirement.

24 CHAIRPERSON GRIFFIS: Okay. What else?  
25 Anything else at this time?

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1 MR. FREEMAN: And with respect to the lot  
2 occupancy, again, they would have to demolish a  
3 portion of the existing structures in order to make  
4 any addition or not necessarily renovation. But in  
5 order to make any addition, they would have to  
6 demolish a portion of the existing structure. And  
7 they're not adding to lot occupancy in any way.

8 CHAIRPERSON GRIFFIS: Okay.

9 MR. FREEMAN: Take it back to the -- I'm  
10 sorry.

11 CHAIRPERSON GRIFFIS: Yes, go ahead.

12 MR. FREEMAN: This is the third part of  
13 the test, no substantial detriment. Again, they're  
14 not adding to the lot occupancy. The rear yard  
15 actually abuts a 10-foot wide public alley, so there  
16 will be open space at the rear. And they're not  
17 changing the existing condition or location of the  
18 garage. And, again, the Office of Planning recommends  
19 approval of the modified application, as does the ANC  
20 and the neighborhood as well.

21 CHAIRPERSON GRIFFIS: Right. And I  
22 appreciate that. I mean I should have said it's a  
23 lot of work to get here as a single issue and getting  
24 everyone to agree or not to oppose it. But that's a  
25 small threshold for us. I mean, coming with that

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1 opposition is very important because of what it says,  
2 because we don't have the testimony that speaks to why  
3 it doesn't meet the test or the opposition to it. So,  
4 quite frankly, it's great to have but we need to get  
5 into the substance of the issue so that we can  
6 actually formulate how we would deliberate on a  
7 variance.

8 Okay. Anything else?

9 MR. POGUE: I just asked him is the  
10 habitability of the structure of paramount interest at  
11 all or significance? I mean, the habitability of the  
12 existing structure is marginal, at best . It's  
13 unhealthy, at best. My wife already has allergies.  
14 You can smell the mold. And I'm grateful that we were  
15 on AC this summer as opposed to when we turn the heat  
16 on. My heater has been -- I had to replace it because  
17 it shorted out. Now, I have a new one sitting on  
18 blocks, and the water rises to the level of the  
19 blocks. I invite this whole body to please come look  
20 at my -- I have to leave the basement door open.

21 CHAIRPERSON GRIFFIS: Right.

22 MR. POGUE: Thank God I have steel bar  
23 doors. It's open right now.

24 MR. GRIFFIS; Right.

25 MR. POGUE: And my neighborhood is not

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1 exactly the safest.

2 CHAIRPERSON GRIFFIS: Right. And just for  
3 clarification, I don't think that we're unreceptive to  
4 the condition, by any means, and in fact many of us  
5 may have been in the same type of situation.

6 The difficulty for rolling that into a  
7 uniqueness or a practical difficulty, in my mind, in  
8 looking at this is, what I have to look at is, how is  
9 that -- well, I guess, directly put, anyone then could  
10 come in and say, "I'm going to renovate my building  
11 and therefore I need this variance." It seems to be  
12 very temporary, although it's critical and important,  
13 but it's a temporary situation of which variances are  
14 not granted, generally speaking, based on those  
15 specific temporary situations but based on permanent  
16 situations that arise out of the land or out of a  
17 special circumstance that is unique to the property  
18 itself.

19 I'm not sure that it's absolutely a unique  
20 situation that would rise to the practical difficulty  
21 in being a persuasive zoning argument. That  
22 substantial renovation has to happen to this  
23 structure.

24 MR. FREEMAN: Are you saying you're  
25 unaware of the fact of substantial renovation or

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1 you're saying substantial renovation in and of itself  
2 is not significant?

3 CHAIRPERSON GRIFFIS: It hasn't been posed  
4 in this application as being persuasive at this point.  
5 I think there are other aspects that arise in this  
6 application that go to uniqueness and practical  
7 difficulty, but as I understood the application, and  
8 this is why you're here to clarify all this, as I read  
9 the entire record put in, there was an indication that  
10 a unit on top of the garage needed to be constructed  
11 in order for you to live in while you renovate the  
12 main structure. That, to me, doesn't even begin to  
13 address what a variance test needs to address by  
14 adding on that.

15 Now, with the connection of it, do we  
16 still walk into that argument? Maybe so, but I'm  
17 still not that persuaded that creating that livable  
18 aspect in the rear is a nexus because of the  
19 renovation that has to go into the main house.  
20 Otherwise, I don't see how you wouldn't grant  
21 everybody coming in that was doing substantial  
22 renovation. For instance, if I bought a house that  
23 needed substantial renovation but I want to now add on  
24 a whole back portion of it to have 100 percent lot  
25 occupancy, what I would best need to say based on this

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1 presentation would be, "Well, I'm gunning the whole  
2 thing, so I have to put this back portion on also.  
3 I'm not sure where the substantial --

4 MR. FREEMAN: The difference in your  
5 hypothetical is that there's an existing structure  
6 located at the rear of the Applicant's lot.

7 CHAIRPERSON GRIFFIS: Okay.

8 MR. FREEMAN: The Applicant isn't building  
9 from the ground up. The Applicant is adding to the  
10 top of his garage structure. As Applicant testified,  
11 unlike other lots in this property, he theoretically  
12 is already working with walls, a parameter within  
13 which he has to build or renovate.

14 CHAIRPERSON GRIFFIS: Right. Right.  
15 Understand that. So let me put it to you this way  
16 then: If the condition on the main structure still  
17 was going through renovation but wasn't at the level  
18 that it is now, if that was removed, would the  
19 variance test be the same?

20 MR. FREEMAN: I think if you were  
21 demolishing the existing structure and just doing  
22 completely new construction, his arguments would have  
23 to be different for meeting the variance test. But in  
24 this case, we're renovating. We're not demolishing,  
25 we're not doing a new front portion building, if you

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1 will. We're doing interior renovations and just  
2 connecting that front building to the rear garage.

3 CHAIRPERSON GRIFFIS: Okay. All right.  
4 I mean, we've got a lot to get through, so we can  
5 continue. I won't take up more time on this.

6 One quick question: You indicated that  
7 you had photographed a lot of carriage houses or such  
8 in the neighborhood, in the area. We may need that in  
9 the record, I'm not sure at this point. In terms of  
10 your proposed design and massing, what type of  
11 materials are you actually using? And the big  
12 question is, in these elevations that I'm looking at,  
13 and also the kind of perspectives, is this all new,  
14 the masonry base and then the top part, because you  
15 said that there's no enclosed garages on the block?

16 MR. POGUE: No. If you saw the original  
17 photos of my garage, you'll see that it's cinderblock  
18 and what I propose to do to dress up the cinderblock  
19 is add standard brick --

20 CHAIRPERSON GRIFFIS: Right.

21 MR. POGUE: -- so that it matches up with  
22 the main house.

23 CHAIRPERSON GRIFFIS: I see.

24 MR. POGUE: In the architect's rendition,  
25 and this is the debate between my wife and myself, of

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1 vinyl versus brick. We've decided to go with brick,  
2 and one of the persons on the ANC had advocated that  
3 point, which was my point.

4 CHAIRPERSON GRIFFIS: So on the second  
5 level it's also brick?

6 MR. POGUE: It's going to be brick instead  
7 of the vinyl rendition that you see.

8 CHAIRPERSON GRIFFIS: I see.

9 MR. POGUE: I had to hurry to get those  
10 changes to you because I was scheduled to go overseas.  
11 I work for the DEA and I had to roll out quickly.

12 CHAIRPERSON GRIFFIS: Okay. Appreciate  
13 that. Okay. Let's move ahead then unless there's any  
14 additional questions at this point. We'll obviously  
15 have more opportunity for you to address the Board,  
16 but I think it might productive if we move on to  
17 government reports. Of course, the Office of Planning  
18 is with us today and has submitted an excellent  
19 analysis.

20 Let's move on and say a very good morning  
21 to you, Mr. Parker.

22 MR. PARKER: Good morning.

23 CHAIRPERSON GRIFFIS: Excellent. Thank  
24 you.

25 MR. PARKER: A very good morning. I'm

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1 Travis Parker with the Office of Planning. I think it  
2 would be helpful to go through -- this is a very  
3 complicated case, so go through a little bit of our  
4 history with this case and with the Applicant and the  
5 variances requested.

6 When this case first came to us in its  
7 original form, we quite frankly agreed with a lot of  
8 the arguments that you're making and the arguments  
9 that the Capitol Hill Restoration Society made. The  
10 original request was for a living quarters on an  
11 accessory unit, and we didn't feel that there was a  
12 case to be made for an accessory living unit on this  
13 lot. So we worked with the Applicant to try and find  
14 ways that he could accomplish his goals in a  
15 matter-of-right fashion.

16 Our original suggestion to the Applicant  
17 was to demolish the garage and rebuild the main house  
18 as one structure with two units in it. The problems  
19 with that were twofold. First, as you've heard the  
20 testimony, the decaying nature of the house, the house  
21 will have to be completely renovated and will be  
22 unoccupiable during that time. And that does fall  
23 under your temporary nature argument, but it somewhat  
24 limits the use of this second unit while it's being  
25 done.

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1           And something to keep in mind is that this  
2 isn't -- even though the situation is temporary, that  
3 request is for a permanent second unit, which is  
4 something allowable in R-4 as a flat but not as an  
5 accessory. So we were trying to find a way to make  
6 his second unit a flat since it will be a permanent  
7 second unit on the lot.

8           Our second choice for this was obviously  
9 connecting the two buildings into one. I do have to  
10 apologize. When we originally discussed this with the  
11 Applicant, we were under the impression that it  
12 limited us to just a variance from 2100.3, which  
13 results from the lot occupancy being over 60 percent.  
14 I did originally miss the rear yard variance which of  
15 course arises when you make that accessory building  
16 part of the main building. So that's something that  
17 we'd have to add that wasn't addressed in my report  
18 that obviously has been discussed today.

19           But combining the buildings into one  
20 simply limits us to the prohibition on an addition to  
21 a nonconforming structure. Now, this structure  
22 clearly is over the 60 percent lot occupancy; it is  
23 approaching 80 percent. Making this addition was  
24 designed to actually lower that lot occupancy. So the  
25 nonconforming status does get lower, but, obviously,

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1 as has been discussed today, the tests still have to  
2 be met. We saw the existing deteriorating structure  
3 of the house as the beginning of our argument, the  
4 inability to live in the house in its current state,  
5 much less while it's being renovated, and we went from  
6 there.

7 As you can see in our report, the  
8 substantial detriment argument was that because none  
9 of the existing conditions on the building -- any of  
10 the existing nonconforming conditions on the building  
11 will be getting in worse. In fact, the side yard is  
12 already at zero. The rear yard, while technically  
13 there as a 20-foot rear yard, there is effectively no  
14 rear yard. We'll be moving the garage back a foot and  
15 a half to make that alley passable. So all of the  
16 conditions are actually improving in terms of  
17 nonconformities.

18 That's where we stand. A lot of great  
19 points have been raised today, and I'd be happy to  
20 discuss them more.

21 CHAIRPERSON GRIFFIS: Excellent. Thank  
22 you very much. Questions from the Board? Ms. Miller?

23 VICE CHAIRPERSON MILLER: Yes, Mr. Parker.  
24 As you know, we don't decide on sympathy or empathy.  
25 I mean, we have to have it meet the standard. And so

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1 I'm not clear on uniqueness or practical difficulty.  
2 So if we could start with uniqueness, if you could  
3 actually identify what you find unique.

4 MR. PARKER: Well, I think we combined the  
5 existing lot layout with the need to make a change.  
6 The existing lot as it is now couldn't be built, and  
7 so while they could --

8 VICE CHAIRPERSON MILLER: Are you saying  
9 there's a lot here that's exceptional because it can't  
10 be built? Can't be built, what do you mean?

11 MR. PARKER: No, no. The existing lot now  
12 is -- this lot could not be built as it is now today.  
13 It could technically be rebuilt, but taking part of it  
14 out, for example, they want to remove the shed that's  
15 currently in the back. Taking that shed out would  
16 lower their lot occupancy in their existing situation.

17 VICE CHAIRPERSON MILLER: Are you saying  
18 it couldn't be built to conform with the regulations;  
19 is that what you're saying?

20 MR. PARKER: Not as it stands right now.

21 VICE CHAIRPERSON MILLER: Is that a unique  
22 situation, though?

23 MR. PARKER: Not necessarily, no.

24 VICE CHAIRPERSON MILLER: Okay. What is  
25 unique?

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1 MR. PARKER: Well, I think this house has  
2 not only health issues but foundation issues. It's a  
3 house that would otherwise be torn down and rebuilt,  
4 and I think the Applicant is making an attempt to  
5 renovate the existing house on a street that contains  
6 a solid street front of similar houses. And I think  
7 that's something that the City wants to support rather  
8 than tearing it down and building something that --  
9 even though this isn't an historic district, you want  
10 to maintain the character of the street through  
11 rehabilitation rather than demolition.

12 VICE CHAIRPERSON MILLER: I mean, I agree  
13 with you that those are all really good policies that  
14 we want to support, but I'm just -- as you know, I  
15 mean, we have to be careful that once we take a  
16 situation and say, "Oh, it has health issues," does  
17 that mean that the next house down the block that has  
18 health issues can get a variance?

19 MR. PARKER: I agree.

20 CHAIRPERSON GRIFFIS: Anything else?

21 VICE CHAIRPERSON MILLER: Not right now.

22 CHAIRPERSON GRIFFIS: Any other questions?  
23 Does Applicant have any cross examination of the  
24 Office of Planning.

25 MR. POGUE: No.

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1 CHAIRPERSON GRIFFIS: No questions? Okay.  
2 Let's move ahead then. Mr. Parker, thank you very  
3 much.

4 We'll establish at the end of this hearing  
5 whether we need to keep the record open for an  
6 additional submission based on the rear yard, relief  
7 that was brought up today.

8 As Mr. Parker had indicated, this site is  
9 not in the historic district, so we wouldn't have any  
10 other reports from that aspect. I don't have any  
11 other governmental reports with this. The ANC has  
12 been noted several times. It is Exhibit Number 20 in  
13 our file, and it is recommending approval of the  
14 application. Is ANC-6C represented today? Not noting  
15 any representative of the ANC present with us, we can  
16 move ahead.

17 And let me at this time ask if there's  
18 anyone present regarding Application 17369, persons to  
19 provide testimony today. Is there any persons present  
20 to provide testimony in support or in opposition to  
21 the application? There are not.

22 Let 's turn to the Applicant for  
23 additional testimony or summations and questions from  
24 the Board.

25 MR. FREEMAN: Just to quickly summarize

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1 the points that we made, I think the uniqueness of  
2 this property, it's a corner lot, there are two  
3 existing structures on the site that don't conform.  
4 Again, the uniqueness of a building on a lot has been  
5 held to satisfy the first part of the three-part  
6 variance test. With respect to practical difficulty  
7 and complying with the lot occupancy requirements, I  
8 think the Applicant is in fact removing a portion of  
9 an existing shed but will be adding on to the top of  
10 the structure. So we're not increasing the occupancy.  
11 However, in order to comply with the lot occupancy, he  
12 would have to demolish a significant, approximately 20  
13 percent, of the existing structures, which would  
14 decrease his living area.

15 An additional practical difficulty is the  
16 location of the garage. He would have to move,  
17 demolish and - either demolish a portion or move the  
18 entire garage in order to comply with the setback  
19 requirements.

20 With respect to the third part of the  
21 test, no substantial detriment, again, we're not  
22 adding to the lot occupancy. The rear of the garage  
23 actually abuts an existing public alley, and we're not  
24 changing that condition there.

25 And, finally, just as you know, it's

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1 supported by the Office of Planning.

2 CHAIRPERSON GRIFFIS: Excellent. Thank  
3 you. Ms. Miller, questions?

4 VICE CHAIRPERSON MILLER: Yes. I want to  
5 ask this question again because I want to give you the  
6 benefit of the doubt, convince me.

7 With respect to that uniqueness question,  
8 again, I thought maybe Office of Planning might  
9 elaborate on it, but I don't think they really did.  
10 You basically state that because the existing  
11 conditions of two buildings on your property make it  
12 unique, and I just don't think you've developed that  
13 enough, at least for me to see what's unique about  
14 that. Aren't there a lot of properties that have two  
15 buildings on it? Or what's unique about your building  
16 configuration?

17 MR. FREEMAN: I think in this case,  
18 Applicant can speak to it perhaps a little more in  
19 detail. Our building is unique in the area in that  
20 it's a corner lot, it's nonconforming, there are two  
21 structures on it that prohibit development and  
22 currently would prohibit development of it. And any  
23 type of renovation that would have required an  
24 addition or enlargement would have required Applicant  
25 to be here today. I'm not sure if that's the case for

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1 other properties in the neighborhood. I don't know as  
2 a factual matter. The Applicant may be able to give  
3 more of an idea about the overall neighborhood and  
4 structures in the square.

5 MR. POGUE: I can elaborate. There are no  
6 other two-structure properties in the neighborhood  
7 that are have people living in them. There is one  
8 around the corner that has a carriage house that is  
9 also -- it has actually got two stories on it -- that  
10 is approximately a block away. It has about --  
11 they're separated by approximately 20 feet. In the  
12 other instances that the Applicant has photos of, the  
13 structure at the rear is practically connected or not  
14 as far separate  
15 from the main residence, if you will.

16 So I think it's unique in that sense that  
17 you'll have a 20-foot setback garage with a living  
18 area connected by a breezeway. Whereas, other homes  
19 in the area think the Applicant could testify a little  
20 closer and connected. Any other property is ten feet,  
21 but with the expansion of the garage to a two-car  
22 garage, the breezeway is going to be a lot shorter.  
23 It's going to be approximately --

24 VICE CHAIRPERSON MILLER: Why is it unique  
25 now?

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1 MR. POGUE: Pardon me?

2 VICE CHAIRPERSON MILLER: Why it's unique  
3 now. I don't think we need to get into what --

4 MR. POGUE: Why is it unique now? Oh.

5 VICE CHAIRPERSON MILLER: But when you  
6 say, "neighborhood," how do you define neighborhood?

7 MR. POGUE: Everything I'm aware of, I  
8 could go as far down as maybe 8th Street, all the way  
9 up to Florida Avenue, North Capitol, all the way to  
10 where 8th Street meets Florida Avenue. The only place  
11 I've seen structures like this, as I reported earlier,  
12 are in the alleys and streets of 10th and 9th Street,  
13 above Maryland Avenue but below Independence in my  
14 ward.

15 VICE CHAIRPERSON MILLER: Okay. Thank you  
16 very much.

17 MR. ETHERLY: Mr. Chair, I think perhaps  
18 where we are here is -- I mean, I would probably  
19 suggest that we set the case for decision-making but  
20 offer some very directed guidance around kind of what  
21 I think is the chief challenge here. I think the  
22 Applicant and the representative have probably both  
23 heard I think what the Board is struggling with. And  
24 I think, in part, it's a little bit of a concern that  
25 we're at the edge of a slippery slope here regarding

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1 the issue of putting it very bluntly and artfully kind  
2 of how that issue of the current condition of the  
3 property, as it currently is set up, impacts your  
4 ability to comply with the zoning regs.

5 I think there is perhaps some additional  
6 information that can be provided, both from a factual  
7 substantive basis and also a legal basis to perhaps  
8 help parse that out.

9 The argument, as I currently hear it, is,  
10 once again, putting it very bluntly and artfully is,  
11 your current house is in such a condition that the  
12 habitability of it is a major, major issue. It pretty  
13 much is not an option for you. And I think we've  
14 heard that fairly clearly.

15 There was a case cite, the Clerics case,  
16 that did I think speak a little bit from your  
17 presentation to the condition of a building being  
18 potentially grounds for that first prong of the  
19 variance test. So I think perhaps the Board, Mr.  
20 Chair, I might suggest, might benefit from a little  
21 more discussion or review of the relevant case law as  
22 it relates to that particular issue. Because I think  
23 that's the major argument here. The property is  
24 unique by virtue of the physical condition that you  
25 currently find the building in.

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1           The concern on the Board's part, as I take  
2           it from the questions of my colleague, is there are a  
3           number of properties -- I might even perhaps offer my  
4           own property as an experience that there are things  
5           that I might want to do to it that for the moment I  
6           might not be able to do from a zoning standpoint. So  
7           I'm worried that, does this case establish a precedent  
8           where others might want to come to the Board to seek  
9           relief because there's some renovation work they need  
10          to do?

11           Clearly, that's not the nature of your  
12          request here, and I think my colleagues and I  
13          understand that. Your request is, in part, "The  
14          condition of my property is so beyond what you would  
15          encounter as a matter of course, it's not just a basic  
16          renovation, it's not just, hey, I want my house to  
17          look better, here's what I'm trying to do." This is  
18          a habitability issue and you have had to wait to get  
19          to a point of being able to financially handle the  
20          renovation that you're now contemplating doing.

21           But I think we need a little more  
22          assistance in putting that in the context of this  
23          variance test, i.e., perhaps it's going to be  
24          submitting some of the documentation that you've  
25          brought with you but haven't yet submitted to the

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1 record in terms of plans around what your contractors  
2 have identified as the nature of this habitability  
3 issue, really kind of parsing that out.

4 But I think another piece of that is, as  
5 you get into the practical difficulty aspect of that.  
6 Okay, let's say that you provide information that  
7 supports a finding that because of the habitability  
8 this property is indeed very unique where there still  
9 is a practical difficulty aspect of that, which  
10 basically asks the question, okay, it's unique because  
11 you can't inhabit it presently.

12 What's the practical difficulty of going  
13 elsewhere while you get the renovation work done? And  
14 I think we've heard part of that in terms of your  
15 discussion, once again, of the fiscal aspects of where  
16 you presently are. And I understand, as I think many  
17 of my colleagues have alluded to, that that is the  
18 circumstance that oftentimes is a very personal and  
19 unique and individual one. But perhaps speaking a  
20 little bit to why there's an inability to perhaps  
21 pursue other needs, maybe not a long-standing  
22 dissertation on it because I would hazard to guess  
23 that that's probably new area for us to pursue in a  
24 variance analysis, per se, but it might be helpful to  
25 parse that out a little bit, because maybe the

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1 question is, get the work done on your house.

2           Clearly, I think you've demonstrated  
3 there's a need to do it, but why not a hotel, why not  
4 some other alternative living arrangements while you  
5 do that? I think you've touched on it, in part, in  
6 that the nature of your family situation right now is  
7 such that you can't do that, and this is probably the  
8 best route for you. But I think maybe parsing that  
9 out a little more in a little more detail might be  
10 helpful.

11           There's a reason why you want to add the  
12 au pair suite to the existing structure that you have.  
13 Part of it is you're fortunate enough to have that  
14 existing structure currently on the property so it  
15 gives you an option to do something. There might  
16 perhaps be some benefit in just kind of walking  
17 through that a little more.

18           I think the substantial detriment  
19 argument, once again, some of the documentation that  
20 you've brought with you will probably be helpful in  
21 terms of illustrating some of the similar properties  
22 in the area that perhaps look like you want to get  
23 your property to, the existence of carriage houses and  
24 things like that. Of course, that's a somewhat  
25 complicated thing because carriage houses have very

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1 interesting architectural history and zoning history,  
2 especially on the Hill.

3 But I think, at minimum, additional  
4 submittals, as it relates to a discussion about any  
5 further case law on the issue of habitability and the  
6 condition of a building, would be helpful. I'm not  
7 suggesting that you're going to find a lot out there.  
8 I haven't looked for it, but I think that might help  
9 you somewhat clarify this issue of how we view that  
10 argument of habitability. Because I think what you  
11 need to do is set this apart from, "This is not your  
12 basic run of the mill renovation because I want my  
13 house to look better."

14 And then the practical difficulty aspect,  
15 talking to why you can't otherwise pursue options that  
16 don't necessarily involve building that au pair suite.  
17 Those answers, I think, of course are going to be very  
18 clear to you, as you sit here now, and I think as  
19 other colleagues have indicated, this Board is  
20 definitely insensitive to the circumstance that you  
21 find yourself in.

22 And I don't take your argument to simply  
23 be one of, "Have sympathy for me. This is where we  
24 are, and we're here before you." I think you have  
25 some points that have been solidly made in terms of

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1 just the foundation, but I think there's some more  
2 that can be provided as it relates to that issue of  
3 how habitability would fit into the variance analysis  
4 and I think the Clerics case is a good place to start  
5 but then also parsing out the practical difficulty  
6 aspect a little more.

7 That would be my suggestion, Mr. Chair, as  
8 kind of some preliminary direction. And then, as I  
9 said, I probably would be amenable to suggesting that  
10 we just set it for decision-making and, of course, any  
11 additional information that other colleagues might  
12 think would be useful.

13 CHAIRPERSON GRIFFIS: Excellent. Well  
14 said. I think we should set this for decision on the  
15 1st of November, '05 and give direction in terms of  
16 what should be submitted. We'll keep the record open  
17 till the following week, which we will give you a date  
18 when the following information should be submitted.

19 I think updated drawings also, just to  
20 reflect what you're already anticipating, would be  
21 excellent, mostly on the site but anything else that's  
22 changing, what you're actually proposing.

23 Mr. Etherly has brought up some  
24 interesting points. The record is going to be kept  
25 open for a clear narrative submission for the case

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1 presentation, that being uniqueness. We do have the  
2 existing structure. I don't think there's a lot of  
3 Board decisions that we need to get into in terms of  
4 briefing. The Board is very familiar with those, but  
5 citing them is not a bad idea. But looking at that,  
6 the uniqueness of it, the existence of the building  
7 prior to the adoption of the zoning regulations, which  
8 would lend itself to have been rendered nonconforming  
9 also is the uniqueness, I believe, that was brought up  
10 today, and then how those uniquenesses render the  
11 practical difficulty and the further tests.

12 That's what I see at this point. Let's  
13 have any other comments. I don't think, unless the  
14 Office of Planning is in great need to submit an  
15 additional report, I don't think we necessarily need  
16 to require that at this point, unless Board members  
17 feel differently. I think we can handle the aspects.

18 I mean, quite frankly, to step back a  
19 little bit and just looking at this, obviously we've  
20 spent a lot of time looking at this and then today.  
21 There's a case to be made here. It just has to be, I  
22 think, decidedly put forth for us to really digest it.  
23 If we look at the relief that's being requested, it's  
24 lot occupancy and rear yard, neither one, as I  
25 understand it, are substantially changing, if changing

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1 at all. And so, again, I just don't think it's been  
2 clearly -- and it's difficult to do, especially with  
3 a case like this, but it hasn't been clearly laid out  
4 for the Board's deliberation.

5 There it is. Anything else that we need  
6 to require? Ms. Miller, you have other ideas?

7 VICE CHAIRPERSON MILLER: Yes. I have two  
8 questions. One is, I don't know if it's in the record  
9 when these buildings were built, but as the Chairman  
10 alluded, the regulations do talk at some point about  
11 if they were built before the zoning regulations or  
12 not. So I'd like that to be at least clear in the  
13 record.

14 And there was a lot of discussion about  
15 the temporary conditions that exist being a practical  
16 difficulty, habitability, et cetera, and if you are  
17 aware of any cases that you know of that have found  
18 that that kind of temporary condition constitutes a  
19 practical difficulty for a variance, I'd be interested  
20 in seeing that.

21 CHAIRPERSON GRIFFIS: Good. But that  
22 lexis search has to be fast, because we're going to  
23 need all this in, and I don't think this is a huge  
24 amount of information, that's not what we're looking  
25 for, but concise.

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1 Ms. Bailey, if you have a calendar in  
2 front of you, why don't we set this? We'll set it for  
3 a decision the 1st of November, and I would suggest  
4 then that the information be submitted in by three  
5 o'clock on the Wednesday prior.

6 MS. BAILEY: The Wednesday is the 26th of  
7 October, Mr. Chairman.

8 CHAIRPERSON GRIFFIS: The 26th of October.  
9 Is that sufficient time to get this documentation in?

10 MR. POGUE: Yes.

11 MS. BAILEY: Okay, next Wednesday.

12 CHAIRPERSON GRIFFIS: Okay. And I think  
13 that's as far as we can push it because all of that  
14 has to come in here packaged and it all has to get it  
15 out to us. So if you want us to make the decision --  
16 if you need more time, we can easily accommodate that,  
17 but it's going to set our decision off maybe a week or  
18 conceivably three weeks.

19 MR. POGUE: I'd rather move --

20 CHAIRPERSON GRIFFIS: Move ahead on the  
21 1st.

22 MR. POGUE: Yes.

23 CHAIRPERSON GRIFFIS: Okay. Good.  
24 Excellent. Then let me just ask if there's any  
25 clarification points that you require? Anything?

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1 You're pretty much sure on -- excellent. If there are  
2 obviously any procedural questions, as your counsel  
3 well knows, they can call the Office of Zoning. Ms.  
4 Bailey and Mr. Moy are very well prepared.

5 MS. BAILEY: Mr. Chairman, can I ask a  
6 clarification question?

7 CHAIRPERSON GRIFFIS: Of course.

8 MS. BAILEY: I just wanted to clarify the  
9 relief. At this point, the application is for relief  
10 from 2001.3, nonconforming structure, from rear yard  
11 for 4.1 and from lot occupancy.

12 CHAIRPERSON GRIFFIS: That's exactly my  
13 understanding unless any others have a difference.  
14 Does the Office of Planning agree with that? Is that  
15 your understanding? Under 2001.3 , of course that  
16 would be the nonconforming aspects and the  
17 nonconformities with the lot occupancy and the rear  
18 yard.

19 MR. PARKER: I would just question the lot  
20 occupancy. You've got an existing lot occupancy and  
21 it's actually decreasing. You've got an existing lot  
22 occupancy of 79 point something, and it's actually  
23 decreasing with the --

24 CHAIRPERSON GRIFFIS: Exactly, but that  
25 wouldn't kick them out of 2001.3 if you had a

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1 nonconforming lot occupancy.

2 MR. PARKER: No, but do they need s a  
3 separate variance from lot occupancy?

4 CHAIRPERSON GRIFFIS: No. I think we're  
5 looking at one single variance from 2001.3, but the  
6 aspects --

7 MR. PARKER: But you also need one from  
8 rear yard.

9 CHAIRPERSON GRIFFIS: I don't think so  
10 because 2001.3 covers rear yard, all those aspects  
11 under the variance.

12 MR. PARKER: If it's already nonconforming  
13 for rear yard. This is a new rear yard.

14 CHAIRPERSON GRIFFIS: I see. Yes, that's  
15 an interesting point. So we'd actually be adding in  
16 a variance.

17 MS. BAILEY: So 2001.3 and rear yard.

18 CHAIRPERSON GRIFFIS: It only gets drier  
19 from here. Okay. Good. So the substantive facts  
20 aren't obviously changing but the relief that's being  
21 sought. So we'd have 2001.3 and I think it's 403, if  
22 I'm not mistaken, but obviously it's in an R-4  
23 District rear yard requirement. Okay. Clear?  
24 Excellent. Thank you very much. We appreciate your  
25 patience to deal with us this morning, and -- 404 is

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1 what it is; I've been corrected. Very well. We will  
2 look for that submission and we will be here on the  
3 1st to deliberate on this case. Obviously, we won't  
4 have any additional testimony. You're welcome to be  
5 here. I would anticipate by that point we'd be  
6 broadcasting so you could watch it if you can't make  
7 it in.

8 Anything else then? Obviously, the Office  
9 of Zoning can answer procedural questions. Thank you,  
10 both.

11 MR. POGUE: Thank you.

12 CHAIRPERSON GRIFFIS: Let's move ahead and  
13 finish our morning schedule and call the last case for  
14 the morning.

15 MS. BAILEY: Application Number 17368 of  
16 Amazing Life Games Preschool, pursuant to 11 DCMR  
17 3104.1, for a special exception to establish a child  
18 development center for 30 children and four staff  
19 within Grace Lutheran Church under Section 205. The  
20 property is zoned R-1-B, and it's located at 4300 16th  
21 Street, Northwest, Square 2646, Lot 807.

22 CHAIRPERSON GRIFFIS: Hi.

23 MS. CRADDOCK: I'm Pickett Craddock. I  
24 live at 3316 North 21st Avenue, Arlington, Virginia.  
25 I'm the Director of Amazing Life Games Preschool, and

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1 we are asking for this exception to have a child care  
2 center on the first floor of Grace Lutheran Church, at  
3 4300 16th Street. The Church welcomes us. We have  
4 met with the Neighborhood League on May 9 and they  
5 welcomed us. And we met with that Crestwood  
6 Neighborhood Association on May 17 and they welcomed  
7 us. And we also met with the ANC and I believe you  
8 have a letter of approval from the ANC. And we are --  
9 there are four staff people.

10 There is some concern over parking, and  
11 there is a ten-car parking lot there. I talked to  
12 John Moore extensively, and we discussed the parking  
13 lot. And the only difference from his recommendation  
14 to what -- which I did talk about on the telephone, he  
15 was concerned about the trash receptacle taking up  
16 space in the parking lot, and it turns out that trash  
17 pickup is -- and that the trash truck would need to  
18 use two parking spaces in order to pick up the trash.  
19 But trash pickup is between 6:30 and 7:30 Mondays and  
20 Fridays, which is not hours which the school would be  
21 open nor the Church.

22 CHAIRPERSON GRIFFIS: Commercial hauler;  
23 is that correct?

24 MS. CRADDOCK: Pardon?

25 CHAIRPERSON GRIFFIS: This is a commercial

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1 hauler? It's not the City that picks up the trash; is  
2 that correct?

3 MS. CRADDOCK: Yes, it's a commercial  
4 hauler.

5 CHAIRPERSON GRIFFIS: Okay. Excellent.  
6 Well, it's a great summation. Let's start with a  
7 brief preliminary matter and let me ask if Jeanne  
8 Buste is present?

9 MS. BUSTE: Yes.

10 CHAIRPERSON GRIFFIS: Ms. Buste, you have  
11 requested party status. Were you wanting to  
12 participate as a party in this case or were you  
13 anticipating submitting this as a written testimony?  
14 I'm going to have you just com up because I'm going to  
15 need you to speak into the microphone. Of course,  
16 party status -- go ahead. Party status of course has  
17 been elevated to participation in the case. You have  
18 indicated that you are requesting supportive party  
19 status proponent in the case, which is not unusual.  
20 However, the majority of those that request party  
21 status are in opposition.

22 If you are granted party status, and we go  
23 through this, if you're granted party status, of  
24 course we will -- after the Applicant presents here  
25 case, we will ask you present a full case. You will

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1 obviously be able to cross examine all the witnesses  
2 that are going to be provided today, noting the  
3 Chair's fulfilled, we'll probably have about 30 to 40  
4 witnesses. So the question is whether you want to  
5 just participate as a person and give testimony or  
6 whether you want to maintain party status?

7 MS. BUSTE: I only filled out the party  
8 status as cautionary in case it was needed. I'm  
9 willing to just stay here as witness, as a proponent.

10 CHAIRPERSON GRIFFIS: Excellent. Thank  
11 you very much. I think we should do that, and you've  
12 already started, and we'll get you an opportunity to  
13 provide oral testimony. We can take this in.

14 Questions, concerns?

15 VICE CHAIRPERSON MILLER: Yes, I just a  
16 comment.

17 CHAIRPERSON GRIFFIS: Quick comment.

18 VICE CHAIRPERSON MILLER: I would just  
19 like to say to Ms. Craddock that I'm very pleased that  
20 you found another location and that it seems to be in  
21 a neighborhood where you are warmly welcomed. So I  
22 think this looks like a good situation.

23 MS. CRADDOCK: Thank you.

24 CHAIRPERSON GRIFFIS: Familiar with the  
25 Applicant?

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1                   VICE CHAIRPERSON MILLER: Yes. I knew her  
2 not on this case.

3                   CHAIRPERSON GRIFFIS: I was not on the  
4 case, exactly. All right. Very well. That being  
5 said then, let's move ahead. We will go through it  
6 and you're obviously very familiar. You indicated  
7 that DNC had submitted and ANC-4A has submitted its  
8 Exhibit Number 21 in our record, and we will take that  
9 through as our chronology moves through.

10                   I think that in my understanding, I'll  
11 hear from other Board members but the record is very  
12 full on this, and I think we have what we need. What  
13 we might want to do is just go through it, and of  
14 course you're here under Section 205 and let me  
15 address specifically some aspects that the Office of  
16 Planning will also be done, talked about several of  
17 the conditions.

18  
19                   First of all, a length of time that the  
20 approval would be for. And so I'd like you to speak  
21 to that. Office of Planning is indicating seven years  
22 as being a reasonable condition on this. Also, just  
23 to establish the enrollment ages of the children. The  
24 Amazing Life Games is from two-and-a half to five  
25 years; is that correct?

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1 MS. CRADDOCK: That's correct.

2 CHAIRPERSON GRIFFIS: Okay. And you will  
3 have a maximum -- you indicated to a staff member that  
4 you will have a maximum of four staff or do you  
5 currently have staff.

6 I MS. CRADDOCK: I currently have four  
7 staff, and that is, as I understand it, I'm only  
8 required to supply two parking spaces and there are  
9 ten there.

10 CHAIRPERSON GRIFFIS: Okay. But I'm going  
11 just to staff before we go to parking.

12 MS. CRADDOCK: Okay.

13 CHAIRPERSON GRIFFIS: Are you not  
14 anticipating that you would grow at all? I mean, if  
15 this was condition -- say, this was approved, not  
16 noting how my other Board members are feeling, but if  
17 this was approved and a condition was stated that  
18 there's a maximum of four staff, you would not be able  
19 to hire more than four staff. So I just want to get  
20 a clear picture on the aspect of whether you have  
21 anticipated growth. That's a real number. What is  
22 the staff that is being requested of this special  
23 exception?

24 MS. CRADDOCK: I have four staff now, four  
25 staff with parent co-ops would handle 30 children. As

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1 I understand it, and Mr. Moore gave me this  
2 information, that should we decide grow we would need  
3 to come back.

4 CHAIRPERSON GRIFFIS: That's correct.

5 MS. CRADDOCK: And that's basically the  
6 situation, and that that's why he was advocating seven  
7 years because we would have to come back in seven  
8 years regardless.

9 CHAIRPERSON GRIFFIS: Okay.

10 MS. CRADDOCK: Is that correct?

11 CHAIRPERSON GRIFFIS: As fun as it is to  
12 come back, it probably isn't the best --

13 CHAIRPERSON GRIFFIS: Yes, I know. It's  
14 so much fun.

15 CHAIRPERSON GRIFFIS: -- utilization of  
16 your time in terms of dealing with your primary  
17 purpose. So for clarity, in seven years you don't  
18 anticipate the need for more staff.

19 MS. CRADDOCK: In our own internal  
20 discussion over growth and no growth, the school has  
21 felt that one of our particular characteristics is  
22 being fairly small and intimate and that we would like  
23 to stay at that way right now. Maybe it will change  
24 eventually but that is really the attitude of the  
25 entire staff at this moment.

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1                   CHAIRPERSON GRIFFIS:    Excellent.    And  
2                   that's a great clarification, and I don't object to  
3                   that.  I'm not pushing you to grow, and I think that's  
4                   well said, the definition.  Obviously, the staff is  
5                   proportionate to the children enrollment, and you  
6                   don't anticipate changing that.  Okay.

7                   VICE CHAIRPERSON MILLER:  Could I see that  
8                   for a second?

9                   CHAIRPERSON GRIFFIS:  Sure.

10                  VICE CHAIRPERSON MILLER:  Number four  
11                  staff for the 30 children, is that based on your  
12                  experience in your other location?

13                  MS. CRADDOCK:  In our location, we had 20  
14                  children and four staff, but three at any one time.  
15                  I mean, two of us are part-time.

16                  VICE CHAIRPERSON MILLER:  Okay.  And I'm  
17                  not pushing to like raise the numbers but seven years  
18                  is not that short of period of time, and so I think  
19                  part of what the Chairman was getting is "Well, would  
20                  you want a cushion so that maybe a maximum of five  
21                  instead of four, even though you think you're going to  
22                  use four.  You wouldn't have to come back to the Board  
23                  if we found today that five would not have an adverse  
24                  impact.

25                  MS. CRADDOCK:  That would be great to give

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1 a cushion, to add another staff person.

2 CHAIRPERSON GRIFFIS: You indicated that  
3 you have two part-time people; is that correct?

4 MS. CRADDOCK: Yes.

5 CHAIRPERSON GRIFFIS: And this may seem --  
6 those two are two of the four that you've calculated?

7 MS. CRADDOCK: That is correct. We're not  
8 a large school.

9 CHAIRPERSON GRIFFIS: Right. No, no, no.  
10 I'm actually being more amused that I would have to  
11 ask because of the different ways we formulate staff  
12 and teachers and part-time and full-time and all that.  
13 Okay. So we're actually having four persons. So in  
14 terms of that comment from Ms. Miller that a maximum  
15 of five would give you an indication of even if you  
16 had to have another quarter person in, that would be  
17 a full count to that. Okay.

18 MS. CRADDOCK: Yes.

19 CHAIRPERSON GRIFFIS: I think that's more  
20 amenable and frankly more realistic in terms of  
21 assessing the application that there might be a little  
22 bit of flexibility here. Okay. Anything else then?  
23 Any other quick clarification of the Applicant at this  
24 point from the Board? Anything else? Very well.  
25 Anything else you'd like to provide at this point?

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1 Otherwise, I think we can get through the rest of the  
2 submissions on this and then return it to you for  
3 closing remarks, unless you have any other opening  
4 remarks.

5 VICE CHAIRPERSON MILLER: That's fine.

6 CHAIRPERSON GRIFFIS: Excellent. Let's  
7 move ahead then and we do have the oft talked about  
8 Office of Planning and their excellent analysis.  
9 Let's move right to it.

10 MR. MOORE: Good afternoon, Mr. Chair, and  
11 members of the Board. I'm John Moore, the Office of  
12 Planning. We stand on the record in support of the  
13 application. Slight clarification: The mention of  
14 the parking spaces. She did talk to me about when  
15 trash is picked up. My concern was that it's on an  
16 angle and in order for the truck to pick up the trash  
17 dumpster, it has to actually block a couple spaces.  
18 So my concern was, since there's a walkway ending at  
19 the back of the Church right at that location, I  
20 wanted some demarcation to say that this is the trash  
21 area so there wouldn't be any problem.

22 Regarding the staffing, the day that I  
23 visited the site there were seven parents onsite. I  
24 guess three of them were volunteers. There was one  
25 parent, I think they had a very small children. I

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1 understand there is a transition period by which the  
2 parents come in with the child. So there were seven  
3 people there and Mrs. Craddock wasn't. So if she had  
4 been there, that would have been eight.

5 I got the impression that there are  
6 usually one to two parent volunteers there on every  
7 day so that does support the staff size. Unless  
8 there's some additional questions, we stand on the  
9 record and support the application.

10 CHAIRPERSON GRIFFIS: Excellent. Thank  
11 you very much, Mr. Moore, for an excellent report.  
12 Let me just clarify, the dumpster that you're talking  
13 about actually is existing and the Church uses that;  
14 is that correct?

15 MR. MOORE: Yes.

16 CHAIRPERSON GRIFFIS: Okay. I don't have  
17 any other questions. Does any of the Board members  
18 have any other questions for Mr. Moore at this time?

19 VICE CHAIRPERSON MILLER: Mr. Moore, do  
20 you have any objection to raising the number of staff  
21 to five?

22 MR. MOORE: None whatsoever.

23 VICE CHAIRPERSON MILLER: Okay. And are  
24 they operating right now in the Church?

25 MR. MOORE: Yes.

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1 VICE CHAIRPERSON MILLER: Since the --

2 MR. MOORE: I sort of prepared the  
3 Applicant that they may be slapped on the write a  
4 little bit for -- I somewhat understand her situation.  
5 She had the children and the use and the last  
6 application was denied, and, as a matter of fact, I  
7 also talked to the Church representative about that.  
8 They knew that they were operating somewhat illegal  
9 but they had to have somewhere to put the children  
10 that she had until right then. So I prepared her that  
11 you may slap her on the wrist a little bit.

12 VICE CHAIRPERSON MILLER: And they had to  
13 leave their prior location?

14 MR. MOORE: Leave the prior location on  
15 Mintwood Place, I believe. And when the second  
16 application at Farragut wasn't approved by the Board,  
17 I guess she was somewhat between a rock and a hard  
18 place.

19 VICE CHAIRPERSON MILLER: Thank you.

20 CHAIRPERSON GRIFFIS: Anything further?  
21 Any other questions from the Office of Planning for  
22 the Board? Does the Applicant have any cross  
23 examination of that Office of Planning? Any  
24 questions? Good. Let's move ahead.

25 We had indicated that the ANC-4A -- is

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1 there a representative from ANC present? Not noting  
2 anyone, we'll take into the record Exhibit Number 21,  
3 of course. We also had the Department of Health which  
4 was recommending the application be granted. That is  
5 I guess attached to the ANC report, but is also in the  
6 record.

7 Let's move further and go to persons  
8 present today that would like to provide testimony,  
9 persons in support of the application. You're welcome  
10 to come forward, have a seat at the table, and why  
11 don't we start with you?

12 MS. BUSTE: Thanks, Mr. Chair. I'll be  
13 happy to respond to any questions you may have, but we  
14 fully support the Church-granted sanctuary. In an  
15 emergency situation, when the school came to us about  
16 the lack of a location and we agreed to provide that  
17 temporary location, provided the application was filed  
18 and pending approval of that application and the  
19 issuance of an occupancy certificate. That was the  
20 basis on which we granted their request.

21 CHAIRPERSON GRIFFIS: Excellent. Thank  
22 you very much for that clarification. Are you aware  
23 of Mr. Moore's issues on the trash dumpster?

24 MS. BUSTE: Yes.

25 CHAIRPERSON GRIFFIS: And do you have any

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1 testimony in terms of how that's going to be dealt  
2 with?

3 MS. BUSTE: As far as I know, two spaces  
4 from the two handicap spaces, which are right next to  
5 the dumpster, will be designated for the school's use.  
6 I believe he asked that that be done, and I understand  
7 that will be taken care of this week; is that correct?

8 MS. CRADDOCK: Yes. We'll have signage  
9 for the school spaces this week.

10 MS. BUSTE: Yes. They have been ordered,  
11 she has ordered them, and they will be available this  
12 week.

13 CHAIRPERSON GRIFFIS: Okay.

14 MS. BUSTE: And here, again, it's already  
15 been explained that the dumpster is in a designate  
16 spot away from the two handicap spaces, and the  
17 dumpster is removed by a commercial trash company  
18 early in the morning, two days a week.

19 CHAIRPERSON GRIFFIS: Okay. And is there  
20 any plans for restriping the parking lot or repairing  
21 the surfaces?

22 MS. BUSTE: Yes. We will be resurfacing.  
23 In fact, we have a bid which I am not aware of yet,  
24 but a bid had been requested.

25 CHAIRPERSON GRIFFIS: Okay.

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1 MS. BUSTE: And that will be taken care of  
2 in due course.

3 CHAIRPERSON GRIFFIS: Good. So that's an  
4 imminent scope of work that's going to happen. And in  
5 that I would imagine if I understand you correctly  
6 that the area for the trash dumpster would also be  
7 painted or demarcated as that's where it should be and  
8 the angle would be set correctly.

9 MS. BUSTE: That's correct.

10 CHAIRPERSON GRIFFIS: Excellent. Okay.  
11 Don't have anything else? Questions?

12 VICE CHAIRPERSON MILLER: In your view,  
13 has there been any problems with drop-off and pickup?

14 MS. BUSTE: None whatsoever.

15 VICE CHAIRPERSON MILLER: No conflicts  
16 with the Church traffic?

17 MS. BUSTE: No conflicts certainly with  
18 the Church schedule or with neighbors. They are very  
19 pleased that the school is there, and the street  
20 directly off 16th Street, which is Varnum, is not  
21 heavily traveled. So hardly car is parked in that  
22 space from 16th Street on Varnum to the alleyway off  
23 which we have parking spaces. The neighborhood does,  
24 in a sense, defer to the Church as its parking. I  
25 haven't heard from the school or from the Ms. Craddock

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1 whether there's been any problem with parking.

2 MS. CRADDOCK: There has been no  
3 opposition to parking or problems with it. At any  
4 given time, there's usually plenty of parking on that  
5 street, plus the ten-car lot.

6 CHAIRPERSON GRIFFIS: Good.

7 VICE CHAIRPERSON MILLER: I'm just  
8 curious, Ms. Craddock, have you gotten a substantial  
9 percentage of students from the neighborhood?

10 MS. CRADDOCK: We have gotten some from  
11 the neighborhood. We were waiting to put out signage  
12 till we had Board approval and we anticipate more. We  
13 do have plenty of spaces for neighborhood children.

14 VICE CHAIRPERSON MILLER: Great. Thank  
15 you.

16 CHAIRPERSON GRIFFIS: Has the abandoned  
17 car been removed?

18 MS. BUSTE: No. The gentleman who owns  
19 the car had a death in the family this weekend. He  
20 had promised it would be removed this weekend. So  
21 we're holding him to the next weekend.

22 CHAIRPERSON GRIFFIS: Sounds good.  
23 Excellent. I don't have anything else. Any other  
24 questions? Anyone else like to testify today, anyone  
25 else in the hearing? Very well. Not noting any,

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1 okay. If there's nothing else, I don't have any other  
2 government reports since the application. I believe  
3 the record is full. We'll turn it over to you for any  
4 closing remarks you might have.

5 MS. CRADDOCK: We would just love to have  
6 this zoning variance so that we can serve the  
7 community.

8 CHAIRPERSON GRIFFIS: Okay. Couple of  
9 other quick things in terms of Section 205 that are  
10 requirements. Of course the outside play area is  
11 onsite; is that correct?

12 MS. CRADDOCK: No. the outside play area  
13 is a public park at -- I always get this wrong --  
14 Upshur area and it's a four-block walk.

15 CHAIRPERSON GRIFFIS: Okay. And when the  
16 children walk there they are of course with staff  
17 members; is that right?

18 MS. CRADDOCK: Yes, they are, and we use  
19 lights on every street crossing.

20 CHAIRPERSON GRIFFIS: Okay. And has that  
21 condition at all come to your awareness? Is there  
22 anything we should be aware of that would make that  
23 unsafe, to walk at signalized intersections or smaller  
24 street crossings?

25 MS. CRADDOCK: We cross at the signals.

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1 We don't cross at Upshur as opposed to Varnum because  
2 there's no light at Varnum.

3 CHAIRPERSON GRIFFIS: Okay.

4 MS. CRADDOCK: And Arkansas has a light.  
5 and then we go across 13th. There is a church patio  
6 in the center that we use for some outside activities  
7 too, but we do go to the park every day that it's not  
8 raining.

9 CHAIRPERSON GRIFFIS: Okay. Very well.  
10 I don't have any other questions or comments. Ms.  
11 Miller?

12 VICE CHAIRPERSON MILLER: Could you just  
13 explain your drop-off and pickup policy, like where it  
14 takes place?

15 MS. CRADDOCK: The children are dropped  
16 off from 8:45 to about 9:30. They don't arrive all at  
17 one time. Usually, parents will park in the lot and  
18 come in and spend some time saying good-bye to their  
19 child. Usually, I'd say an average of ten minutes a  
20 child. And then they would go and the child would  
21 stay.

22 The majority of the children are one  
23 o'clockers at this point, and we have a low enrollment  
24 because of the change in location. So we're not  
25 talking about a tremendous number of children anyway.

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1 But I think one day we do have 20 and about eight stay  
2 till three, and then they're picked up at three. We  
3 are a program that has the possibility of being open  
4 till six, but at this point we do not have any  
5 children who are staying till six.

6 VICE CHAIRPERSON MILLER: Thank you.

7 MS. CRADDOCK: Thank you.

8 CHAIRPERSON GRIFFIS: Anything else? Any  
9 other questions, comments by the Board?

10 VICE CHAIRPERSON MILLER: At this point,  
11 Mr. Chairman, I would move to approve Application  
12 Number 17368 of Amazing Life Games for special  
13 exception relief, pursuant to 11 DCMR, Section 3104.1,  
14 to establish a child development center with Grace  
15 Lutheran Church under Section 205 at premises 4300  
16 16th Street, Northwest, with conditions.

17 MR. ETHERLY: Second, Mr. Chair.

18 CHAIRPERSON GRIFFIS: Thank you, Mr.  
19 Etherly. What are the conditions?

20 VICE CHAIRPERSON MILLER: Approval shall  
21 be for seven years, enrollment shall not exceed 30  
22 children, ages two and a half to five years.

23 CHAIRPERSON GRIFFIS: Okay.

24 VICE CHAIRPERSON MILLER: The Center shall  
25 have a maximum of five staff.

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1 CHAIRPERSON GRIFFIS: Okay.

2 VICE CHAIRPERSON MILLER: The days and  
3 hours of operation shall be Monday through Friday, 8  
4 a.m. to 6 p.m.

5 CHAIRPERSON GRIFFIS: Okay.

6 VICE CHAIRPERSON MILLER: That's all I  
7 have. Mr. Chairman, we consider special treatments.

8 CHAIRPERSON GRIFFIS: That's correct. I  
9 think that one of the conditions, Ms. Miller, that you  
10 may want to elaborate on is that the parking area  
11 would maintain free of divots and cracks and properly  
12 striped and that the trash receptacle will also be  
13 oriented for proper pickup and clearly demarcated.  
14 And that three parking spaces on the lot would be  
15 reserved exclusively for the staff and visitors at the  
16 Amazing Grace Preschool during the hours of operation.

17 MS. CRADDOCK: Three or two?

18 CHAIRPERSON GRIFFIS: We were talking two?  
19 That's exactly what I meant.

20 VICE CHAIRPERSON MILLER: You know,  
21 there's a -- as I'm looking at Office of Planning's  
22 report, it looks like there's a conflict in the hours  
23 of operation. Under the special treatments, it says  
24 6 to 6, and under the conditions --

25 CHAIRPERSON GRIFFIS: Right, but that's

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1 not a conflict. I mean, the operation is 8 to 6. I  
2 mean, it makes sense that you would have to have those  
3 free by 6 a.m. for people to be showing up to set up  
4 and all that. The operation is from 8 to start and 6  
5 p.m.

6 VICE CHAIRPERSON MILLER: That's fine.  
7 Okay.

8 CHAIRPERSON GRIFFIS: I don't think we  
9 need to necessarily -- I mean, that's fine. We'll put  
10 times in there if we need.

11 MR. BUSTE: And we also have to have all  
12 spaces open to the school during the hours Monday  
13 through Friday, but we're happy to designate two if  
14 that's a requirement.

15 CHAIRPERSON GRIFFIS: Good information.  
16 Anything else?

17 VICE CHAIRPERSON MILLER: I don't have  
18 anything.

19 CHAIRPERSON GRIFFIS: Mr. Etherly, accept  
20 it with conditions?

21 MR. ETHERLY: Very acceptable, Mr. Chair.

22 CHAIRPERSON GRIFFIS: Very well. The  
23 motion before us has been seconded and conditioned.  
24 Is there any further deliberation? Not noting any  
25 further deliberation, let me ask all those in favor,

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1 signify by saying aye. Opposed? Abstaining?

2 MS. BAILEY: Mr. Chairman, the vote is  
3 recorded as 5-0-0 to approve the application Ms.  
4 Miller made the motion, Mr. Etherly second. Mr.  
5 Parsons and Mr. Mann and Mr. Griffis are in agreement,  
6 and it's with the conditions, as stipulated.

7 CHAIRPERSON GRIFFIS: Excellent. I don't  
8 think we need a full order unless any other Board  
9 members object to issuing a summary order. In that  
10 case, with rules and regulations, we'll issue a  
11 summary order with conditions. We will obviously  
12 assist in the writing of those specific conditions to  
13 make them very clear, concise, understandable and also  
14 measurable.

15 With that being said, I think you note the  
16 intent and it's all based on the fact that testimony  
17 that you provided today. Thank you very much. Good  
18 luck, and we appreciate your patience with us. Is  
19 there any other further business for the Board this  
20 morning?

21 MS. BAILEY: Not for the morning session,  
22 Mr. Chair?

23 CHAIRPERSON GRIFFIS: Excellent. Thank  
24 you very much. Then not noting any further business,  
25 let's adjourn the morning session. Now, those who are

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1 of course appearing for the afternoon session, which  
2 should start in about four minutes, we are going to  
3 take 45 minutes for a brief lunch recess and then we  
4 will resume. I would anticipate by 1:45 we will call  
5 our first case in the afternoon.

6 (Whereupon, the foregoing matter went off  
7 the record at 12:55 p.m. and went back on  
8 the record at 2:11 p.m.)

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

2:11 p.m.

CHAIRPERSON GRIFFIS: Good afternoon, ladies and gentlemen. Let me call to order the 18 of October 2005 afternoon public hearing, the Board of Zoning Adjustments of the District of Columbia. My name is Jeff Griffis, Chairperson. Joining me today is the Vice Chair, Ms. Miller, and Mr. Etherly. Representing the National Capitol Planning Commission with us is Mr. Mann, and representing the Zoning Commission with us is Mr. Parsons.

We appreciate everyone's patience with us on several levels. I'll be very quick in my openings; however, we should make note that we're back in our hearing room but not all together back in our hearing room. Attendant to that, I will give some instructions.

But, first, we are going to be recording all our proceedings. As usual, the court reporter is sitting to my right. We will possibly have some technical difficulties, as all of our wiring is not set up, so bear with us, and I will give instruction, if need be, and if microphones are not working. But I would ask that people still turn off all their cell phones, beepers, noise makers so that we don't disrupt

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1 anyone giving testimony before the Board today.

2 Copies of today's hearing agenda are  
3 available for you. You can pick it up on the table  
4 temporarily situated close to the entrance there.

5 The order of procedure for our hearings  
6 always and specifically for this afternoon, the  
7 special exceptions and variances will be first. We'll  
8 hear from the applicant, their statements and the case  
9 presentation. Secondly, we will go through any  
10 government reports attendant to the application -- the  
11 Office of Planning, Department of Transportation and  
12 such.

13 Third, we will go the Advisory  
14 Neighborhood Commission within which the property is  
15 located. Fourth will be persons and parties in  
16 support of an application. Fifth will persons or  
17 parties in opposition to an application. Sixth,  
18 finally, we will hear summations, rebuttal testimony  
19 or closing remarks by the applicant.

20 We have an appeal on our agenda this  
21 afternoon. I will run through the order of the appeal  
22 once we call that just to clarify all those  
23 participants and not take up the time at this point.

24 Cross examination is permitted by the  
25 applicant and the parties in the case. The ANC within

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1 which the property is located is automatically a party  
2 in the case and therefore will be able to conduct  
3 cross examination. Nothing prohibits this Board from  
4 limiting the scope, the time, the direction of cross  
5 examination, but I will be very specific in that type  
6 of direction if it is required during the course of a  
7 hearing.

8 The record will be closed at the  
9 conclusion of the hearings this afternoon except for  
10 any material that the Board specifically requests. We  
11 are very specific as to what material should be  
12 submitted in order to fill out a record and when that  
13 should be submitted into the Office of Zoning. It  
14 should be also noted that all the proceedings of this  
15 Board must take place in the open and before the  
16 public. This is in accordance with the Sunshine Act.  
17 It is also in accordance with our rules, regulations  
18 and procedure.

19 Also, in accordance with all of those is  
20 the ability for us to enter into executive session.  
21 We enter executive sessions both during or after a  
22 hearing on a case. It is used for the purposes of  
23 reviewing the record. It is also used for purposes of  
24 deliberating on a case.

25 We will make every effort to conclude our

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1 hearings this afternoon by six o'clock hour, but we  
2 don't have a clock in the hearing room, so I can't  
3 guarantee it will be timely. That's just a joke.  
4 We'll be out of here in a timely manner.

5 That being said, I'm going to ask if those  
6 present today that are planning to provide testimony  
7 -- well, first let me say a very good afternoon to Ms.  
8 Bailey who is representative of the Office of Zoning,  
9 sitting on my very far right. Mr. Moy, on my closer  
10 right, also with the Office of Zoning. The Office of  
11 Attorney General is represented with us with Ms.  
12 Monroe.

13 I'm going to ask those that are going to  
14 provide testimony or are thinking of providing  
15 testimony this afternoon if you would please stand and  
16 give your attention to Ms. Bailey. She is going to  
17 swear you in.

18 MS. BAILEY: Would you please raise your  
19 right hand?

20 CHAIRPERSON GRIFFIS: Is that everyone  
21 that's here for this afternoon's case? Excellent.  
22 We'll get this out of the way once.

23 MS. BAILEY: Do you solemnly swear or  
24 affirm that the testimony you will be giving this  
25 afternoon will be the truth, the whole truth and

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1 nothing but the truth?

2 (Witnesses sworn.)

3 (Sirens.)

4 CHAIRPERSON GRIFFIS: We'll assume you all  
5 heard that and answered properly. Very well. Thank  
6 you very much, Ms. Bailey.

7 At this point then, let me ask if there  
8 are any preliminary matters attendant to the cases on  
9 the schedule this afternoon. Preliminary matters are  
10 those which relate to whether a case will or should be  
11 heard today. Requests for postponements, withdrawals,  
12 whether proper and adequate notice has been provided,  
13 these are elements of preliminary matters.

14 If you have a preliminary matter for the  
15 Board's attention, I would ask that you come forward,  
16 have a seat at the table in front of us, and let me  
17 ask Ms. Bailey if she's aware of any preliminary  
18 matters for the Board's attention in this afternoon's  
19 cases.

20 MS. BAILEY: Mr. Chairman, members of the  
21 Board and to everyone, good afternoon. And, no, Mr.  
22 Chairman, at this point, staff does not have any  
23 preliminary matters.

24 CHAIRPERSON GRIFFIS: Excellent. And not  
25 seeing come forward with a preliminary matter, I think

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1 we're about ready to call our first case of the  
2 afternoon, but I have to make a comment. It would not  
3 go unnoticed that the room is packed but no one stood  
4 or only a few for testimony. It would appear that we  
5 have guests this afternoon, so we're all going to be  
6 on our best behavior, I'm sure, and I understand that  
7 this is a classroom, Catholic University architecture.  
8 If I'm mistaken, someone can correct me later, but  
9 there that is. Sit back, enjoy, this is going to be  
10 fascinating. Hopefully it's extra credit too.

11 (Laughter.)

12 With that, let's move ahead, Ms. Bailey,  
13 and you can call our first case in the afternoon.

14 MS. BAILEY: Application Number 17370 of  
15 Square 484 Hotel L.L.C. and 484 OPCO, L.L.C., pursuant  
16 to 11 DCMR 3102.2 and 3104.1, for a special exception  
17 under Subsection 2108, to reduce the amount of  
18 off-street parking spaces required under Subsection  
19 2101.1 and a variance from Subsection 2115.9 and  
20 2115.18, to allow for attendant-assisted parking,  
21 applicable to an existing apartment building and a  
22 hotel in the DD/C-2-C Districts. My understanding,  
23 Mr. Chairman, the premises is 599 and 555  
24 Massachusetts Avenue, Northwest, and the Square is 484  
25 and it's Lot 26, A&T Lots 836 and 837.

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1 CHAIRPERSON GRIFFIS: Excellent. Then  
2 we'll trust your understanding.

3 Let's move right ahead.

4 MR. GLASCOW: Good afternoon, Mr.  
5 Chairman, members of the Board. For the record, my  
6 name is Norman M. Glasgow, Jr., the law firm of  
7 Holland & Knight. Is this working?

8 CHAIRPERSON GRIFFIS: I think it's  
9 working. Well, I'll interrupt you if it isn't picking  
10 up. It's not going to transmit well in the hearing  
11 room, but it's getting on to the record.

12 MR. GLASCOW: All right. Thank you. Here  
13 with me today from the same firm is Mr. Dennis Hughes.  
14 Also in attendance are Mr. Stewart Bartley and Jeff  
15 Miller of the JBG Companies. They're representatives  
16 of the owners of the property and Mr. Marty Wells  
17 who's a traffic consultant. I'm going to offer Mr.  
18 Wells as an expert witness in traffic. He's been  
19 accepted as such many times in the past by both the  
20 Zoning Commission and the Board.

21 CHAIRPERSON GRIFFIS: And we have his  
22 information in the record?

23 MR. GLASCOW: I know from other cases you  
24 do.

25 CHAIRPERSON GRIFFIS: But not today.

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1 MR. GLASCOW: Not today.

2 CHAIRPERSON GRIFFIS: Any questions from  
3 the Board.

4 MR. GLASCOW: The subject site is located  
5 on the southern half of Square 484, which is bounded  
6 by 5th Street, 6th Street and Massachusetts Avenue,  
7 Northwest. Present application before the Board is a  
8 request for a 25 percent reduction in required parking  
9 spaces for the hotel portion of the site, which is  
10 located on the west side of the Square, known as 599  
11 Massachusetts Avenue. This would reduce the required  
12 number of parking spaces for the hotel from 117 to 88  
13 spaces.

14 There will be provided 75 compliant spaces  
15 that are lined and striped in accordance with the  
16 regulations and then 13 spaces through valet parking.  
17 There are also an additional ten spaces located in the  
18 vault area. So while 88 spaces are being provided,  
19 pursuant to the approval of the Board, there are in  
20 fact an additional ten vault spaces on the site, for  
21 a total of 98 spaces available to the hotel if this  
22 application is approved by the Board.

23 In providing the 13 attendant-assisted  
24 spaces, the Applicant is requesting a variance relief.  
25 The C-2-C District is not one of those that are listed

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1 in Section 2115.9; however, it is noteworthy that  
2 prior to the adoption of the DD regulations, this  
3 subject property was located in the SP zone and could  
4 have availed itself of this provision as a matter of  
5 right. Subject property is also located within the  
6 central employment area.

7 I understand that the Board members have  
8 a copy of the Statement of Applicant, which discusses  
9 in detail how all the regulations are being met by  
10 this application.

11 On the residential side of the equation,  
12 as a result of granting this application, the  
13 Applicant will be able to provide a minimum of 134  
14 parking spaces for the 246 residential units.  
15 Although this is not technically a part of the  
16 application, it is the desire of the Applicant that  
17 the residential parking be increased for this building  
18 from the presently provided number, which is  
19 approximately 100 spaces.

20 The Applicant has discussed this project  
21 with the Office of Planning, the Advisory Neighborhood  
22 Commission and representatives of DDOT and is aware  
23 only of support of the application and that there is  
24 no opposition.

25 We also had a unanimous vote in support of

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1 the application from the Advisory Neighborhood  
2 Commission, but we are not aware that their letter has  
3 been submitted to the record.

4 If there are no preliminary questions, I'd  
5 like to call the first witness, Mr. Stewart Bartley.  
6 Yes, sir?

7 CHAIRPERSON GRIFFIS: Just a quick  
8 clarification. You mention it in your opening and  
9 it's also in your written submission. Of course, the  
10 zoning history this was an SP zone, but under the SP  
11 zone what is built today that's obviously a mixed use  
12 structure, large hotel and apartment building. Under  
13 the SP, this could not have been built; is that  
14 correct?

15 MR. GLASCOW: Under the SP District, no,  
16 it would not have been built. It was zoned DD C-2-C  
17 back in 1990.

18 CHAIRPERSON GRIFFIS: Okay. So the SP  
19 obviously wouldn't allow the amount of massing that's  
20 there now. It's clearly all having the C-2-C  
21 currently. However, what you're saying is the relief  
22 you're requesting under Section 2115.9 could have been  
23 availed if it as SP.

24 MR. GLASCOW: Right. What that provision  
25 entailed back when they were adopted was the pretty

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1 heavily dense zones that had commercial uses, and this  
2 was back, I think, in the mid-1980s. Mr. Parsons may  
3 remember the case when the parking regulations were  
4 redone and they allowed the stripe valet and  
5 attendant-assisted parking. They were permitted in  
6 the C-5, the C-4, the C-3-C zones and the SP zones,  
7 all of which were right around the downtown area.  
8 This site is located in the central employment area  
9 and was SP, so we think it is an appropriate location  
10 from a land planning standpoint that since it has more  
11 than 75 required spaces for the hotel, that it's  
12 appropriate that we could have the 13  
13 attendant-assisted parking spaces.

14 CHAIRPERSON GRIFFIS: I guess that's my  
15 question. How do we define the appropriateness on  
16 using 2515.9. Although it came out of SP, it is not,  
17 and this isn't -- as you've just stated, this isn't a  
18 zone district of which that section can be availed.

19 MR. GLASCOW: Right. We had similar relief  
20 with the DCUSA project with GRID, and in that  
21 situation we had more of an uptown urban situation,  
22 and we weren't in downtown, as we are now, and in the  
23 central employment area. This site is in the central  
24 employment area; the other site was not.

25 CHAIRPERSON GRIFFIS: But the prior

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1 application that you referenced, was that processed  
2 under 2115?

3 MR. GLASCOW: Yes, because we were not in  
4 any of those zone districts that were listed. So from  
5 that standpoint, it's the same as this case. It's the  
6 same relief as was granted in that case.

7 CHAIRPERSON GRIFFIS: So the variance that  
8 you're requesting in this specific application of  
9 2115.9 is to put the C-2-C in that section for that  
10 type of relief.

11 MR. GLASCOW: It's to allow a C-2-C, a DD  
12 C-2-C zoned piece of property, to allow it to take  
13 advantage of the provisions of 2115.9.

14 CHAIRPERSON GRIFFIS: Fascinating.

15 MR. PARSONS: How are we to do that  
16 without changing the regulations, Mr. Glasgow?

17 MR. GLASCOW: I think it's similar to any  
18 other type of variance when you can meet the burden of  
19 proof. We're not asking that all DD C-2-C pieces of  
20 property be able to take advantage of that, although  
21 that may be something separately that the Commission  
22 may want to take a look at for those with the  
23 nonresidential part, because it's only for the  
24 nonresidential piece that you can do the attendant  
25 valet as a matter of right.

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1           But we think that once you get within this  
2 part of the central employment area, specifically this  
3 site, that it is appropriate in this context that we  
4 be permitted the variance relief being in the central  
5 employment area of property that was previously SP,  
6 that in those circumstances, for the nonresidential  
7 use and specifically in DD, a hotel in its entirety is  
8 nonresidential, that we be able to take advantage of  
9 the attendant-assisted parking.

10           MR. PARSONS: Thank you.

11           CHAIRPERSON GRIFFIS: That's an  
12 interesting case. I mean, there is some separation  
13 from the first case that you indicated and this one.  
14 But looking primarily at this one, aren't we -- we're  
15 talking about a reallocation, essentially, of the  
16 parking spaces.

17           MR. GLASCOW: That is correct.

18           CHAIRPERSON GRIFFIS: We're not talking  
19 about if relief was granted that less would be built  
20 but rather where they are tied to. So in this  
21 reallocation, isn't it really more about the access  
22 and operation of the parking spaces?

23           MR. GLASCOW: Well, that is part of what  
24 we're going to be getting into with the testimony of  
25 Mr. Wells, and I think that's part of what the Office

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1 of Planning looked at and was looked at by DDOT.

2 CHAIRPERSON GRIFFIS: Then why wouldn't we  
3 be looking under 2117?

4 MR. GLASCOW: Which part of 2117 were you  
5 looking at with respect to the relief?

6 CHAIRPERSON GRIFFIS: Me?

7 MR. GLASCOW: Well, it's one building on  
8 one lot.

9 CHAIRPERSON GRIFFIS: Right. What about  
10 2117.3 and 2117.4, required parking spaces shall be  
11 clearly striped, lined in accordance. That would go  
12 to what I'm understanding in the application that's  
13 been submitted is stacking, parking some tandem, some  
14 attendant.

15 MR. GLASCOW: Right.

16 CHAIRPERSON GRIFFIS: Four would go to the  
17 accessibility to access from the improves streets and  
18 allies if that went into an area of the design of this  
19 that it wouldn't be directly accessed from those  
20 areas.

21 MR. GLASCOW: You can do it alternatively  
22 that way. In 2117.3, it does refer back to 2115.

23 CHAIRPERSON GRIFFIS: I know. Funny how  
24 circular these all are.

25 MR. GLASCOW: Yes. Since we are providing

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1 attendant-assisted, we thought that that was the best  
2 provision to use. The hotel does operate on  
3 attendant-assisted basis, right at this point in time.  
4 You don't go and park your car down in the garage.  
5 They take it from you and park it down there.

6 CHAIRPERSON GRIFFIS: All right. Well,  
7 let's move ahead. I don't think the substantive  
8 issues are going to change. The special exception, of  
9 course, is not in need of clarification, in my mind,  
10 and we'll move ahead and the Board will bring up any  
11 other questions if they have them.

12 MR. GLASCOW: I'd like to call the next  
13 witness, Mr. Stewart Bartley.

14 MR. BARTLEY: Thank you, Mr. Chairman and  
15 members of the Board. Thanks for taking the time to  
16 hear us today. As the Chairman has already noted,  
17 this case really is about a reallocation in terms of  
18 a practical matter, so I'll keep my remarks brief and  
19 then certainly be able to answer any questions.

20 The existing improvements, which we have  
21 a rendering of here to my right, are in fact built --  
22 hopefully, it looks a little nicer than that in real  
23 life, I hope you've had a chance to see it -- was  
24 built in two phases and it is in fact one lot of  
25 record. So there are two adjacent three-level

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1 underground parking garages that in total have more  
2 parking than the -- they have some 228 spaces,  
3 including vault spaces -- well in excess of the  
4 minimum for the two uses.

5 But as we've noted, basically what we're  
6 asking for today while styled as a parking reduction,  
7 we're actually asking to be able to provide 13 more  
8 spaces to the property in its entirety, the 13  
9 attended assisted spaces and make those available  
10 within the garage that is underneath the hotel, and  
11 thus freeing up, enabling us to allocate spaces.

12 The hotel does need and has never used 42  
13 some odd spaces to the residential use where we in  
14 fact -- history has proven we have a demand for  
15 substantially more than the code minimum parking for  
16 residential and downtown. And in particular, this is  
17 a for sale condominium and I think we'll find the  
18 demand is even slightly higher in that scenario.

19 The other benefit is it will also enable  
20 us to better control access to the garages, in  
21 particular the residential garage when thinking ahead  
22 to eventually turning this over to a homeowners  
23 association who would be operating it. Under the  
24 current arrangement, the hotel has access to that  
25 garage and this would greatly limit that access. And

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1 I think that is certainly important to residents and  
2 especially in this particular neighborhood that is a  
3 developing neighborhood.

4 Let me speak a little bit more to the  
5 demand for the hotel parking. The hotel is actually  
6 doing quite well. So I think we can -- we have sold  
7 it out on a number of occasions. So I think when Mr.  
8 Wells testifies you'll see that his sampling includes  
9 dates where we were very, very well occupied. But  
10 what we're finding is what you would likely expect at  
11 that location, two blocks from the Convention Center.

12 Our customers, our guests are Convention  
13 Center attendees. They fly in from out of town, they  
14 take a taxi or other public transportation to our  
15 hotel, and then they walk to the Convention Center.  
16 For the most part, that's what we're experiencing.

17 So we have never filled the garage. I  
18 don't want to steal Mr. Wells' thunder on his  
19 testimony but we have yet to fill up the spaces that  
20 we already have, much less these 13 attended assisted  
21 spaces. We're talking --

22 CHAIRPERSON GRIFFIS: This came before the  
23 Board in 2001, correct?

24 MR. BARTLEY: Yes.

25 CHAIRPERSON GRIFFIS: And there wasn't any

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1 parking relief requested; is that right?

2 MR. BARTLEY: No.

3 CHAIRPERSON GRIFFIS: The hotel was built  
4 out for the matter-of-right required parking spaces,  
5 correct?

6 MR. BARTLEY: Right, the lot as a whole,  
7 yes.

8 CHAIRPERSON GRIFFIS: What you're telling  
9 us today is that --

10 MR. BARTLEY: We just don't need --

11 CHAIRPERSON GRIFFIS: -- we require much  
12 too much.

13 MR. BARTLEY: You require much too much,  
14 and --

15 CHAIRPERSON GRIFFIS: It wasn't us, it was  
16 the Commission, but go ahead.

17 MR. BARTLEY: Yes. And at least our  
18 experience, on the flipside of that, on the  
19 residential, is we prefer to provide more than the  
20 code minimum, and the one occasion where we forced to  
21 build the code minimum, that was a bit of a marketing  
22 issue for us, and we actually had to secure  
23 longer-term rental contracts for some of our customers  
24 in nearby garages.

25 So, actually, if we could wave a magic

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1 wand and put another level under the residential  
2 building, we would probably do that today, but I think  
3 this is the next best thing.

4 I should also note that we're hopeful that  
5 if this relief is granted, we can take another look at  
6 the residential garage. While this is, again, not  
7 strictly a matter before you today, but we're hopeful  
8 that we can maybe more efficiently stripe that garage  
9 and squeeze a few more spaces out of the residential  
10 -- the garage that's underneath the residential  
11 building currently.

12 What else? Our hotel is a limited service  
13 hotel, so one very good question that was asked at ANC  
14 is, do we have restaurants, do we have bars. We do  
15 not have any of that type of activity that would  
16 attract local folks driving their own cars, although  
17 they probably wouldn't drive to a bar now anyway.

18 Let's see, as Mr. Glasgow mentioned, we  
19 already operating the hotel as valet-parking only.  
20 You cannot park your car there. So this would not --  
21 there would not be any additional burden on the hotel  
22 operations from this relief.

23 So we would have 98 spaces. And, again,  
24 we have not been able, in the hotel garage, including  
25 the vault spaces, so, again, we've never been able to

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1 sell that spaces in the garage as of yet.

2 I've already touched on demand from the  
3 residential, and, again, we think that between the  
4 Office of Planning report and our submission,  
5 notwithstanding the earlier discussion about which  
6 section we should be seeking relief from, we're  
7 hopeful that you'll find it and the legal tests are  
8 well met.

9 I think the practical benefits of this are  
10 many. We, again, have support of the community. I  
11 was there at both of the meetings, and I'm sorry that  
12 we didn't get a letter in -- they didn't get a letter  
13 in for the record, but they in fact -- there was an  
14 amendment in fact that suggested there was strong  
15 support from the community. I know they don't want  
16 any more people competing for on-street parking than  
17 necessary, and if we -- my fear if we weren't granted  
18 this relief, we would simply have a number of spaces  
19 that were dedicated to hotel use. We couldn't make  
20 available to the residents and they just wouldn't be  
21 used. So we hope you'll agree that this is relief  
22 that you can grant.

23 And with that, I will stop and be glad to  
24 answer any questions.

25 CHAIRPERSON GRIFFIS: Okay. I guess for

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1 clarity and conciseness, you adopt the testimony that  
2 was written in the submission in terms of the nature  
3 and location of the hotel and how its accessible, that  
4 the maximum number of students, employees and guests,  
5 customers or clients can easily expect to use the  
6 proposed building structures at one time is properly  
7 set on this.

8 MR. BARTLEY: Yes. We stand on the --

9 CHAIRPERSON GRIFFIS: You know, there was  
10 an interesting point that you indicated in the written  
11 submission, the proximity to public transportation.  
12 You indicated that the Metro line to the Convention  
13 Center, I believe it was, on whatever avenue that is.  
14 And also the Gallery Place Chinatown. In your  
15 understanding of urban dynamics and walkability, would  
16 you find that that's walkable?

17 MR. BARTLEY: Yes. We're finding that  
18 that's certainly walkable, as are our residents at --  
19 I mean, obviously, we'd love to be closer, especially  
20 for the residential building, but I think that's close  
21 enough. We're also -- I'd be remiss if I didn't say  
22 the new circulator has a stop, I think, right in front  
23 of our building. So we're pleased with the beginnings  
24 of the development of the Mt. Vernon Triangle. We  
25 would love to see -- we are, as you know, the only one

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1 that's actually up -- new project that's up and built,  
2 and so we're looking forward to having some company.

3 CHAIRPERSON GRIFFIS: Okay. What is the  
4 front of your building?

5 MR. BARTLEY: I'm sorry?

6 CHAIRPERSON GRIFFIS: What do you call the  
7 front of your building? You said the circular steps  
8 in the front of the building.

9 MR. GLASCOW: Oh, Mass Avenue, of course.

10 CHAIRPERSON GRIFFIS: On Mass. Okay.  
11 Good.

12 MR. BARTLEY: Yes.

13 CHAIRPERSON GRIFFIS: That's all the  
14 preliminary questions I have. Anyone have any other  
15 questions? Ms. Miller?

16 VICE CHAIRPERSON MILLER: Yes. The number  
17 of parking spaces for both the hotel and the residence  
18 was that determined in the previous order?

19 MR. BARTLEY: I'm sorry, I was just citing  
20 the actual number of spaces that are there. My notes  
21 indicate that we have 228 total spaces, including some  
22 19 vault spaces. So have 209 zoning legal spaces on  
23 the entire lot of record. And our requirement is --  
24 the code minimum is 179. So we have 30 more spaces --  
25 30 more zoning compliance spaces and then on top of

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1 that 19.

2 Again, today, we are asking for an  
3 additional 13 within the hotel garage, which we think  
4 is actually a fairly conservative number given the  
5 layout that we've come up with. I think if there was  
6 suddenly this great demand, we could actually squeeze  
7 more cars in there than the 13, but I think the 13 is  
8 a comfortable number.

9 VICE CHAIRPERSON MILLER: I just wanted to  
10 clarify, I thought that you made reference to an order  
11 two years ago, and I just wanted to make sure that the  
12 number of parking spaces, the requirement was coming  
13 from regulations versus the order?

14 MR. BARTLEY: That is correct. Right?  
15 Yes, right. I think, though, maybe you should  
16 describe what --

17 VICE CHAIRPERSON MILLER: The regulations.

18 CHAIRPERSON GRIFFIS: There was no relief  
19 granted in 2001 for parking.

20 MR. BARTLEY: The prior order did not have  
21 any --

22 CHAIRPERSON GRIFFIS: They built this out  
23 in matter-of-right in accordance with the regulations.  
24 What they need is a reduction in the required for the  
25 hotel because they're finding that the utilization of

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1 those is diminished as opposed to the demand on the  
2 other use, which is now condos, correct?

3 MR. BARTLEY: Correct.

4 CHAIRPERSON GRIFFIS: Okay. Anything  
5 else?

6 VICE CHAIRPERSON MILLER: No.

7 MR. ETHERLY: Very briefly, Mr. Chair, and  
8 perhaps anticipating some of Mr. Wells' testimony, I  
9 wanted to piggyback off of one of your comments but  
10 direct a question to Mr. Wells. And that is for the  
11 purposes of service vehicles, employee parking, things  
12 along those lines, let me deal with service vehicles  
13 first. The underground spaces that are utilized by  
14 the hotel don't typically accommodate any service  
15 vehicles or delivery vehicles or anything along those  
16 lines based on your familiarity with the subject  
17 property, correct?

18 MR. WELLS: That's correct.

19 MR. ETHERLY: Okay. So you wouldn't be  
20 impacting any of your service needs. All of that is  
21 taken care of at the rear loading dock area.

22 MR. WELLS: Yes. I think what has not  
23 come out in testimony yet is that the apartment  
24 building or condominium building garage and the hotel  
25 garage are completely independent. They're not

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1 connected in any way. They have separate means of  
2 access, they have separate means of internal  
3 circulation. They are functionally independent  
4 garages.

5 MR. ETHERLY: Okay. So for the purposes  
6 of the ongoing functionality of just the hotel portion  
7 of this application, there's no impact or, shall we  
8 say, any parking impacts as it relates to service  
9 vehicles having to scurry around for parking elsewhere  
10 or otherwise make alternative arrangements.

11 MR. WELLS: They do not have to make  
12 alternative arrangements.

13 MR. ETHERLY: Okay. With respect to the  
14 issue of employee parking pertaining to the hotel,  
15 what's your experience or what has your analysis  
16 shown? Will there be any impact in terms of employee  
17 parking with regard to the loss of these spaces?

18 MR. WELLS: I think very few employees  
19 drive in fact. Very few employees can afford to pay  
20 \$22 a day to park in this garage.

21 MR. ETHERLY: Thank you. Thank you, Mr.  
22 Chair.

23 CHAIRPERSON GRIFFIS: Good. Any other  
24 questions? Okay. Let's move on.

25 MR. GLASCOW: I'd like to call the next

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1 witness then, Mr. Marty Wells. Can you briefly  
2 summarize your report?

3 MR. WELLS: Thank you. Good afternoon.  
4 I was retained to determine, as a practical matter,  
5 whether or not 88 parking spaces would be adequate to  
6 serve the existing hotel. We concluded in fact that  
7 88 spaces would be adequate and we based that on a  
8 review of the hotel's records and our own  
9 observations, our own parking occupancy counts. It  
10 turns out the hotel maintains daily records of the  
11 number of cars parked in the garage. We have that  
12 information for the first 215 days the hotel has been  
13 opened. It opened March 9, and we have daily data  
14 through last Wednesday.

15 Of those 215 days, the highest occupancy  
16 occurred on March 22 when there were 86 cars in the  
17 garage. Now, that's because that was the opening  
18 night party and there were a lot of JBG folks there.  
19 The next highest occupancy was only 73 cars. The 95th  
20 percentile occupancy, that is to say 95 percent of the  
21 time there are 65 or fewer cars in that garage. The  
22 average is only 36. So based on that data, one would  
23 conclude that 88 spaces are enough. But as a famous  
24 American advised us, "Trust but verify."

25 We conducted our own parking occupancy

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1 counts on eight days, in early July, the tourist  
2 season. In early October, the maximum occupancy that  
3 our firm observed was on October 4 when the  
4 association of the U.S. Army filled the Convention  
5 Center, and the hotel was essentially fully booked.  
6 Ninety-six percent of the rooms were booked. On that  
7 day, we counted a peak of 60 cars in that garage.

8 So, again, let me repeat, we concluded  
9 that 88 parking spaces would be adequate to serve the  
10 existing 228-room hotel, and I'm gratified to say that  
11 DDOT agrees with that conclusion. And I did mention  
12 the independent operation of the two garages, and let  
13 me underscore that point.

14 CHAIRPERSON GRIFFIS: Did you analyze how  
15 that's going to impact the independent garage has to  
16 utilize some for the apartment but is actually part of  
17 the hotel? I know there's some narrative description  
18 on that, but are you --

19 MR. WELLS: I believe the proposal is for  
20 the garages to -- correct me if I'm wrong, but the  
21 proposal is for the two garages to operate  
22 independently. All of the hotels parking requirement  
23 would be met within the three underground levels of  
24 parking beneath the hotel. And all of the spaces that  
25 are currently built or might be restriped in the three

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1 levels of parking beneath the apartment building would  
2 be devoted entirely to the residential condominiums.  
3 That in fact is the nub of the case, to allow the  
4 independent operation and full deployment of those  
5 bases to their respective buildings.

6 CHAIRPERSON GRIFFIS: Is that right?  
7 We're not physically actually moving any spaces then?

8 MR. GLASCOW: That's correct.

9 MR. BARTLEY: Right now, while Mr. Wells  
10 is correct that they are operated independently, there  
11 is a reciprocal easement agreement so that if the  
12 hotel needed the 42 spaces that are physically beneath  
13 the residential building, they have access. And  
14 that's okay for us because we manage both buildings,  
15 and so we can manage that. Part of, again, the  
16 benefit, if you think about in the future when there's  
17 just a homeowners' association, which would have a  
18 professional manager, of course, but I think limiting  
19 the hotel's access to the garage on 5th Street, the  
20 residential garage, is another major benefit of this  
21 relief.

22 CHAIRPERSON GRIFFIS: I don't think  
23 anyone's questioning that. I'm just trying to get a  
24 handle on the fact that -- well, the easement would go  
25 away, would be voided, wouldn't it, if this was

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1 approved?

2 MR. BARTLEY: Yes, we would have to modify  
3 it. There may be some other reasons why we'll have to  
4 modify it. Again, it's technically one lot of record.

5 CHAIRPERSON GRIFFIS: Right. Is it going  
6 to maintain that or that's going to change? It will  
7 always be one lot of record.

8 MR. BARTLEY: Right.

9 CHAIRPERSON GRIFFIS: Okay. There it is.  
10 Keep moving. Next? Anything else?

11 MR. GLASCOW: That concludes the direct  
12 presentation of the Applicant?

13 CHAIRPERSON GRIFFIS: Excellent. What  
14 color are the stripes -- no. Okay. Any other  
15 questions of the Applicant at this time? Any  
16 clarifications? Yes, Mr. Parsons?

17 MR. PARSONS: Is there any contemplation  
18 that these two buildings would be joined at the  
19 parking garage; that is, to remove a wall so that cars  
20 could move between the two?

21 MR. BARTLEY: No, not currently. Early  
22 on, there were some design thoughts about that, but  
23 for reasons I'm not sure I was party to, design  
24 decisions were made along the way and they were  
25 actually built, of course, at separate times. And it

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1 is in fact different ownerships. There's commonality  
2 in ownership but they're two different ownerships.

3 MR. PARSONS: Do you know the floor levels  
4 are the same?

5 MR. BARTLEY: I do not know if they are  
6 the same.

7 PARSONS: That's all right.

8 MR. BARTLEY: I doubt --

9 MR. PARSONS: Sorry I asked.

10 CHAIRPERSON GRIFFIS: They might have the  
11 sections --

12 MR. BARTLEY: I'm sure they're close but  
13 we would never be that lucky for them to actually line  
14 up.

15 CHAIRPERSON GRIFFIS: Anything else?  
16 Clarifications? Let's keep this moving then and move  
17 on to the Office of Planning's report that's with us  
18 today. Exhibit Number 34 in the record. Good  
19 afternoon, sir.

20 MR. LAWSON: Thank you, Mr. Chair, members  
21 of the Board. For the record, my name is Joel Lawson,  
22 and I'm with the D.C. Office of Planning.

23 Just very briefly, the subject property,  
24 as noted by the Applicant, is located on the southern  
25 portion of Square 484 and is currently developed with

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1 a 155-suite hotel facing 6th Street and a 246-unit  
2 apartment building fronting onto Massachusetts Avenue,  
3 to the east of the hotel.

4 Access to underground parking spaces for  
5 the residential development is provided from 5th  
6 Street, Northwest and the hotel parking spaces, from  
7 6th Street, Northwest. As constructed, there is no  
8 internal underground connection between the two  
9 separate parking areas.

10 The Office of Planning analysis indicates  
11 that the proposed relief meets the relevant zoning  
12 regulations test for special exception and variance.  
13 The proposal is consistent with the comprehensive plan  
14 and generalized land use map and would not appear to  
15 undermine the integrity of the zoning regulations.

16 Subsequent to filing the OP report, DDOT  
17 submitted comments indicating no objection to the  
18 proposal and concurrence with the report of the  
19 Applicant's traffic consultant. The Applicant has  
20 indicated that the proposal was positively reviewed by  
21 the ANC. As such, OP recommends approval of the  
22 request.

23 And that it's for me, and I'm available  
24 for questions. Thank you.

25 CHAIRPERSON GRIFFIS: Excellent. Thank

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1 you very much, Mr. Lawson, for bringing to our  
2 attention that DDOT actually had submitted something,  
3 and we'll take that on the record.

4 I have one quick question in terms of the  
5 preliminary matter that we brought up. Your analysis  
6 actually goes to the same direction; however, 2115.9  
7 permits attendant-assistant tandem spaces, and I cut  
8 down to the rest of the paragraph that says, "So this  
9 regulation does not apply, although the proposal would  
10 appear to otherwise meet the requirements of the  
11 section." And then you go on to say how they meet it  
12 and recommend approval. How do we reconcile that? Do  
13 you have difficulty in processing under 2515.9?

14 MR. LAWSON: What section are you looking  
15 at?

16 CHAIRPERSON GRIFFIS: Page 4, at the  
17 bottom, the variance Section 2, the last paragraph, in  
18 the middle of the paragraph, begins, "However."

19 Sorry, perhaps I went too fast. In the  
20 last paragraph, on Page 4, Section 2, the variance,  
21 that paragraph, not full, but ends on that page  
22 saying, "So this regulation does not apply," referring  
23 to 2115.9. However, you continue to say that the  
24 proposal would appear to otherwise meet the  
25 requirements of this section and then recommend

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1 approval.

2 MR. LAWSON: Yes, I understand what you're  
3 saying. What I meant by that sentence was that the  
4 Applicant was not allowed that provision by right,  
5 because it's not within one of the zones where that  
6 provision is allowed. So that's what necessitates the  
7 variance request.

8 CHAIRPERSON GRIFFIS: I see. So you're  
9 actually aligning yourself with the Applicant's  
10 position that the variance is coming out of putting  
11 the C-2 zone into 2115.

12 MR. LAWSON: We were addressing some of  
13 the comments that were made by the Applicant where  
14 they're discussing where the tandem parking is  
15 permitted in other zones. We're saying that in other  
16 zones the Applicant is correct, it is permitted. In  
17 this case, it's not permitted by right, so the  
18 Applicant needs a variance from this provision in  
19 order to do what it is that they're proposing to do.

20 We felt that they met the relevant test  
21 for satisfying that variance test, and that's what our  
22 analysis was based on.

23 CHAIRPERSON GRIFFIS: Excellent. Okay.  
24 That's clear. Questions from the Board?

25 VICE CHAIRPERSON MILLER: Yes. Mr.

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1 Lawson, if 2115 did not apply, could the Applicant  
2 seek a variance from 2101.1?

3 MR. LAWSON: Well, I don't have my zoning  
4 regulations in front of me, but --

5 VICE CHAIRPERSON MILLER: Okay. They're  
6 the parking requirements. They're the ones that set  
7 the number of spaces that are required and under this  
8 application, I think there are 13 remaining that fall  
9 outside of the special exception relief of the 25  
10 percent. So, therefore, they don't meet the parking  
11 requirements with those 13 spaces.

12 So I guess if it's 2115, they're saying they  
13 want a variance in order to do attendant parking, and  
14 my question is, if they can't do that, can't they seek  
15 a variance under 2101.1?

16 MR. LAWSON: Yes. The Applicant has  
17 variance under that section. It wouldn't have  
18 directly addressed the situation that they're  
19 proposing to provide, which is the tandem parking  
20 spaces, which I assume is why they went with this  
21 process. And we felt that it was an appropriate  
22 process and a appropriate way for them seek to relief  
23 that they were asking for. But I agree with you that  
24 in theory the relief could have been sought through  
25 the parking regulations themselves. This one seems to

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1 be much more direct in terms of what it is they're  
2 actually proposing onsite.

3 VICE CHAIRPERSON MILLER: Right. Okay.  
4 Thank you.

5 MR. LAWSON: This process, by the way,  
6 also does, because they're seeking this process, it  
7 does require the provision of those tandem spaces. I  
8 would guess that a direct relief from parking  
9 regulations would mean that those tandem spaces would  
10 not be required. And we feel that since the parking  
11 is attendant-assisted, those parking spaces might as  
12 well be provided since there is adequate space in the  
13 parking lot for those very rare days, those one in a  
14 thousand days where some additional spaces may  
15 actually be necessary.

16 VICE CHAIRPERSON MILLER: Right. I mean,  
17 I think that sometimes there are different ways of  
18 getting at the same thing, and if the Board were to  
19 decide that 2215 wasn't applicable for some reason, I  
20 think it would have the option of making those tandem  
21 parking spaces required as a condition to the variance  
22 we're giving.

23 MR. LAWSON: That's true.

24 VICE CHAIRPERSON MILLER: Okay.

25 CHAIRPERSON GRIFFIS: Breaking new ground.

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1           Excellent. Any other questions by the Board? Does  
2           the Applicant have any cross examination of the Office  
3           of Planning? Very well. Thank you very much, Mr.  
4           Lawson. Appreciate an excellent report; very helpful.

5                        I don't have any other government reports  
6           to this application. We did note -- I'm sorry, Mr.  
7           Lawson, did the Department of Transportation submit a  
8           letter of any kind of was just the verbal  
9           communication that you had? Are you aware of any?

10                      MR. LAWSON: I'm sorry, did you say the  
11           Department of Transportation?

12                      CHAIRPERSON GRIFFIS: Do we have it in the  
13           record? Yes, we have it. Okay. There it is. Just  
14           make sure that it's in the record, and we'll review  
15           that very quickly as it goes through.

16                      That being said, we don't have any other  
17           that go to Exhibit Number 36.

18                      Let's move ahead then to any persons  
19           present to provide testimony. Is anyone here present  
20           in accordance with the Application 17370 to provide  
21           testimony, either in support or in opposition? Oh,  
22           interesting.

23                      Exhibit Number 35 is a letter from the  
24           downtown cluster of congregations from the Executive  
25           Director, Mr. Terrence Lynch, in support of the

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1 application. Indeed so.

2 Mr. Glasgow, are you aware of any other  
3 submissions that I am neglecting take note of?

4 MR. GLASCOW: No, sir.

5 CHAIRPERSON GRIFFIS: Very well. Not  
6 noting anyone else coming up to give testimony in this  
7 application, we'll turn it over to you, Mr. Glasgow,  
8 for any closing remarks that you might have.

9 MR. GLASCOW: Well, we believe that we  
10 have met the burden of proof for the application. We  
11 did have a discussion with the Office of Planning  
12 early on and did discuss with them whether we should  
13 go under 2115.9 or whether there should be a variance  
14 requested for reduction of off-street parking.

15 It was determined at that point in time  
16 that we would take the track that we did because it  
17 would much more fully and completely comport with how  
18 the garage would actually be operated, that if we were  
19 going to have attended-assisted valet spaces in the  
20 garage and in the aisles, that it seemed to be more  
21 compliant on both of our parts when we discussed this  
22 matter that we go through and that we meet the  
23 provisions of 2115.9, such as the signage and the  
24 things that go along with that, rather than just ask  
25 for a variance from the parking requirements. It was

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1 thought that it would be more structured under the  
2 scenario and would be the way that we would actually  
3 be operating the garage.

4 We do believe that we've met the burden of  
5 proof, and if we could, we would like to have a bench  
6 decision, as the units in the condominium building are  
7 being sold at this point in time, and it is helpful to  
8 have more parking spaces available to those potential  
9 purchasers.

10 CHAIRPERSON GRIFFIS: Very well. Any  
11 clarification, questions? Board ready to proceed? If  
12 there's no objection to proceeding, why don't we move  
13 ahead under a motion and then we can take our  
14 deliberations under that? And I would move approval  
15 of Application 17370, that is an application for a  
16 special exception under 2108, which would reduce the  
17 amount of off-street parking spaces required under  
18 Section 2101 and a variance from the Subsections  
19 2215.9, 2215.18, to allow the attended-assisted  
20 parking applicable in the apartment building and hotel  
21 that is at 599 and 555 Massachusetts Avenue.

22 I would ask for a second.

23 MR. ETHERLY: Second, Mr. Chair.

24 CHAIRPERSON GRIFFIS: Thank you very much,  
25 Mr. Etherly. I do appreciate it.

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1           You know, it's an interesting point when  
2 the question from the Board came up and Mr. Glasgow  
3 addressed it as could this have come under other  
4 regulations. I want to quickly address that.  
5 Certainly, I think there's many ways that you could  
6 take any application and it's not ours to sit and  
7 decide which way, especially with a certified  
8 application. But I was thinking about that specific  
9 one of whether you would just come in for a straight  
10 parking reduction. And the straight parking  
11 reduction, I was wondering, well, what would the  
12 practical difficulty be here, it is built and all  
13 that. And also the comments made that this more  
14 directly addresses what will actually happen. I was  
15 wondering if this wasn't possibly the better course of  
16 action in terms of the test that needed to be made to  
17 address the existing situation.

18           But going then directly to the  
19 application, the special exception I think was very  
20 clear and laid out in the Applicant's submission and  
21 also in the Office of Planning's, and that is for the  
22 reduction of 25 percent. It's interesting in looking  
23 at the tandem use, and it really boils down to in this  
24 one not the most exciting of substance here but we're  
25 really talking about restriping surfaces and just

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1 reallocating these spaces. But, really, it's painting  
2 of blacktop, and I think that doesn't lessen the  
3 burden of proof that has to be made in terms of a  
4 variance case.

5 But it is fairly clear in terms of the  
6 zoning history, the uniqueness of the building itself  
7 and the structure, not to mention the mixed use and  
8 the mass here, the zoning history in its outgrowth  
9 creates a practical difficulty in invoking that aspect  
10 of one type of parking, and that's the tandem parking.  
11 In terms of whether it impairs the intent, taking the  
12 zone planner map, I think it's fairly clear from all  
13 of the testimony that's been provided, especially  
14 persuasive is the Office of Planning, that this would  
15 not.

16 And, also, I would say the engineer and  
17 the Applicant's architect saying that this more  
18 adequately reflects the reality of use in this  
19 facility, being the hotel and the condos.

20 That's all I have to say, and I'll open it  
21 up further for any further deliberation.

22 VICE CHAIRPERSON MILLER: Mr. Chairman, I  
23 would agree with you with respect to granting a  
24 variance in this case. I mean, it's such a clear,  
25 logical case that they should be able to reallocate

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1 the spaces and that they meet the test.

2 My concern is, I think it would be more  
3 legally correct to grant them a variance from 2101.1  
4 and then set forth the conditions that they've  
5 represented that they're going to do with respect to  
6 2115.9 or the ones that are listed in the tandem  
7 parking. Because it's not clear to me that it's  
8 appropriate to grant a variance from 2115.9 under  
9 these circumstances, being that they're not in the  
10 zone that's listed there. So, basically, I agree with  
11 the same relief; it's just in what format.

12 CHAIRPERSON GRIFFIS: We'll note that for  
13 the record, unless you're asking about rechanging the  
14 deliberations at this point.

15 VICE CHAIRPERSON MILLER: Rechanging the  
16 deliberation?

17 CHAIRPERSON GRIFFIS: Well, we've got a  
18 motion for us to approve the application that was  
19 presented. If we want to change the relief for the  
20 elements under the relief that it needs to go under,  
21 I would say start being persuasive and make this  
22 motion fail, and then you're going to need to bring a  
23 new motion in order to come under a new section. I  
24 mean, I haven't heard any testimony or case  
25 presentation of a parking reduction under 2110, unless

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1 I missed it.

2 VICE CHAIRPERSON MILLER: Why they need  
3 one?

4 CHAIRPERSON GRIFFIS: Or 2101. Yes,  
5 that's what you're saying.

6 VICE CHAIRPERSON MILLER: I think the  
7 reasons are really the same. All right. Give me a  
8 minute. That's fine. I mean, I'm willing to go  
9 along. I think the relief is the same. I think the  
10 facts are the same, the relief is the same, and so  
11 it's just which regulation is more appropriate.

12 CHAIRPERSON GRIFFIS: All right. I don't  
13 disagree with you.

14 VICE CHAIRPERSON MILLER: So I'm not sure  
15 why I need to go into what their uniqueness is or  
16 practical difficulty. I mean, I think they made their  
17 case. I don't think we need to really waste time on  
18 that. So I think the only question is --

19 CHAIRPERSON GRIFFIS: Mr. Glasgow, in your  
20 legal opinion, can we switch the section that we're  
21 about to approve in this application?

22 MR. GLASCOW: Mr. Chairman, I think the  
23 Board does have the discretion, assuming that it meets  
24 the burden of proof under either case. Because we did  
25 have a variance that was advertised.

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1 CHAIRPERSON GRIFFIS: My question, is  
2 there a substantive difference in what you need to  
3 present if we look at a parking reduction, or 2101.1,  
4 or whether we proceed as has now been presented under  
5 2115.9?

6 MR. GLASCOW: I think in this case, the  
7 answer is probably not, because we have 75 spaces that  
8 are legally striped right now. The testimony was, I  
9 think, on a worst-case basis we had 60 as the hotel  
10 operates. The only time that we did not have -- that  
11 we had more than 60 was the night that the hotel  
12 opened. So I think that we have testimony in the  
13 record that we never need more than the 75 that's  
14 provided. Then the question is, is how the Board  
15 wants to deal with the attended-assisted parking,  
16 which is why we came to the conclusion with the Office  
17 of Planning to go the route that we did.

18 CHAIRPERSON GRIFFIS: Right. Okay.

19 VICE CHAIRPERSON MILLER: Mr. Glasgow, I  
20 wouldn't want to err in stating right now the  
21 conditions to parallel what I heard you represent and  
22 what I think I heard Mr. Lawson represent would be  
23 equivalent to your compliance with 2115.9 and some of  
24 the other regulations. So we were just discussing for  
25 the minute the possibility of your submitting a

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1 proposed order, a summary order which would put the  
2 conditions in. Such conditions would include the  
3 tandem parking for 13 spaces, blah, blah, blah, and  
4 then we would have it right and decide this next  
5 Tuesday. Do you have a reaction to that?

6 MR. GLASCOW: No. We can proceed either  
7 way.

8 CHAIRPERSON GRIFFIS: Mr. Glasgow, we're  
9 going to do that. Because it comes to light,  
10 actually, in the case that you invoked early on, which  
11 was RLA case, Application 17232. Our order was issued  
12 under 2101.1, and I think that we did -- when you  
13 first came in, there was a similar discussion on 2115,  
14 if I'm not mistaken. I mean, certainly, the fact of  
15 the matter is that our order does look like relief was  
16 granted for the parking spaces, as well as other  
17 aspects to it.

18 So perhaps we look at it that way, and we  
19 set this for a special public meeting, unless there's  
20 any objection from the Board members or others.  
21 Comments? Any other sections we want to throw in  
22 there?

23 MS. BAILEY: Mr. Chairman, there is a  
24 motion on the table, so is that tabled?

25 CHAIRPERSON GRIFFIS: Yes. Thank you very

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1 much.

2 MR. PARSONS: Are you amending the motion?  
3 Is that what's --

4 CHAIRPERSON GRIFFIS: No. We're putting  
5 it off totally, tabling the motion till next week.  
6 We're going to set this for a special public meeting,  
7 unless there's a strong objection and continue today.  
8 There was a motion for a bench decision today. The  
9 Board members indicated that perhaps this is better  
10 processed under 2101, but the Board is not prepared to  
11 condition it at this point. It would need  
12 conditioning, and therefore we would just need that  
13 submission of a draft order from the Applicant's  
14 attorney and we could bring it up next Tuesday.

15 MR. GLASCOW: I guess what we were  
16 thinking is that just like almost summary order that  
17 you have the summary order is that the Board takes the  
18 action and we submit the summary order for the record,  
19 and the Board reviews the summary order.

20 CHAIRPERSON GRIFFIS: Yes.

21 MR. GLASCOW: I mean, that's what  
22 generally happens.

23 VICE CHAIRPERSON MILLER: That's what I  
24 was saying before was, I was put on the spot where I  
25 could have tried to articulate the conditions to

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1 parallel the provisions and the regulations, but I  
2 preferred if you took the time to submit an order with  
3 those conditions so that we actually get it accurate.  
4 We don't make a quick stab at articulating those  
5 conditions.

6 MR. GLASCOW: Okay. Well, what we thought  
7 was that the Board could take action today and the  
8 Board then needs to issue an order, and the Board can  
9 review the draft order and see whether that is the  
10 order that it would like to use.

11 VICE CHAIRPERSON MILLER: I guess maybe we  
12 should phrase it differently, that you submit proposed  
13 conditions that would go along with variance relief  
14 under 2101. But I don't think that the Board is  
15 prepared right now to vote on the conditions without  
16 seeing those first or articulating them. The point  
17 was that you would be able to better articulate it.  
18 It's only a week's difference.

19 CHAIRPERSON GRIFFIS: Two days.

20 MR. GLASCOW: That's fine.

21 CHAIRPERSON GRIFFIS: Put it in a draft  
22 order, summary order with conditions. And I would  
23 give you direction that the past order that the Board  
24 issued under 17232 and the application that's here.  
25 The elements are going to be the same. The relief

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1 section is different for adequacy of the  
2 appropriateness of you looking at the conditions.  
3 We'll ask you to propose them to the Board. We'll  
4 have them in by three o'clock on Thursday. Is that  
5 possible? Yes? That will get us in timely manner for  
6 Tuesday special public meeting, first thing in the  
7 morning. We should be able to take this up and move  
8 on. Everybody okay with that?

9 Ms. Bailey, you mind reiterating that  
10 schedule?

11 MS. BAILEY: The Board will take this up,  
12 Mr. Chairman, next Tuesday, that's October 25, at a  
13 special public hearing, at 9:30 in the morning. Mr.  
14 Glasgow, you are to file a draft summary order by this  
15 coming Wednesday, at 3 p.m., sir. This coming  
16 Thursday.

17 MR. GLASCOW: Thursday?

18 MS. BAILEY: At 3 p.m.

19 CHAIRPERSON GRIFFIS: Good. Everyone  
20 clear on that? The last bit of administrative  
21 procedure we need to do, I need to ask Mr. Etherly if  
22 he is accepting and tabling the motion in which he's  
23 a seconder on and if he is okay with that?

24 MR. ETHERLY: Mr. Chair, I'm comfortable  
25 with the direction, and I appreciate the conference of

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1 my colleague. I was inclined to move forward today,  
2 but I'll go with the consensus of the Board and we'll  
3 move forward and get it done next week.

4 CHAIRPERSON GRIFFIS: Excellent. The  
5 gentleman has reinvoked your motion, it's been  
6 seconded next week, and Tuesday, which we will decide  
7 this. Very well. Thank you all very much.

8 Let's move ahead then and call the next  
9 case for the afternoon, 17335.

10 MS. BAILEY: Application Number 177335.  
11 This is an appeal of the Kalorama Citizens  
12 Association, pursuant to 11 DCMR 3100 and 3101, from  
13 the administrative decision of the Zoning  
14 Administrator of the Department of Consumer and  
15 Regulatory Affairs.

16 Appellant alleges that the Zoning  
17 Administrator erred by issuing Building Permit Number  
18 B46999, dated March 2, 2005, allowing the erection of  
19 a roof deck. Appellant contends that the roof deck  
20 violates the maximum building height under Subsection  
21 2510.1. The property is located in the R-5-D District  
22 at 1819 Belmont Road, Northwest, Square 2551, Lot 45.

23 CHAIRPERSON GRIFFIS: Excellent. Let me  
24 just go through very briefly because I went through in  
25 my opening not the order of procedures for the appeal

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1 application. So of course for this we will have and  
2 begin with a statement of witnesses of the Appellant.  
3 We will move to the Zoning Administrator or other  
4 government officials and their case presentation.  
5 We'll go to the case of the owner, lessee or any  
6 intervener that we establish in this, if not, the  
7 Appellants, of course, and the ANC within which the  
8 property is located. We will also hear from the  
9 Intervener again if we have any established. And,  
10 lastly, we'll have rebuttal and closings by the  
11 Appellant. I'll go through that if need be, but I  
12 think we're all familiar with the procedures with  
13 this.

14 So I'll open it up, have you introduce  
15 yourselves and a very good afternoon.

16 MS. BROWN: Excuse me, Mr. Chairman, I  
17 have a preliminary matter.

18 CHAIRPERSON GRIFFIS: Let's have everyone  
19 say hello, for the record.

20 MS. BROWN: Oh, I'm sorry. Hello.

21 CHAIRPERSON GRIFFIS: And then we'll get  
22 it.

23 MS. HARGROVE: I'm Ann Hargrove, the  
24 Zoning Chairman for the Kalorama Citizens Association,  
25 and this is our counsel for the day, Mr. Hargrove.

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1 CHAIRPERSON GRIFFIS: Excellent.

2 MS. HARGROVE: One last point to make to  
3 you, we can't hear at the back of the room, so it  
4 would be wise for each of you to realize you don't  
5 have your usual great booming voices through the  
6 microphone and help us a little bit with that.

7 CHAIRPERSON GRIFFIS: Thank you very much.  
8 We appreciate you bringing that to our attention.  
9 You're absolutely right. We will try and speak up,  
10 except for that which we don't want you to hear with  
11 our own bickering, but that we'll try and keep to  
12 ourselves. Yes?

13 MS. BROWN: Good afternoon, members of the  
14 Board. My name is Carolyn Brown, with the law firm of  
15 Holland & Knight, on behalf of Montrose, L.L.C. I  
16 need to clarify the intervener status of Montrose. It  
17 was my understanding that they had a small ownership  
18 interest still in this property. They have sold their  
19 ownership interest, but we would still request  
20 intervener status under Section 3112.15, which allows  
21 the Board to grant intervener status at the Board for  
22 cause shown. And Montrose still has warranty  
23 obligations to the owners of the building, and  
24 obviously they were the permit holder, they were the  
25 owner at the time the permit was issued, and they

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1 clearly are the developer and have had a long-standing  
2 history with this property. So we would request  
3 intervener status on that basis.

4 CHAIRPERSON GRIFFIS: Okay. And do you  
5 want to clarify, what is warranty status?

6 MS. BROWN: They have warranty obligations  
7 as the developer who constructed the building to the  
8 individual owners.

9 CHAIRPERSON GRIFFIS: And for how long  
10 does that last?

11 MS. BROWN: Two years.

12 CHAIRPERSON GRIFFIS: And so my  
13 understanding is then for two years they have to  
14 maintain that everything works in proper order,  
15 essentially? Is that what it is?

16 MS. BROWN: Yes, and I think in particular  
17 that there maybe -- excuse me, I'll just consult with  
18 my folks for a quick moment and clarify.

19 CHAIRPERSON GRIFFIS: Sure.

20 MS. BROWN: One of the obligations is that  
21 the building was constructed in accordance with the  
22 permits and the rules and regulations.

23 CHAIRPERSON GRIFFIS: Okay. So they  
24 maintain responsibility for two years for a number of  
25 elements.

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1 MS. BROWN: That's correct.

2 CHAIRPERSON GRIFFIS: Okay. And that is  
3 -- very well.

4 MR. HARGROVE: Mr. Chairman, this is  
5 somewhat curious situation. It's one thing for  
6 Montrose to have responsibility, that is, presumably,  
7 a legal obligation to the new owners to see that the  
8 building complies with permits or in other respects  
9 the zoning regulations, it's another thing that  
10 Montrose has the legal ability to carry out the  
11 determinations this Board that the building does not  
12 comply with the zoning regulations or that the permit  
13 itself did not comply with the zoning regulations. It  
14 would be useful and, it seems to me, probably  
15 essential to know who the new owner is and whether  
16 that legal relationship exists. Otherwise, this case  
17 seems to be somewhat beside the point.

18 MS. BROWN: If I may respond. The appeal  
19 is against the decision of the Zoning Administrator  
20 and not against the property owner or whoever -- it's  
21 a condo association and there are, I believe, five  
22 individual owners of the units.

23 CHAIRPERSON GRIFFIS: No, I absolutely  
24 agree. I'm not sure that I follow your position.

25 MR. HARGROVE: Well, the question is

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1 whether any party to this proceeding would have the  
2 authority to carry out the determination of this  
3 Board. Presumably, the Zoning Administrator would,  
4 but does Montrose, who is seeking to intervene, have  
5 any authority to carry out the determinations of this  
6 Board in light of the fact it no longer owns any  
7 interest in the property?

8 CHAIRPERSON GRIFFIS: Well, I didn't hear  
9 the statement that they don't own an interest but  
10 rather they have a warranty responsibility for up to  
11 two years. So I guess the direct question is, if a  
12 decision on this appeal was established to the Board,  
13 it was needed to be enforced by the Zoning  
14 Administrator, would Montrose be the one that  
15 performed that which would come into compliance with  
16 this appeal?

17 MS. BROWN: I don't know that that's -- I  
18 can answer that question two ways. First, I think  
19 that's something that would be worked out under the  
20 warranty obligations with the individual owners at the  
21 point that that becomes an issue.

22 But, secondly, intervener status has  
23 nothing to do with who is going to perform any  
24 corrective work to the building. It's a question of  
25 enforcement once the Board of Zoning Adjustment

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1 renders a decision and the inspectors go our there and  
2 tell whoever the owners are to comply. And then if  
3 the warranty obligation shifts that burden to  
4 Montrose, that's fine, but it's the enforcement --

5 MR. HARGROVE: Which seems to me to be  
6 precisely the point. The owner is not a party to this  
7 proceeding.

8 MS. BROWN: Nor does the owner have to be  
9 a party to this proceeding.

10 CHAIRPERSON GRIFFIS: What was the section  
11 that you cited to establish it was 3112?

12 MS. BROWN: 3112.15.

13 CHAIRPERSON GRIFFIS: Yes. At the time of  
14 the hearing of the appeal, the Board, in its  
15 discretion, for good cause shown, may permit persons  
16 who have a specific right or interest that will be  
17 affected by action on the appeal to intervene in the  
18 appeal.

19 So what we're trying to establish is that  
20 in order to establish an intervenor that you would be  
21 affected by the action. And so why don't you just  
22 state simply the affect on Montrose if this was --  
23 once this is acted upon.

24 MS. BROWN: The specific affect that this  
25 decision would have if the decision comes out that

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1 there is indeed an error in the Zoning Administrator's  
2 decision is that Montrose has a warranty obligation  
3 under the compliance for the decision, whatever that  
4 decision may be.

5 MR. HARGROVE: Do the current owners have  
6 a corresponding duty to allow Montrose to carry out  
7 that determination, is the question, or are we left in  
8 a legal limbo --

9 CHAIRPERSON GRIFFIS: I understand.

10 MR. HARGROVE: -- in which Montrose is  
11 obligated under the warranty, which is a bilateral  
12 relationship between Montrose and the new owner, but  
13 nobody has any authority to go in and make the  
14 corrective measures?

15 VICE CHAIRPERSON MILLER: It sounds to me  
16 as -- if corrective action were required, which is a  
17 possibility if this appeal were granted, that Montrose  
18 might have to pay for that. So it sounds like they do  
19 have an interest that I think would be recognized by  
20 this regulation.

21 CHAIRPERSON GRIFFIS: Do you concur, Ms.  
22 Brown?

23 MS. BROWN: Yes, I do.

24 CHAIRPERSON GRIFFIS: Follow up?

25 MR. HARGROVE: I beg your pardon.

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1                   CHAIRPERSON GRIFFIS: Do you have any  
2 follow up to that?

3                   MR. HARGROVE: Let me get a reading on a  
4 procedural point. As Ms. Hargrove said, it would be  
5 useful if all of the members of the Board would speak  
6 into the microphone, if the microphone is operating,  
7 in any event with all the force and clarity that your  
8 remarks deserve, if not more so.

9                   CHAIRPERSON GRIFFIS: Good.

10                  MR. HARGROVE: Particularly in my case,  
11 because I do have a hearing impairment, and I don't  
12 want to miss any precious word.

13                  CHAIRPERSON GRIFFIS: Exactly. So, and if  
14 you think you have missed it, just bring it to our  
15 attention and we'll repeat. Ms. Miller will repeat  
16 what she was saying or I can --

17                  VICE CHAIRPERSON MILLER: Okay. What I  
18 was saying was that if this appeal is granted, it's  
19 possible that corrective action would be required, and  
20 that Montrose, by its warranty relationship, would  
21 have to pay for that action. Therefore, it seems to  
22 me that Montrose should be granted party status, that  
23 it does have the type of interests that these  
24 regulations should cover.

25                  MR. HARGROVE: Well, this may well be the

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1 case, but it does seem to me there is a question about  
2 the position of that hypothetical new owner who finds  
3 himself or herself confronted by an order from this  
4 Board in a proceeding to which he or she is not a  
5 party.

6 CHAIRPERSON GRIFFIS: This does not  
7 require that the owner would be an intervenor in an  
8 appeal. But we can proceed with the owner or not.

9 MR. HARGROVE: We're not aware of whether  
10 the new owners are even aware of this appeal.

11 CHAIRPERSON GRIFFIS: Okay. Understood.  
12 Understood. And I think I understand your point. I'm  
13 not sure that's a requirement that would have been  
14 noticed, but we wouldn't do a roll call or subpoena  
15 them to be here.

16 That being said, it has been brought to  
17 our attention, we've been asked to grant intervenor  
18 status, and I'll hear any objections to doing that as  
19 it's been put forth. If there are no objections from  
20 the Board members, we'll take it as a consensus then  
21 and establish Montrose as an intervenor in the  
22 proceedings and move ahead with that.

23 Let's go right, then, to the body of the  
24 appeal, and we'll turn it over to you for presentation  
25 of the case.

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1 MS. HARGROVE: We have another preliminary  
2 matter, which is a modest one, which is that Alan Roth  
3 has sent a letter. He is upstairs in a hearing. No,  
4 we are not in the same building -- excuse me -- but he  
5 is at a hearing which he could not miss today, and so  
6 we would like to enter it into the record. If he does  
7 come, he can present some of the content of it  
8 himself.

9 Secondly, I do want to say before Mr.  
10 Hargrove continues on our behalf that we understand  
11 that this is an appeal that is basically on the law.  
12 We were very tempted to -- all the neighbors wanted to  
13 come down here and do the riot act, as they've already  
14 done before you, about the adverse effects of this  
15 situation. But we do understand that that's  
16 impossible.

17 Although a couple of them are here today  
18 to hear this proceeding, I doubt at this point that we  
19 will recognize them in the course of the proceeding,  
20 other than to say that they are here and interested --

21 CHAIRPERSON GRIFFIS: Good.

22 MS. HARGROVE: -- because this is not a  
23 case about adverse effects. This is about a case of  
24 interpretation of the law.

25 CHAIRPERSON GRIFFIS: Excellent. And let

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1 me just take not enough time I think to thank you for  
2 your understanding of the exact processing of which  
3 we're going to. Too many times we do get appeals that  
4 kind of blow out of proportion and people have rising  
5 expectations of what we're actually going to be able  
6 to do or decide or hear, and then are fairly  
7 disappointed by the fact that, one, they weren't able  
8 to testify or, two, it seemed like we weren't  
9 listening to their testimony.

10 I think I myself -- but I think the rest  
11 of the Board would agree with me that both of you are  
12 very knowledgeable on these issues, and we appreciate,  
13 obviously, the time that you've had to focus clearly  
14 the presentation of the case you're about to bring as  
15 an appeal, and not a special exception or a variance,  
16 which would be totally different. So --

17 MR. HARGROVE: Thank you, Mr. Chairman,  
18 and thanks to all of the members of the Board for yet  
19 another session on this apparently interminable saga.

20 CHAIRPERSON GRIFFIS: And while we have  
21 that, I think I'm being interrupted, because we may  
22 have another preliminary matter. Is that correct?

23 MS. BELL: Yes, thank you. Lisa Bell with  
24 the Office of the General Counsel for DCRA. Good  
25 afternoon, everyone.

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1 I realize I come to this case a little  
2 late in the game, but we do have a concern with regard  
3 to the appeal and whether or not it is based on an  
4 error by the Zoning Administrator, or if it is really  
5 an appeal of a decision that was issued -- rendered  
6 earlier by this Board in 17109.

7 I realize no one has raised the issue of  
8 preclusion yet, but it appears from my understanding  
9 -- from my understanding of the prior case that this  
10 Board made a determination about the calculations for  
11 the actual roof deck plateau as -- or a platform, for  
12 lack of a better word.

13 And as a result of that, the Intervenor  
14 came back to DCRA and obtained a revised permit, which  
15 is the subject of this appeal. The revised permit  
16 follows somewhat verbatim the language that was  
17 provided by the Board in its directive or in its  
18 dicta, for lack of a better word, and its comments  
19 about the appropriateness of calculating the roof  
20 platform for the purposes of the Height Act.

21 As I understand the Appellant's argument,  
22 they seem to -- it seems to stem from the as-built  
23 calculations or the as-built measurement of the roof  
24 deck -- in other words, whether or not it's actually  
25 a plateau now, or whether or not it's fleshed as part

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1 of the membrane -- you know, a platform right above  
2 the roof membrane and the safety guard rails.

3 As far as DCRA is concerned -- or it's the  
4 ZA's position that the permit was issued pursuant to  
5 the directive by the Board issued in 17109, which, as  
6 I understand, it's the Intervenor's position also.

7 So my question would be twofold. If the  
8 Board is -- in this appeal, is it your intent to  
9 reconsider the calculation of the Height Act as  
10 compared from the roof platform to the surface roof  
11 deck in this appeal, or, for those issues that were  
12 settled in 17105, rely on that when it's issued in a  
13 written opinion?

14 CHAIRPERSON GRIFFIS: Anyone want to take  
15 that on? Oh, okay. I'll address it.

16 (Laughter.)

17 I don't -- I can understand where you're  
18 going in the Zoning Administrator's position, but I  
19 don't agree at all. If there was an official action  
20 that's being appealed, which we have set forth here,  
21 which is a revised permit, the Zoning Administrator --  
22 what's at issue here, and what is before us, is  
23 whether that determination by the Zoning Administrator  
24 was correct or not -- the basis of which we can get  
25 into, what -- that basis of the decision. And that

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1 will be the substance of what we're going to hear  
2 today, and we'll have to decipher that and deliberate  
3 on it.

4 But I don't -- I don't see -- essentially,  
5 as I'm understanding you, is not proceeding with this  
6 appeal based on the fact that there was a past  
7 procedure.

8 MS. BELL: Well, the second permit was  
9 issued pursuant to the language of the Board in the  
10 earlier appeal.

11 CHAIRPERSON GRIFFIS: So you say. Yes?

12 MR. HARGROVE: If I may, counsel is  
13 referring, as I understand it, not to a decision by  
14 the Board at the hearing on February 21st, or whatever  
15 it was, but rather to a comment by one member of the  
16 Board -- the Chairman as it happened -- expressing an  
17 opinion that a roof deck railing would be permitted  
18 under the Height Act if the floor of the roof deck did  
19 not exceed the Height Act limits.

20 There was no decision by the Board. This  
21 was an issue not before the Board at that time. It  
22 was a volunteered opinion. And, in fact, the  
23 discussion appended to the statement in opposition by  
24 Mrs. Brown makes quite clear that the Board was not  
25 making the decision as a Board, and then -- but merely

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1 heard this opinion and went on then to deal with the  
2 issues which were before it.

3 The Board doesn't have the authority to  
4 decide issues that have not been properly raised by  
5 the introduction of a proceeding, as this one does,  
6 and the party is given an opportunity to be heard. So  
7 there was no action by the Board.

8 Now, DCRA is free, if it wishes, to scan  
9 the content of the transcripts and see if it can  
10 define any basis for making its decisions, but there  
11 was no decision by the Board on the issue in question.  
12 That's the issue which is raised properly by this  
13 appeal.

14 CHAIRPERSON GRIFFIS: Understood.  
15 Comments, Ms. Miller? Questions?

16 VICE CHAIRPERSON MILLER: Yes. I just  
17 want to -- I mean, there is no final written order,  
18 obviously, by this Board, but it's coming. But the  
19 difference I see is in the previous case there was a  
20 deck that was found to be non-compliant with the  
21 Height Act, and now we have a different situation  
22 where we have a deck that is being represented as  
23 compliant with the Height Act. So they're different,  
24 and we have a different permit.

25 CHAIRPERSON GRIFFIS: So you're ready to

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1 proceed?

2 VICE CHAIRPERSON MILLER: Yes.

3 CHAIRPERSON GRIFFIS: Ms. Brown, comment?

4 None.

5 Follow up, Ms. Bell? Anything else?

6 MS. BELL: Only that, as I said, the  
7 permit at issue here is a revision from the first  
8 permit, so -- with plans showing the revised roof  
9 deck.

10 CHAIRPERSON GRIFFIS: So what are you  
11 actually asking us, then?

12 MS. BELL: Well, I think you just ruled  
13 against me.

14 CHAIRPERSON GRIFFIS: Well, we did.

15 (Laughter.)

16 Okay.

17 MS. BELL: So --

18 CHAIRPERSON GRIFFIS: Mr. Roth has joined  
19 us representing the ANC. I don't know if you caught  
20 all of this second preliminary motion. If so, did you  
21 have a comment on that? We'll give you an  
22 opportunity. None? Okay. I'm sure there's going to  
23 be plenty of time to address that.

24 So very well, then. Any other preliminary  
25 matters for the Board's attention?

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1                   Okay. Let's do, then -- we've been handed  
2 also, Mr. Hargrove, I believe a hearing statement by  
3 KCA. Is that correct, Mr. Hargrove?

4                   MR. HARGROVE: Yes.

5                   CHAIRPERSON GRIFFIS: Okay. So we have  
6 those. And this has been -- everyone else has copies  
7 of this distributed? Perfect. Let's move ahead,  
8 then.

9                   MR. HARGROVE: Well, thank you, Mr.  
10 Chairman. Briefly, the facts in this case are the  
11 following. Pursuant to earlier permits, Montrose, LLC  
12 erected a rooftop structure near the front of the  
13 building at 1892 Belmont Road. That structure  
14 consisted of a floor surface resting on rafters, which  
15 themselves rested on the roof surface, and a three-  
16 foot railing.

17                   Portions of this structure exceeded the  
18 applicable 70-foot height limit under the Height of  
19 Buildings Act, although some portions of that  
20 structure apparently did not because of the grade of  
21 the roof.

22                   And, accordingly, on June 22nd, after an  
23 appeal by Kalorama Citizens Association -- June 22,  
24 2004 -- as you know, this Board decided that the  
25 structure was in violation of the Height of Buildings

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1 Act, because such structures are not included in the  
2 list of accepted structures in the Height Act, which  
3 may exceed the height limits.

4 Montrose subsequently obtained a permit to  
5 substitute a different structure in the place of that  
6 structure, and did so, demolishing the original  
7 structure. This new structure consists of a floor  
8 surface resting on sleepers that, in turn, rest on the  
9 roof surface, and a three-foot railing.

10 Some portions of this structure, like its  
11 predecessor, exceed the height limits. And, according  
12 to Montrose at any rate, and the drawings that we have  
13 now received, some portions, including the floor  
14 surface, do not exceed the height limit.

15 Kalorama Citizens Association, supported  
16 by the ANC, is appealing that permit.

17 So the situation is this. We have two  
18 structures, which are identical in the respects that  
19 I just mentioned. The Board has determined that the  
20 first structure is in violation of the Height of  
21 Buildings Act, so the burden is on the developer and  
22 the issuer of the permit to come up with some legal  
23 basis in the Height Act, because it's the Height Act  
24 that is controlling this case, for concluding that  
25 structure number two is in any respect different.

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1           There is not -- there is no such basis in  
2 the Height Act. The Height Act makes no distinction  
3 between rooftop structures, of which only some portion  
4 exceeds the height limit, and those of which all  
5 portions exceed the limit.

6           Subparagraph (c) of the relevant section  
7 of the Height Act -- 6-601.05 -- states the basic  
8 prohibition on exceeding the stated height limit on  
9 residential streets. Then, as you're aware, as an  
10 exception to the basic prohibition, subparagraph (h)  
11 provides the exclusive list of types of structures  
12 that "may be erected to a greater height."

13           It does not say that only the top six  
14 inches or six feet or 50 percent or some other portion  
15 may exceed the limit. And it's clear that a structure  
16 on the permitted list would be allowed if every part  
17 of it exceeded the limit.

18           Conversely, a type of structure that  
19 extends above the limit but is not on the permitted  
20 list, which is what we're dealing with here, is not  
21 exempted simply because the bottom six inches or the  
22 bottom six feet or some other portion is below the  
23 limit. This appears to be the case with both the  
24 first structure and -- now demolished and the  
25 structure that we're dealing with here.

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1           The Congress clearly could have built such  
2 refinements into the legislation had it intended to do  
3 so, and it did not.

4           Now, even if the Congress had drafted the  
5 Act in this way, subparagraph (h) of this -- of the  
6 Act makes clear that the structures that are on the  
7 permitted list may not be used or constructed for  
8 human occupancy. And it is, in our view, beyond  
9 question that this roof deck, accessible only to the  
10 occupants of the top apartment of this building, is  
11 intended for human occupancy.

12           Montrose suggests certainly, I must say,  
13 that even if the floor of the structure is for human  
14 occupancy, its railing in some way should not be so  
15 regarded, on page 8 of their opposition. Leaving that  
16 aside, this -- it's worth noting that this human  
17 occupancy provision in the Height Act is not simply  
18 another technical add-on to the criteria that the  
19 Height Act sets forth.

20           It seems to us perfectly clear that the  
21 Congressional drafters apparently realized that as  
22 soon as they permitted rooftop structures to be used  
23 for human occupancy to begin exceeding the Height Act,  
24 the whole purpose of the Height Act limitation would  
25 be compromised, as indeed seems to be the case, I

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1 might say, by some of the photographs that are  
2 attached to Montrose's statement in opposition.

3 Now, Montrose's argument at page 7 that a  
4 roof deck constructed for use by occupants of a  
5 building is nevertheless not "used for human  
6 occupancy" under the Height Act, on the basis of the  
7 1953 Corporation Counsel opinion, is simply a logical  
8 fallacy. That opinion, incidentally, is appended to  
9 the statement -- joint statement of KCA and the ANC in  
10 this case, and it's one that you're familiar with from  
11 previous iterations of this problem.

12 Montrose bases its conclusion on a  
13 statement that -- in that opinion that the Act "was  
14 intended to prevent the use of enclosed space above  
15 the height limit for residential office or business  
16 purposes."

17 Now, recall that this opinion was asked  
18 for in order to determine whether the kinds of  
19 mechanical equipment, which the Height Act originally  
20 envisions as permissible in penthouses -- namely,  
21 elevator equipment -- might be supplemented by other  
22 forms of mechanical equipment in a penthouse, as the  
23 technology developed.

24 And ultimately the Corporation Counsel  
25 decided that it could be, that other forms of

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1 mechanical equipment would be appropriate. But the  
2 whole opinion was about penthouses, which, of course,  
3 are enclosed, so this statement that the Act was  
4 intended to prevent human occupancy of enclosed  
5 structures is not surprising at all, because that's  
6 what the opinion was about.

7 The statement does not imply that only  
8 enclosed space is barred by the Height Act above the  
9 height limits, and neither the opinion nor the Act  
10 itself in any way implies, let alone asserts, that the  
11 Height Act permits human occupancy of structures that  
12 are not on the permitted list, which is exactly the  
13 case that we're confronted with here.

14 In sum, the structure at issue here is,  
15 without question, a structure intended for human  
16 occupancy. The Height Act says nothing about whether  
17 it has a roof or is enclosed or the nature of the  
18 occupancy.

19 Moreover, Montrose has conveniently  
20 overlooked the other requirement for a permitted  
21 structure that this Corporation Counsel opinion  
22 clarifies, and that is that the structure, if it is to  
23 be permitted above the Height Act limit, be necessary  
24 for the functioning of the building.

25 Now, by no stretch of the imagination is

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1 this roof deck necessary for this structure -- for the  
2 functioning of the building. It has nothing to do  
3 with the mechanical systems of the building. It's for  
4 the recreational enjoyment of the residents.

5 So there is no basis for saying that the  
6 Height Act would permit this structure, a structure  
7 intended for human occupancy, to exceed the Height Act  
8 limit.

9 Well, there being no support in the  
10 language of the Act, Montrose presents a list of  
11 existing buildings with pictures that it says have  
12 roof decks and railings that exceed the applicable  
13 Height Act limits.

14 This may well be true for, as we have  
15 pointed out in earlier sessions, it is unfortunately  
16 the case that in one way or another over the years  
17 developers have been able to put up a number of  
18 buildings in the District, including large commercial  
19 projects, that violate various provisions of the  
20 Height Act.

21 What is not true is that the mere fact of  
22 the existence of these buildings can, by some sort of  
23 legal alchemy, be transmuted into interpretations of  
24 the Height Act, constituting some sort of legal  
25 precedent.

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1           The Board has already rejected this very  
2 argument in KCA 1, in finding that the structure in  
3 that case violated the Height Act. Montrose would  
4 have us believe that even if, as the Board concluded,  
5 the existence of these buildings constitutes no  
6 precedence, these buildings that have the railings and  
7 the pergolas and other apparatus extending above the  
8 Height Limit, even if the mere existence of these  
9 buildings constitutes no precedent, that a -- the  
10 floor of the roof deck is permitted, perhaps they can  
11 somehow be taken as a precedent for permitting the  
12 railing alone. It's a complete non sequitur.

13           As court decisions have made clear, the  
14 existence of these buildings is without value or  
15 effect as a legal precedent. To constitute precedent  
16 in our system, there must be a decision articulated by  
17 an authorized tribunal on an issue raised before it,  
18 and considered by it.

19           In place of such decisions, Montrose  
20 offers photographs of the buildings. The reason why  
21 no accompanying BZA or Zoning proceedings are cited  
22 would appear to be, although we haven't been able to  
23 research each one of these buildings, that for those  
24 projects as to which such proceedings exist the orders  
25 contain no mention of the Height Act, or at least, in

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1 any event, no indication that the specific issue of  
2 the lawfulness of a railing exceeding the Height Act  
3 was presented to or raised by or considered by the  
4 Board or Commission in question.

5 That is certainly the case for the one  
6 building cited by Montrose for which we have thus far  
7 been able to locate a BZA order. That's Case  
8 Number 16881 of July 24, 2002, which relates to the  
9 building at 400 Massachusetts Avenue.

10 So Montrose's argument, in effect, is  
11 this: in the case of these buildings -- show me the  
12 photographs -- there must have been plans indicating  
13 that a railing would exist in the completed structure  
14 that exceeded the height limit. Therefore, the Board  
15 must be assumed to have been, however unwittingly,  
16 interpreting the Height Act to allow the railing in  
17 giving approval to the overall project.

18 This simply is not the way precedent is  
19 made in a legal system, and certainly not in our legal  
20 system. In order to constitute precedent, as I've  
21 said, there must be on a particular point of law that  
22 point is being properly raised before the tribunal,  
23 and then specifically and explicitly addressed in its  
24 opinion.

25 The Court of Appeals has repeatedly said

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1 this, and I will not cite the cases or the statements  
2 of the Court for reasons of brevity, but I'll submit  
3 that at a later point.

4 So unable to present any BZA decision that  
5 the Height Act allows railings to exceed the height  
6 limit, Montrose asserts that the opposition's  
7 statement, page 5, that at least the Zoning  
8 Administrator had a long-standing interpretation to  
9 the effect -- to that effect and "has consistently  
10 defended it."

11 Well, we have before us no record of any  
12 case in which the question has even been posed to the  
13 Zoning Administrator, let alone one in which he or she  
14 was required to defend a position on it. The Zoning  
15 Administrator cannot now retroactively infer such a  
16 long string of decisions or determinations by pointing  
17 to the existence of these non-complying buildings.

18 If anything, the evidence indicates a  
19 pattern in more recent years of paying no attention to  
20 the Height Act at all unless it was absolutely  
21 unavoidable. For example, the plans on the basis of  
22 which this contested permit was issued do not disclose  
23 the elevation of any portion of the building, let  
24 alone of the structure that is at issue here, nor does  
25 the record of the permit give any indication that

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1 either the elevation of the structure or its  
2 consistency with the Height Act was considered in  
3 approving the permit.

4 Another item, the Board will recall that  
5 in the approval of the original permits of KCA -- in  
6 the approval of the original permits in KCA 1, a  
7 former Zoning Administrator, acting under contract,  
8 ignored the Height Act all together -- again, even  
9 after the decisions on June 22, 2004, in KCA 1, which  
10 had dealt exhaustively, if not exhaustingly, with  
11 Height Act issues, and the question of whether they  
12 were properly raised at various stages of the approval  
13 process.

14 A case was presented to this Board --  
15 Number 17109 -- on July -- the order is July 14, 2004,  
16 by counsel in the present case in which the Height Act  
17 issue in that case was not presented to the Board, and  
18 is not mentioned, of course, in the order.

19 Finally, as just noted, the BZA  
20 proceedings regarding the buildings listed by Montrose  
21 in this case, the non-compliant buildings that are the  
22 subject of this, in those proceedings there is  
23 apparently no mention of the very issue in support of  
24 which these buildings are pointed to and the  
25 photographs presented.

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1           So it is in this context, I would suggest,  
2           that the Board, which after all has a custodial  
3           responsibility for the proper application of the  
4           Height Act and the zoning regulations, it is in this  
5           context that the Board should evaluate these claims  
6           that one can retroactively discover so-called long-  
7           standing interpretations or precedents on Height Act  
8           issues.

9           Well, Montrose then argues that even if  
10          the Board, in the present case, determines that what  
11          it calls this consistent historical interpretation is  
12          in error, the principle of stare decisis, or  
13          precedent, requires the Board to apply its new  
14          interpretation, its so-called new interpretation, only  
15          prospectively, and it cites the Smith case, Smith v.  
16          District of Columbia BZA, a 175 case.

17          Now, there are three things wrong with  
18          this that I'll briefly enumerate. First, as just  
19          pointed out, there is no long-standing historical  
20          interpretation or string of BZA decisions constituting  
21          precedence for the proposition that railings are  
22          exempt from Height Act limits. And observing, after  
23          the fact, that some developers have managed to put  
24          buildings up without regard to Height Act limitations  
25          does not create one.

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1           So the principle of state decisis does not  
2 come into play here. It comes into play only when  
3 there are genuine precedents that have to be  
4 established in accordance with the underlying  
5 principles of any legal system.

6           Secondly, even if there were long-standing  
7 precedent, the Smith case does not stand for the  
8 proposition that Montrose cites it for, which is that  
9 a rule -- a contrary or new rule must be applied only  
10 prospectively.

11           This was a case in which a homeowner  
12 asserted that proposition in an effort to make his or  
13 her case. The Board failed to consider that  
14 contention, and the Court of Appeals decided simply  
15 that the Board should have considered it. The Court  
16 of Appeals took no position on the validity of the  
17 assertion that only prospective -- only -- I'm sorry,  
18 only prospective application would be admitted.

19           Finally, the Court of Appeals has  
20 repeatedly held that an agency may depart from prior  
21 determinations or interpretations, so long as it  
22 presents a reasoned explanation for the change.

23           Finally, there is the argument that since  
24 the floor of the new structure is below 70 feet in  
25 elevation, the Board should simply pay no attention to

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1 the portions of the structure that exceed the height  
2 limit and allow the whole structure to remain, in the  
3 interest of safety, particularly, it is noted, since  
4 under the construction codes a roof deck can't be  
5 built without a railing.

6 Well, if the Board were the legislature,  
7 perhaps it might want to enact new rules to this  
8 effect. I'm not going to argue the policy one way or  
9 another. Not being the legislature, however, the  
10 Board would not -- would have no legal basis for  
11 enacting new rules to this effect.

12 The argument that it should do so is based  
13 purely on policy and not on law. It has even been  
14 suggested, as we noted earlier, that since the Height  
15 Act was designed to address safety concerns -- this I  
16 think was the Chairman's suggestion -- namely, fire  
17 safety -- it would be absurd to invoke the Height Act  
18 as a bar to a safety feature, such as a railing.  
19 There may be a certain logic to that as a matter of  
20 policy, but a look at the principles that govern  
21 statutory interpretation compels precisely the  
22 opposite conclusion in this case.

23 Consider the fact that the drafters were  
24 keenly cognizant of safety concerns -- fire safety as  
25 it happens -- the fact that they did include in the

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1 Act an enumeration of structures that could exceed a  
2 height limit, but the further fact that they did not  
3 include any such accepted structures that had to do  
4 with safety, is an even clearer indication that they  
5 had no intention to permit exceptions for rooftop  
6 structures based on safety considerations.

7 At the same time, significantly, they made  
8 explicit -- the same provision -- their intention not  
9 to permit exceptions for rooftop structures that are  
10 intended or constructed for human occupancy.

11 So the Act makes clear that the portion of  
12 a building that extends above the allowable limit, as  
13 is indisputably the case here, is prohibited unless it  
14 is enumerated in the list of exceptions and is  
15 prohibited in any event if it is for human occupancy  
16 and not necessary for the functioning of the building.

17 The Board's authority is limited to  
18 applying this existing law and regulations. It  
19 obviously has no power to make new rules, whether for  
20 reasons of safety or other policy considerations, and  
21 certainly not new rules that contravene an act of  
22 Congress.

23 So, in conclusion, the existing law is if  
24 you can't build a roof deck without a railing, without  
25 violating the construction code, don't build it. And

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1 if you can't put up a roof deck with a railing without  
2 violating the Height Act, likewise don't build it, or  
3 else perhaps lower your roof.

4 This points, I would suggest, to what is  
5 the real issue in this case in practical terms. And  
6 that is whether property owners who want to install  
7 these wonderful rooftop recreational facilities, which  
8 are, in fact, encouraged by the zoning regulations in  
9 some zoning districts for all residents, but who are  
10 unwilling to give up three or four feet of height in  
11 order to do so lawfully, whether such property owners  
12 will be compelled to do so, or whether, on the other  
13 hand, as with this really terribly unfortunate project  
14 in the present case, they will be allowed to cram  
15 every possible foot of marketable, occupiable space in  
16 -- onto the lot, up to the height limit, and then cram  
17 even more occupiable space on top of the height limit.

18 The permit in the present case purported  
19 to authorize such a structure that violates the Height  
20 Act. The permit should be revoked and the structure  
21 removed.

22 Thank you.

23 CHAIRPERSON GRIFFIS: Thank you very much.

24 Do you want --

25 VICE CHAIRPERSON MILLER: Okay. I just

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1 have a couple of questions. First of all, I wanted to  
2 make sure -- are you challenging the roof deck? I'm  
3 sorry. Are you challenging the roof deck in this  
4 case? I think you made mention to it, but I didn't  
5 think that was at issue, that -- it's not only --  
6 isn't it just the railings that are at issue in this  
7 appeal?

8 MR. HARGROVE: Our challenge is to the  
9 structure that was authorized by the permit, which is  
10 -- consists of a sleeper zone resting on the roof,  
11 connecting members, the floor, the deck, the railing.  
12 We see no basis in the -- in the Height Act, as I've  
13 just explained, for allowing a structure that exceeds  
14 the Height Act that is not for -- necessary for the  
15 functioning of the building and is intended for human  
16 occupancy to be permitted.

17 Obviously, other parties have endeavored  
18 to, figuratively, saw off the railing and give it some  
19 separate embodiment.

20 CHAIRPERSON GRIFFIS: I think we  
21 understand your position. But the direction question,  
22 as I understand it, you're appealing the entire -- all  
23 the elements in the revised permit. Is that correct?

24 MR. HARGROVE: Well, all the -- all of the  
25 elements in the new permit. The new permit was not a

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1 revision.

2 CHAIRPERSON GRIFFIS: I'm sorry. The --

3 MR. HARGROVE: There were revisions

4 from --

5 CHAIRPERSON GRIFFIS: You're absolutely

6 right. In the new --

7 MR. HARGROVE: -- the previous case.

8 CHAIRPERSON GRIFFIS: -- permit for the

9 deck.

10 MR. HARGROVE: Yes.

11 CHAIRPERSON GRIFFIS: Okay.

12 VICE CHAIRPERSON MILLER: But is your

13 argument that the roof deck and railings are one

14 structure, or are you arguing it two different ways?

15 One is they're one structure, or -- or just -- and,

16 second, the railings by themselves.

17 MR. HARGROVE: Well, I don't know that it

18 makes much difference, as far as the law is concerned.

19 But, in fact, the permit authorized a structure, which

20 consisted of the elements that I just described, and

21 the structure exceeds the -- exceeds the height limit.

22 VICE CHAIRPERSON MILLER: Okay. And I

23 just want to follow up on one other point that you

24 make about the Height Act that -- the Height Act makes

25 clear that any portion of a building that extends

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1 above the allowable limit, as is indisputably the case  
2 here, is prohibited unless enumerated on the list of  
3 exceptions.

4 Okay. My question is -- I think at one  
5 point you did make reference to penthouse has been  
6 construed by the Corporation Counsel -- penthouse over  
7 elevator shafts, which is specifically enumerated, has  
8 been construed to include penthouse over stairways.  
9 Now, that's not specifically enumerated there. How do  
10 you reconcile that?

11 MR. HARGROVE: That's correct. And it is  
12 accepted that on the basis of the Corporation Counsel  
13 opinion the -- a provisional concept of penthouses  
14 containing functional equipment could properly be  
15 extended to other kinds of penthouses, including  
16 functional equipment.

17 But there was no -- there is no basis at  
18 all for saying that a roof deck or a roof deck  
19 railing, if you prefer, fits into any such exception.  
20 It is on the basis of the rationale of that opinion  
21 that various kinds of mechanical equipment have been  
22 permitted to exceed the Height Act, including  
23 antennas, for example, and air conditioning equipment.  
24 But it has no bearing on whether a structure of this  
25 sort is permitted under the Height Act.

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1 VICE CHAIRPERSON MILLER: Thank you.

2 CHAIRPERSON GRIFFIS: Other questions?  
3 You made the point when you started out showing the  
4 similarities of the structure, and it was -- one of  
5 the arguments was the past was found not to be in  
6 accordance with proper issuance of a permit;  
7 therefore, this one is.

8 Can you just restate what you found the  
9 similarities -- you kept speaking about they were both  
10 on sleepers. Is it the constructability that is  
11 similar?

12 MR. HARGROVE: They are similar in  
13 structure, but the legally relevant similarities is  
14 that both of them had parts which extend above the  
15 Height Act limits, and both of them apparently had  
16 parts which were below the Height Act limit. And in  
17 KCA 1, the fact that that -- that structure rested in  
18 part on members that were below the Height Act limit  
19 had nothing to do, or did not prevent the Board from  
20 deciding that the structure exceeded the height limit.

21 The burden is on the proponents of this  
22 structure, it seems to me, to find some -- as I've  
23 said, to find some basis in the Height Act for  
24 distinguishing between the two structures. And we see  
25 none, as I have argued, whether on the basis of safety

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1 or any other consideration.

2 And, certainly, the Height Act does not  
3 open the door to any sort of proposition that a  
4 structure, portions of which are below the height  
5 limit, should be allowed, if any portion of it exceeds  
6 the height limit.

7 CHAIRPERSON GRIFFIS: Okay. And your  
8 point there -- okay. And was I following you  
9 correctly that the writing of this, the Height of  
10 Buildings Act of 1910, incorporated all those aspects  
11 of safety that would ever have been anticipated?  
12 Meaning you were saying that today we should look at  
13 safety issues the same way as they did then, otherwise  
14 they would have incorporated all those that we have  
15 today?

16 MR. HARGROVE: Well, I'm saying simply  
17 that if the Congress had been concerned about safety,  
18 to the extent of saying that any feature or structure  
19 of the building that had a safety purpose would be  
20 permitted to exceed the height limits, like penthouses  
21 for elevator shafts and other mentioned, it would have  
22 said so.

23 And it certainly cannot be presumed to  
24 have had that intention, because it was already  
25 cognizant of safety issues very keenly. In fact, it's

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1 not clear, as you know, whether the primary --

2 CHAIRPERSON GRIFFIS: There is --

3 MR. HARGROVE: -- motivation for the Act  
4 was concern about fire safety, or its primary  
5 motivation was the concern of --

6 CHAIRPERSON GRIFFIS: It kind of suggests,  
7 though, that the Federal Government has never changed  
8 our safety issues since 1910, which doesn't seem very  
9 logical. I mean, our building safety aspects have  
10 changed dramatically over the last 10, 20 years.  
11 You're saying that -- that, no, for anything that was  
12 on the roof or attendant to the Height Act, they  
13 anticipated and they knew of them all, and, therefore,  
14 didn't incorporate any.

15 For instance, like the fire safety in  
16 buildings now is a sound attenuation in the  
17 enunciators and the strobe lights. All of those were  
18 anticipated in 1910, but weren't incorporated?

19 MR. HARGROVE: No. The point is they had  
20 no intention of dealing -- of passing a piece of  
21 legislation that took safety concerns into account and  
22 attempted to implement those concerns except as to  
23 fire safety.

24 There is no evidence that they had any  
25 such concerns, and the fact that they were concerned

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1 about safety but did not include any exception for  
2 safety devices makes it even clearer --

3 CHAIRPERSON GRIFFIS: Were they not  
4 concerned about fire rating, then? Material fire  
5 rating and separations, because they didn't include it  
6 in that?

7 MR. HARGROVE: Yes. That doesn't seem  
8 surprising to me. This Act was not intended to be a  
9 fire code. It was intended for quite specific  
10 purposes.

11 And your mention of the various pieces of  
12 legislation and codes that have succeeded this Act in  
13 the last 95 years makes the very point that I'm trying  
14 to make, and that is that if you want to change rules  
15 about the -- what sorts of structures are permitted  
16 above the height limit, you need new legislation, not  
17 an effort by this Board to make new rules, because, as  
18 we all agree, it's beyond the authority of this Board  
19 to make new rules.

20 CHAIRPERSON GRIFFIS: No. I wasn't  
21 stepping into the fact of who makes new rules. I was  
22 trying to understand your point that all of the rules  
23 were understood and known of, and whatever was left  
24 out was purposely left out, which opens up a huge  
25 universe of things that were not incorporated into the

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1 Height Act of 1910.

2 But that being said, my understanding is  
3 that your position is that a rail is -- well, I don't  
4 want ask that right now.

5 Okay. Let's move on. Are there any other  
6 questions at this time?

7 VICE CHAIRPERSON MILLER: I just have one  
8 other follow up, and this is from your -- this is from  
9 your pleading, but it's what you're talking about  
10 anyway. But you make a point about it bars any  
11 structure constructed or used for human occupancy.

12 Now, does that mean on the flip side that  
13 other structures could be allowed as long as it  
14 doesn't -- as long as it's not constructed or used for  
15 human occupancy?

16 MR. HARGROVE: I'm not sure I understand  
17 your question.

18 VICE CHAIRPERSON MILLER: Well, I'm just  
19 picking up from what you said in your pleading that if  
20 something -- one of the tests is that it can't be used  
21 for human occupancy, that that's one -- a big  
22 distinction. And my question is: if we look at a  
23 structure, and it's clearly not used for human  
24 occupancy, does that mean it could be allowed?

25 MR. HARGROVE: Only if -- it does not mean

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1 that unless that structure can be fitted into one of  
2 the categories in the Height Act itself, the accepted  
3 categories. So you couldn't have a horse stable on  
4 the roof or a doghouse, because they don't --

5 VICE CHAIRPERSON MILLER: What do you mean  
6 by categories? Do you mean by like embellishments or  
7 things like -- what do you mean by it?

8 MR. HARGROVE: I mean the list of  
9 structures that are enumerated in subparagraph (h) of  
10 the section that I quoted in the Height Act, which  
11 includes, for example, penthouses for elevator  
12 equipment. The whole point is that that's an  
13 exclusive list of accepted structures, and you've got  
14 to fit your structure, if you want to -- if you want  
15 to have it exceed the height limit, into one of those  
16 categories.

17 The opinion of the Corporation Counsel  
18 expanded one of those categories, but -- so that you  
19 do have examples of mechanical equipment that were not  
20 in existence in 1910 that are now permitted. But  
21 there is no category into which you can fit a roof  
22 deck for recreational purposes, or a roof deck  
23 railing.

24 VICE CHAIRPERSON MILLER: Thank you.

25 CHAIRPERSON GRIFFIS: Anything else? Any

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1 other questions at this time? Were you going to call  
2 any witnesses?

3 MR. HARGROVE: No.

4 CHAIRPERSON GRIFFIS: Okay. Cross  
5 questions? Actually, I don't know how we're going to  
6 cross this, but legal counterquestions? Can we call  
7 it that?

8 MS. BELL: Yes. I want to add that that's  
9 exactly the point that I raised earlier about the  
10 substance of the appeal. The Appellant really hasn't  
11 raised issues related to the Zoning Administrator's  
12 error or the factual review of the technical review of  
13 the permit. But that aside, I would like to ask him  
14 a few questions about his legal argument, particularly  
15 with regard to some of the facts.

16 CHAIRPERSON GRIFFIS: Good. And before  
17 you do that, gather your thoughts. I want to have one  
18 quick clarification from the Board. I take it almost  
19 as a motion, and probably should take it as a motion,  
20 from the Kalorama Citizens Association to incorporate  
21 the prior appeal.

22 And I just wanted to make it clear that  
23 it's -- that it is my position that we have not  
24 incorporated the record into this current application,  
25 and I'll hear from -- from others. I don't think the

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1 record is closed to not accept any information that's  
2 submitted as part of the pieces, unless that comment  
3 on page 2 is specifically for the Appendix A, which  
4 was attached. And you can give me clarification on  
5 that.

6 MR. HARGROVE: We do not ask that the  
7 entire record of any of the previous proceedings be  
8 incorporated into this -- into this proceeding. But  
9 we did ask that that one document be regarded as a  
10 part of this record, as well as a part of the record  
11 of the previous proceedings.

12 CHAIRPERSON GRIFFIS: Excellent. And I  
13 think that's an excellent point itself. That's the  
14 clarification I needed in terms of Attachment A.

15 Okay. Questions?

16 MS. BELL: Good afternoon, Mr. Hargrove.

17 MR. HARGROVE: Yes.

18 MS. BELL: Mr. Chairman, if I may  
19 intervene. As I understand -- is this the  
20 presentation of DCRA, or is this cross examination of  
21 the Appellant?

22 CHAIRPERSON GRIFFIS: This is what we're  
23 going to call the time for cross examination. She has  
24 some questions of your legal analysis as -- I don't  
25 know, unless you're presenting testimony -- you are

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1 presented as the legal counsel to the Kalorama  
2 Citizens Association, so we haven't really heard  
3 testimony to cross. So we're having legal analysis  
4 questions for you.

5 MR. HARGROVE: We're having a legal  
6 repartee.

7 CHAIRPERSON GRIFFIS: Indeed.

8 MS. BELL: That's correct.

9 (Laughter.)

10 That's correct. At the beginning of your  
11 argument, sir, you indicated that there were two  
12 structures that your appeal focused on. Are the two  
13 structures the roof deck and the railing?

14 MR. HARGROVE: No. The two structures are  
15 the first roof deck and all of its parts, which  
16 consisted of a railing, the supporting members, and  
17 the floor of the structure, now demolished, and the  
18 second structure, which is the subject of this appeal,  
19 which is a new structure erected in place of the  
20 original one.

21 MS. BELL: Okay. So is it your argument  
22 that B449218, which is the revised permit, addresses  
23 the demolished roof deck as well as the reconstructed  
24 roof deck?

25 MR. HARGROVE: No. The new permit is not

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1 revised, I would suggest. It's a new permit, and it  
2 authorizes only the construction of a new structure.  
3 And it is that structure that we're appealing.

4 MS. BELL: Okay. And your classification  
5 as -- of B449218 as a new permit is based on what  
6 facts?

7 MR. HARGROVE: Based on what facts?

8 MS. BELL: Yes.

9 MR. HARGROVE: The facts that there was a  
10 new application for a new project, and a new number  
11 was assigned to a new permit.

12 MS. BELL: Did you review the application  
13 and permit for B449218?

14 MR. HARGROVE: I reviewed the record that  
15 is maintained by DCRA, yes, and in fact that record is  
16 -- which consists only of the application and some  
17 drawings, as well as the permit itself, is appended to  
18 our joint statement in this appeal.

19 MS. BELL: Okay. But the application and  
20 the permit for 449218 and its completion is attached  
21 to your submission? Is that your testimony?

22 MR. HARGROVE: No, because I don't know  
23 whether that's the complete record or not.

24 MS. BELL: Okay.

25 MR. HARGROVE: All I have is what was

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1 presented to me at the Records Division of DCRA when  
2 I asked for records of the permit and the permit  
3 itself.

4 MS. BELL: Okay. So it's possible that  
5 there were portions of the application that were not  
6 included with your submission?

7 MR. HARGROVE: It's quite possible. I've  
8 had that experience before in dealing with the  
9 Records --

10 MS. BELL: Okay.

11 MR. HARGROVE: -- Division.

12 MS. BELL: Are you familiar with  
13 Permit B469999?

14 MR. HARGROVE: I'm not familiar with any  
15 of them by number. Which permit is that?

16 MS. BELL: Okay. That's the permit that  
17 was issued March 2nd of this year, and that was the  
18 permit that is the revision of the B449218.

19 MR. HARGROVE: When was B whatever it was  
20 issued?

21 MS. BELL: The first one or the second  
22 one?

23 MR. HARGROVE: If you don't mind, we're  
24 not going to be able to carry this on unless you will  
25 describe --

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1 MS. BELL: Sure.

2 MR. HARGROVE: -- the permit --

3 MS. BELL: Why don't you take a look at --

4 MR. HARGROVE: -- rather than calling it  
5 by name.

6 MS. BELL: Why don't you take a look at  
7 them very quickly.

8 MR. HARGROVE: I do not have room in my  
9 head for all these numbers.

10 MS. BELL: No, I understand. If you could  
11 just take a look at them, please.

12 (Pause.)

13 MR. HARGROVE: Okay. B469999, issued on  
14 the 2nd of March 2005, is the subject of our appeal.

15 MS. BELL: That's right. So it really  
16 isn't -- it isn't the first one that we discussed, the  
17 449218, is that correct?

18 MR. HARGROVE: Well, I'll have to see what  
19 that number refers to.

20 MS. BELL: Okay.

21 MR. HARGROVE: This appears to be the  
22 permit which was the subject of the earlier appeal in  
23 which you did not have the pleasure of participating.

24 MS. BELL: Okay. All right. So we can  
25 agree, sir, that it's the second permit -- and could

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1 you read that description, please, for the Board so  
2 that we're clear?

3 MR. HARGROVE: Yes. There -- I wouldn't  
4 say that it would necessarily be clear when we read  
5 the description of the permit.

6 MS. BELL: Okay.

7 MR. HARGROVE: That's part of the problem  
8 with these things. Amend and revise Permit B449218 to  
9 revise framed deck as shown on original permit  
10 drawings to a patio surface on the surface of the  
11 existing roof.

12 MS. BELL: Okay. Now, you, in your papers  
13 and to the Board, indicated that that permit should  
14 have had some reference to the Height Act. Is that  
15 correct?

16 MR. HARGROVE: In my view, it would be  
17 highly desirable if permits were more completely  
18 expository of what the work contemplated is and why  
19 it's been authorized. But there is no reason that the  
20 permit is required to make mention of the Height Act.

21 MS. BELL: Okay. So we can agree -- I'm  
22 sorry. Are you finished?

23 MR. HARGROVE: But I did say that the  
24 record of the permit in our possession has -- or the  
25 permit application and approval has no reference to

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1 the Height Act, nor any indication that the Height Act  
2 was considered.

3 MS. BELL: Okay. But we can agree, then,  
4 that although part of your argument is that the Zoning  
5 Administrator didn't consider the Height Act because  
6 it does not appear on the permit was based on your  
7 understanding of the zoning regs, not an actual  
8 violation of the zoning regs. Is that correct?

9 MR. HARGROVE: I'm not sure I understand  
10 the question. We're not --

11 MS. BELL: Is there a zoning reg -- is  
12 there a zoning --

13 MR. HARGROVE: We're not asserting that  
14 the Zoning Administrator did not consider the Height  
15 Act. In fact, I would like to determine that when the  
16 time comes for cross examination on our part. I'm  
17 simply saying there is no record -- no indication in  
18 the record of the permit, its application and  
19 approval, so far as we have any access to such record  
20 that the Height Act issue was raised or considered, or  
21 by whom it was raised or who made the determination.

22 MS. BELL: Okay. I guess I'm confused.  
23 Perhaps I can get at this another way. In your  
24 testimony, you indicated that the permit did not make  
25 reference to the calculations of the Zoning Act.

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1           So is it your argument that there is a  
2           legal requirement under the zoning regulations that  
3           the permit indicate the calculations with regard to  
4           the roof deck or that the zoning -- excuse me, or that  
5           the Height Act was considered by the Zoning  
6           Administrator.

7           MR. HARGROVE:    No.    There's no such  
8           requirement in the zoning regulations.

9           MS. BELL:    Okay.

10          MR. HARGROVE:   The zoning regulations, in  
11          fact, don't bear on this -- the issue here.  What is  
12          required is that the Height Act be properly applied,  
13          and it would be helpful to have some indication that  
14          the Height Act issue had been considered in the  
15          approval of the permit, and we see no such indication.

16          MS. BELL:    Okay.    And that's great,  
17          because my point is you see no such indication.  And  
18          to your -- to your way of thinking, indication would  
19          be reference on the application, and what else?  What  
20          other fact?

21          MR. HARGROVE:   For starters, it would be  
22          an indication that a Height Act issue was presented in  
23          the process of approval, if the original plans had  
24          indicated the elevation of the structures for which  
25          approval was being sought, which they did not.

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1           The plans that we -- have been later  
2 submitted to us, and the first time we've seen any  
3 indication of -- by Montrose as to what the elevation  
4 of the structure was. It would be helpful if there  
5 were some notation at the point of the zoning checkoff  
6 that a Height Act issue had been considered, and that  
7 the Height Act was complied with in the view of the  
8 permitting authority.

9           MS. BELL: Okay. But, as you say, there's  
10 no legal requirement that that --

11          MR. HARGROVE: Not to my knowledge.

12          MS. BELL: Now, with regard to the plans  
13 that were provided during the technical review, do you  
14 have any evidence that the Height Act -- that the plan  
15 showed a roof surface that exceeded the 70-foot  
16 requirements of the Height Act?

17          MR. HARGROVE: No, I have no evidence from  
18 those plans that it -- what the elevation of it was.

19          MS. BELL: Okay. So sitting here today,  
20 you have no evidence which supports that the Zoning  
21 Administrator indeed erred with regard to approving  
22 these plans under this permit under the premise that  
23 it exceeded the Height Act?

24          MR. HARGROVE: On the contrary, there is  
25 -- the plans themselves make clear that the structure

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1 authorized by the permit, which is described in the  
2 permit, exceeded the height limit.

3 MS. BELL: Can you show me where you find  
4 that evidence, sir?

5 MR. HARGROVE: Yes. As Montrose has now  
6 confirmed, 70 feet, which is the applicable height  
7 limit on Belmont Road, Northwest, comes in right about  
8 here on the building. While the elevation was not  
9 disclosed, it was certainly known on the basis of  
10 everybody who had had anything to do with these prior  
11 proceedings, and it is obvious from the drawing that  
12 portions of the authorized structure, which is this  
13 apparatus here, exceeded that limit.

14 MS. BELL: So your argument is, based on  
15 the prior proceedings, the prior BZA hearings that the  
16 Board tell us this is --

17 MR. HARGROVE: No. The argument is based  
18 on the physical characteristics of the building and  
19 its height. We happen to have evidence as to what  
20 that is from a long-standing discussion of that issue  
21 in the prior proceedings.

22 MS. BELL: Okay. But the Board has  
23 indicated that we need to look at this record as  
24 independent or different from the earlier KCA 1. So  
25 that's why I'm asking you with regard to the

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1 information you have before you today.

2 Now, it appears that one of the things  
3 that you're referring to is the guard rail. So is it  
4 fair to say that your testimony, your argument, is  
5 that the safety rails, the guard rails, are what  
6 exceeds the Height Act and not the roof platform  
7 itself?

8 MR. HARGROVE: No. My argument is that  
9 the structure authorized by the permit exceeds the  
10 Height Act.

11 MS. BELL: Is the structure, to your way  
12 of thinking, both the guard rail and the roof deck?

13 MR. HARGROVE: I don't -- I don't know  
14 where the 70-foot point hits this structure, whether  
15 at the sleepers or the floor or the connecting members  
16 or any portion of the guard rail, but it's not usually  
17 relevant.

18 MS. BELL: Could the guard rails, in and  
19 of itself, sir, constitute a structure within the  
20 meaning of the zoning regs?

21 MR. HARGROVE: Could it constitute a  
22 structure within the meaning --

23 MS. BELL: Yes.

24 MR. HARGROVE: -- of the zoning regs?

25 MS. BELL: That's correct.

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1 MR. HARGROVE: I don't know the answer to  
2 that question.

3 MS. BELL: Okay. And in your assessment,  
4 is there any other legal basis that either the Zoning  
5 Administrator or the Intervenor could have relied on  
6 that would allow an exemption for the guard rail to  
7 exceed 70 feet -- to exceed the 70-foot Height Act?

8 MR. HARGROVE: No.

9 MS. BELL: No?

10 MR. HARGROVE: Yes. Just to elaborate on  
11 the answer to your previous question, not simply from  
12 the records of the numerous previous proceedings, but  
13 now also from the record of this case, there is no  
14 question about the height of the structures insofar as  
15 they -- that question relates to whether the Height  
16 Act limits are exceeded, because we now have drawings  
17 which indicate where 70 feet is.

18 MS. BELL: Did you provide drawings to the  
19 Board?

20 MR. HARGROVE: No. No, Montrose provided  
21 those drawings.

22 MS. BELL: Okay.

23 MR. HARGROVE: I hope they provided you  
24 copies.

25 MS. BELL: Okay. So you're relying on

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1 Montrose's submission that the 70-foot height standard  
2 has been exceeded by the guard rails but not by the  
3 roof surface?

4 MR. HARGROVE: No, I'm not --

5 MS. BELL: Do you concede that?

6 MR. HARGROVE: -- saying that. I don't  
7 know exactly what portions of the structure -- I can't  
8 ascertain from these drawings exactly what portion of  
9 the structure are above and exactly what are below.  
10 But it is clear that some portions of the structure  
11 are below -- are above the height limit.

12 MS. BELL: Sir, can I ask which provision  
13 of the zoning regulations that you contend the Zoning  
14 Administrator erred?

15 MR. HARGROVE: The Zoning Administrator is  
16 required to apply -- to comply in all of his  
17 determinations with the Height Act, and I'll be happy  
18 to provide you the citations for that. I hope that  
19 the Office of Counsel for DCRA is aware of that fact.

20 MS. BELL: Finally, sir, are you familiar  
21 with Section 2503.3 in the zoning regulations?

22 MR. HARGROVE: Well, no, but I'm just  
23 about to be.

24 MS. BELL: It relates to structures and  
25 open spaces.

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1 CHAIRPERSON GRIFFIS: Okay. What is the  
2 direct question there?

3 MS. BELL: It indicates that railings  
4 required under the construction code are excluded from  
5 measuring calculations.

6 MR. HARGROVE: Now, would you give me the  
7 number of that?

8 MS. BELL: 2503.3.

9 MR. HARGROVE: 2503.3?

10 MS. BELL: Yes.

11 MR. HARGROVE: Yes. As it happens, I'm  
12 quite familiar with this provision, which, of course,  
13 applies to structures on the ground. It has nothing  
14 to do with roof decks.

15 MS. BELL: Okay. So it would be your  
16 assessment that that would not apply to this case.

17 MR. HARGROVE: Exactly.

18 MS. BELL: Okay.

19 MR. HARGROVE: And I would go beyond that  
20 and say, even if the provision did apply to this case  
21 -- that is, it was not limited to structures on the  
22 ground -- there would be a serious question about its  
23 consistency with the Height Act. And, of course, it's  
24 trumped by the Height Act, which is an act of  
25 Congress. But there is no such provision in the

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1 zoning regulations.

2 MS. BELL: Could you tell me --

3 MR. HARGROVE: So this one is quite  
4 irrelevant.

5 MS. BELL: Okay. Could you tell me,  
6 please, why you believe that structures, as it relates  
7 to this section, are required to be on the ground?

8 CHAIRPERSON GRIFFIS: Let's get back on  
9 track here. You seem to be moving him into an  
10 entirely new --

11 MR. HARGROVE: It refers to a fence or  
12 retaining wall.

13 CHAIRPERSON GRIFFIS: But, Mr. Hargrove,  
14 I don't -- I don't remember you making a legal  
15 argument --

16 MR. HARGROVE: I beg your pardon?

17 CHAIRPERSON GRIFFIS: I don't remember you  
18 making a legal argument utilizing 2503, so I'm not  
19 sure why we're having you questioned on that.

20 MS. BELL: Well, he referred to it at  
21 first as a roof structure, and then he referred to  
22 them as separate and --

23 CHAIRPERSON GRIFFIS: I know. But you're  
24 taking him down a path to make another argument. If  
25 the crux of your argument is based on 2503, a few

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1           peppering questions of legal analysis might be useful.  
2           But to present the section to Mr. Hargrove now and  
3           have him tell us why he believes it doesn't work for  
4           his case doesn't make a lot of logical time  
5           utilization.

6                       MS. BELL: Well, I appreciate that. I  
7           only went that one extra question, because he said he  
8           was very familiar with it.

9                       CHAIRPERSON GRIFFIS: Okay.

10                      MR. HARGROVE: The answer to the question,  
11           briefly, is that this refers to a fence or a retaining  
12           wall constructed in a yard.

13                      MS. BELL: Okay.

14                      MR. HARGROVE: Yards do not appear on the  
15           top of the building.

16                      MS. BELL: Okay.

17                      CHAIRPERSON GRIFFIS: The top of a  
18           building is an open space, isn't it?

19                      MR. HARGROVE: I beg your pardon?

20                      CHAIRPERSON GRIFFIS: The top of a  
21           building becomes open space, doesn't it?

22                      MR. HARGROVE: There is no reference to  
23           open space in those terms. But the yard --

24                      CHAIRPERSON GRIFFIS: What's the heading  
25           of Section 2500?

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1 MR. HARGROVE: 2500?

2 CHAIRPERSON GRIFFIS: Yes. That's the  
3 chapter you're looking at, isn't it?

4 MR. HARGROVE: Oh, yes, the whole section  
5 is Structures Required in Required Open Spaces. But  
6 2503.3 about railings has to do with --

7 CHAIRPERSON GRIFFIS: I understand that.

8 MR. HARGROVE: -- in a yard.

9 CHAIRPERSON GRIFFIS: Indeed. Okay.

10 MS. BELL: Okay. And my --

11 CHAIRPERSON GRIFFIS: Anything else?

12 MS. BELL: Yes. My last question went to  
13 the long-standing practice of the Zoning  
14 Administrator. You indicated in your argument that  
15 you do not believe there was a long-standing practice  
16 with regard to guard rails based on the fact that  
17 permits had been issued in other cases, and that there  
18 weren't any case law. Is that correct?

19 MR. HARGROVE: I don't understand your  
20 question.

21 MS. BELL: Well, let me rephrase it. Is  
22 it possible that there is a long-standing practice in  
23 the Zoning Administrator's office, in the review of  
24 guard rails as they relate to safety rails that exceed  
25 the Height Act, that would not be part of case

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1 authority or precedents or examples of permits not  
2 challenged by applicants?

3 MR. HARGROVE: Well, in the first place,  
4 the whole point of the question whether there's a  
5 long-standing practice has to do with the larger issue  
6 whether there's a precedent for this position with  
7 respect to railings.

8 And our position simply is that there is  
9 no evidence that -- that there is such a long-standing  
10 practice, that the buildings that exist which in our  
11 view exceed -- are in violation of the Height Act in  
12 this respect do not constitute such evidence, and that  
13 a -- such a practice cannot be established simply by  
14 pointing retroactively to the fact that people have  
15 been able to put up these buildings with railings.

16 MS. BELL: Do you have any evidence or  
17 proof that the Zoning Administrator views the guard  
18 rails, with regard to the Height Act, any differently  
19 than has been presented by the Intervenor?

20 MR. HARGROVE: No, I have no evidence that  
21 the Zoning Administrator views them at all. That's  
22 the whole point.

23 MS. BELL: Okay. We'll provide that in  
24 our testimony, then.

25 CHAIRPERSON GRIFFIS: Excellent. Thank

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1 you.

2 Ms. Brown?

3 MS. BROWN: No questions.

4 CHAIRPERSON GRIFFIS: Excellent.

5 MS. BELL: Thank you.

6 CHAIRPERSON GRIFFIS: Thank you very much.

7 Don't go too far. We're ready for you, Ms. Bell, if,  
8 Mr. Hargrove, you don't have any follow up questions  
9 -- would save your time towards the end, and we can  
10 move right to the Government's case, if you're ready.  
11 Do you want five minutes?

12 MS. BELL: Yes. I'm not quite sure she's  
13 ready.

14 CHAIRPERSON GRIFFIS: Okay. Let's take  
15 five.

16 (Whereupon, the proceedings in the  
17 foregoing matter went off the record at  
18 4:25 p.m. and went back on the record at  
19 4:41 p.m.)

20 MS. BELL: DCRA would like to hear the  
21 testimony of Ms. Faye Ogunneye, who is the Chief of  
22 the Zoning Division at DCRA. I'd like to ask her a  
23 series of questions related to the appeal.

24 The first one is with regard to the  
25 technical review. Ms. Ogunneye, could you please

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1 explain to us the technical review that was provided  
2 by the Zoning Division for B469999?

3 MS. OGUNNEYE: Yes. This is a revision to  
4 a previous building permit application, and the  
5 previous permit is referenced on the application. And  
6 generally what happens is you're doing a modification  
7 to a permit which already was approved.

8 MS. BELL: And in this particular -- could  
9 I ask you for the record, please, to read the  
10 description of the revised permit that was issued in  
11 this case, and the date it was issued?

12 MS. OGUNNEYE: Sure. The date is 3 --  
13 well, I'm sorry, March 2, 2005, and it's to amend and  
14 revise Permit Number B449218, to revise framed deck as  
15 shown on original permit drawings to a patio surface  
16 on the surface on the existing roof.

17 MS. BELL: Now, if I can digress for just  
18 a moment, I'm showing you another application and  
19 permit. Could you please describe that for the Board,  
20 please?

21 MS. OGUNNEYE: Yes. It's a building  
22 permit that was issued March 11, 2003, for alteration  
23 and repair of existing building addition in rear, add  
24 two floors -- that part is kind of scrambled out --  
25 attic, retaining wall, and stair at rear, and then

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1 cleared for EIS to have separate electrical, plumbing,  
2 and mechanical installation permits are probably  
3 required.

4 MS. BELL: Okay. And both of those  
5 permits are for the subject property of this appeal,  
6 1819 Belmont Avenue?

7 MS. OGUNNEYE: Yes, they are.

8 MS. BELL: Okay. Now, do you understand,  
9 then, the B469999 to rely in part on the original  
10 permit, but to make some modifications?

11 MS. OGUNNEYE: Correct.

12 MS. BELL: Okay. Could you please  
13 describe for the Board the zoning tech review of the  
14 subject permit here, the B469999?

15 MS. OGUNNEYE: Basically, the technician  
16 would be reviewing the area to be revised only to make  
17 sure that it does comply with the requirements of the  
18 zoning regs.

19 MS. BELL: Would the zoning tech consider  
20 the Height Act in reviewing of this permit?

21 MS. OGUNNEYE: If it's applicable, yes,  
22 they would.

23 MS. BELL: Would the zoning tech also  
24 review the plans that were provided with this  
25 application in addition to the original permit, or

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1 separate from the original permit?

2 MS. OGUNNEYE: Usually, it would be  
3 separate from the original permit, because whatever  
4 permit that's issued is issued as a matter of right.  
5 So the assumption is what's on that permit is correct,  
6 and any addition to it is what will be reviewed at the  
7 time of the new application.

8 MS. BELL: Could I --

9 CHAIRPERSON GRIFFIS: Okay. One, there's  
10 a second permit that she read. Is that in the record?  
11 Do we have copies of it? And, two, you indicated when  
12 you started off that you were going to I think review  
13 the testimony that's been submitted, or is going to be  
14 submitted by Ms. Ogunneye. Are you submitting written  
15 testimony?

16 MS. BELL: No.

17 CHAIRPERSON GRIFFIS: Okay.

18 MS. BELL: I can submit copies of the  
19 permit, if you would like.

20 CHAIRPERSON GRIFFIS: The original base  
21 permit?

22 MS. BELL: Yes. But the subject permit  
23 was provided by the Appellant.

24 CHAIRPERSON GRIFFIS: I know.

25 MS. BELL: Oh, okay.

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1 CHAIRPERSON GRIFFIS: But if it wasn't  
2 important, then why did you have her read it? And if  
3 it's important, then put it in the record.

4 MS. BELL: Okay. The reason why I had her  
5 read it, because there was apparently some dispute.

6 CHAIRPERSON GRIFFIS: That's all right.  
7 Let's continue on. We'll get a copy.

8 MS. BELL: Okay. Great, thank you.

9 Could I ask you to take a look at the  
10 plans, please?

11 MS. OGUNNEYE: Okay.

12 MS. BELL: Now, the plans that have been  
13 provided in this application, if you could take a  
14 moment to look at them. And I'd like to know, in your  
15 opinion, are they consistent with the description for  
16 the application and the permit that was issued?

17 MS. OGUNNEYE: Yes, I would say they are.  
18 Yes.

19 MS. BELL: Is there a zoning regulation  
20 that requires the height calculations or elevations to  
21 appear on the permit that's issued to the permit  
22 holder?

23 MS. OGUNNEYE: No.

24 MS. BELL: Is there a requirement that  
25 there is some designation that the Height Act was

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1 considered in the zoning tech review on the actual  
2 permit that's issued pursuant to an application?

3 MS. OGUNNEYE: No, not -- because this  
4 looks like a walkthrough process, which is pretty much  
5 a quick review. No, there would be no basis for that.

6 MS. BELL: Reviewing this application and  
7 permit, I think -- I'm sorry. I asked that question  
8 earlier. The plans that you review indicated that a  
9 guard rail was placed above the roof surface that's  
10 flush on the floor, the roof floor. Is that correct?

11 MS. OGUNNEYE: Yes. There are railings,  
12 and I guess it's about as flush as it can be.

13 MS. BELL: And the Height Act requires  
14 that in this particular zone -- can I ask you the zone  
15 for the subject property?

16 MS. OGUNNEYE: R-5-D as in David.

17 MS. BELL: Is 70 feet. The guard rails,  
18 as shown on the plans, exceed the 70-foot height  
19 limitation.

20 MS. OGUNNEYE: Are you asking me if they  
21 exceed it?

22 MS. BELL: No, no, no. I'm just saying  
23 that initially. My question is: in your experience,  
24 can guard rails or safety rails attached to a roof  
25 exceed the height limitations for the Height Act?

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1 MS. OGUNNEYE: In making determinations  
2 for the roof deck itself, the floor of the deck is  
3 what determines the Height Act considerations. Any  
4 guard rails would be requirement per building code for  
5 life safety issues. So, no, it wouldn't be.

6 MS. BELL: So for the purposes of the  
7 Height Act, the calculation would be based on the  
8 actual roof and not the railings.

9 MS. OGUNNEYE: Correct.

10 MS. BELL: In your experience, is that a  
11 lot -- your interpretation of how the guard rails are  
12 being calculated, is that a long-standing practice  
13 within the Zoning Administrator's office?

14 MS. OGUNNEYE: Yes, it is.

15 MS. BELL: And based on your experience,  
16 that is how that calculation is applied?

17 MS. OGUNNEYE: Yes. I mean, I hesitate  
18 because of the word "calculation," but, yes, the  
19 measurement --

20 MS. BELL: The measurements.

21 MS. OGUNNEYE: -- would be taken, right.

22 MS. BELL: Okay. Is that a better word  
23 for you -- "measurements"?

24 MS. OGUNNEYE: Yes.

25 MS. BELL: Okay. Now, are you familiar

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1 with Section 2503.3?

2 MS. OGUNNEYE: Yes, I am.

3 MS. BELL: Does that provision, in your  
4 mind, give any assistance to the analysis of guard  
5 rails on roof decks?

6 MS. OGUNNEYE: I believe it does.

7 MS. BELL: And could you please tell the  
8 Board how you think it gives some assistance for the  
9 Zoning Administrator interpretation?

10 MS. OGUNNEYE: Even though the section  
11 refers to required -- or structures that are allowed  
12 within required open spaces, the extract that we --  
13 let me see. And I wish I had -- can I just look at  
14 the copy of it, please?

15 (Pause.)

16 Okay. 2503.2, I believe. Is that what  
17 you have?

18 MS. BELL: That's correct.

19 MS. OGUNNEYE: Right. .2. The part that  
20 states, "Any railing required by the D.C. Construction  
21 Code, Title 12, DCMR, shall not be calculated in the  
22 measurement of this height." Now, the section does  
23 refer to structures within required open spaces.

24 Now, as I heard Mr. Hargrove mention in  
25 his previous -- I guess it was during his testimony,

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1 roof decks have never been something that was common  
2 way back when the zoning regs were written up.  
3 However, it is a structure that's in required spaces.  
4 I mean, the rooftop is still an open space. A deck  
5 usually would be in a required either rear yard or  
6 side yard.

7 Now, if the applicant is proposing to put  
8 the same kind of deck on their rooftop, as long as  
9 they provide access to get onto the roof, and that  
10 access complies with the penthouse structure or, you  
11 know, well, the Height Act wouldn't apply in that  
12 case.

13 Then, of course, you will have to have the  
14 railings for life safety reasons, and I believe that's  
15 the reasoning behind why it is noted in the  
16 regulations. And I believe it's noted in .2, .3, and  
17 .4. So when the regs were written, they were well  
18 aware that there are such structures as railings that  
19 are required strictly for life safety reasons and not  
20 for anything else, because it really doesn't make it  
21 an occupiable space for all intents and purposes.  
22 It's just to keep people from falling over.

23 MS. BELL: Okay. Thank you. Just one  
24 final question. If the roof as constructed, or roof  
25 surface as constructed, does not meet the design plans

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1 used during the permit process, is that a zoning issue  
2 or a zoning matter that would be reviewed by the  
3 Zoning Administrator?

4 MS. OGUNNEYE: No, it's not.

5 MS. BELL: Okay. Thank you.

6 CHAIRPERSON GRIFFIS: Very well. Thank  
7 you very much.

8 Mr. Hargrove?

9 MR. HARGROVE: Hello again, Ms. Ogunneye.

10 MS. OGUNNEYE: Hello. How are you, sir?

11 MR. HARGROVE: Fine.

12 MS. OGUNNEYE: Good.

13 MR. HARGROVE: In your testimony, you  
14 indicated that this was -- seemed to be a walkthrough  
15 case. In a walkthrough case, or in any other case in  
16 which a Height Act issue might be raised, could you  
17 describe the process that is employed in DCRA for  
18 determining and evaluating Height Act issues? Is that  
19 left simply to the person who signs the application?

20 MS. OGUNNEYE: Correct. Everything is  
21 left to the person that does sign the application,  
22 yes.

23 MR. HARGROVE: So that is the highest  
24 official in DCRA that considers the question when I  
25 come in to seek a permit for a building that raises a

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1 Height Act issue?

2 MS. OGUNNEYE: Well, what happens is, are  
3 the zoning technicians well informed enough to conduct  
4 any type of review process and conduct approvals on  
5 applications? Wherever they might feel there is a  
6 gray area, or they are not so certain about it, they  
7 will either meet with the Chief of Zoning Review or  
8 meet with the Zoning Administrator himself for  
9 clarifications.

10 MR. HARGROVE: Is there any written  
11 evidence that the reviewing officer or any higher  
12 official considered the Height Act issues in this  
13 case?

14 MS. OGUNNEYE: With respect to the second  
15 building permit, the revised one, or the original  
16 permit?

17 MR. HARGROVE: This case is about the --  
18 about the second permit.

19 MS. BELL: Well, I actually want to object  
20 to that question, because it assumes facts that aren't  
21 in the record. If there was a review by a higher  
22 official, there is nothing to indicate that there  
23 would be proof of it in the application or on the  
24 permit.

25 MR. HARGROVE: My question was

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1 disjunctive. I didn't say "and," but in any event  
2 it's a fair question to know whether anybody reviewed  
3 the Height Act issue, and, if so, who it was.

4 MS. BELL: Not -- since she didn't review  
5 the --

6 MS. OGUNNEYE: Well, at this point, I  
7 mean, again, you have to remember that there was an  
8 existing roof deck on this rooftop, and they are  
9 proposing to drop it a number of inches or feet --  
10 inches lower. So for all intents and purposes,  
11 they're bringing it more into compliance.

12 So whether or not they would have looked  
13 at the Height Act, I really couldn't speak to that,  
14 being that it was a walkthrough process. But the  
15 structure that is being proposed is as close to the  
16 roofline as you could structurally get away with.

17 MR. HARGROVE: So I gather that the answer  
18 is there is no written evidence that the Height Act  
19 issue was considered in this case.

20 MS. OGUNNEYE: I would say there is no  
21 need to be written evidence --

22 MR. HARGROVE: But there is none --

23 MS. OGUNNEYE: -- about that.

24 MR. HARGROVE: -- is that correct?

25 MS. OGUNNEYE: I couldn't say that. But,

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1 I mean, again, it's a walkthrough process. We don't  
2 do writeups. I mean, this is a process that we are  
3 supposed to get through in 20 minutes, 30 or 35  
4 minutes. I --

5 MR. HARGROVE: Well, thank you. I have  
6 here a copy of the Height Act, and I was wondering if  
7 you could point out for us the provision in the Height  
8 Act that permits this structure to exceed the height  
9 limits.

10 MS. OGUNNEYE: I don't believe it exceeds  
11 the height limit.

12 MR. HARGROVE: Is it correct that the  
13 structure authorized the -- that the permit authorized  
14 the structure which is described in the drawings that  
15 you reviewed a moment ago?

16 MS. BELL: Are you referring to the guard  
17 rail?

18 MR. HARGROVE: Is that correct? The  
19 permit authorized the construction of the structure  
20 described -- depicted in those drawings.

21 MS. OGUNNEYE: Correct.

22 MR. HARGROVE: Is every part of that  
23 structure below 70 feet, in your estimation?

24 MS. OGUNNEYE: I was hoping that we had  
25 copies of the previous -- the drawings on the previous

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1 permit that was approved. My recollection was that  
2 the roof was slightly below the 70 feet at the time  
3 that the original building permit was approved.

4 MR. HARGROVE: The question is: does any  
5 part of this structure authorized by the permit exceed  
6 70 feet, in your estimation?

7 MS. OGUNNEYE: From what I know, no, it  
8 doesn't.

9 MR. HARGROVE: So the guard rail is below  
10 70 feet, in your judgment?

11 MS. OGUNNEYE: No. The guard rails are  
12 above 70 feet.

13 MR. HARGROVE: Was the guard rail  
14 authorized by the permit as a part of the structure?

15 MS. OGUNNEYE: The guard rails I exempt  
16 based on the fact that --

17 MR. HARGROVE: No. The question is: were  
18 the guard rails authorized by the permit?

19 MS. OGUNNEYE: Okay. In that case, I'll  
20 say no. We don't -- we don't require the life -- the  
21 guard rails, but life safety building codes requires  
22 that they show it, or else they don't get approval for  
23 it.

24 MR. HARGROVE: So your position is that  
25 the permit did not authorize the construction of the

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1 guard rail, notwithstanding the fact that it appears  
2 on the drawings that --

3 MS. OGUNNEYE: Well, remember that the  
4 permit has been reviewed by about eight or nine  
5 disciplines. And technically the guard rails never do  
6 count in the height. If someone had a deck within  
7 their side yard, we never measure it up to the  
8 railings, and we do stay consistent in our  
9 determinations.

10 There are tons of roof decks outside in  
11 the District, and I've yet to see one that doesn't  
12 have guard rails on them.

13 MR. HARGROVE: So your position is that no  
14 part of the structure, the construction of which was  
15 authorized by the permit, exceeds 70 feet in height,  
16 including the guard rail.

17 MS. BELL: Well, I'm going to object to  
18 that, because, clearly, from her testimony she is  
19 separating the guard rails from the roof deck surface  
20 or the roof platform.

21 MR. HARGROVE: Well, then, may we agree  
22 that the permit clearly authorized the construction of  
23 a structure, parts of which exceeded 70 feet in  
24 height?

25 MS. OGUNNEYE: The permit, but not

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1 necessarily the zoning aspect. The zoning aspect does  
2 not take into account the railings.

3 MR. HARGROVE: Which brings us --

4 MS. OGUNNEYE: The zoning --

5 MR. HARGROVE: I understand that there's  
6 a distinction between what the permit authorized to be  
7 done and what the permit could lawfully authorize to  
8 be done, and that's exactly the point I wish to get  
9 to.

10 MS. OGUNNEYE: Okay.

11 MR. HARGROVE: I had asked you earlier if  
12 you would identify the part of the Height Act which  
13 authorizes the erection of a structure such as the one  
14 here in excess of the Height Act.

15 CHAIRPERSON GRIFFIS: It's an unfair  
16 question in terms of the phraseology of it. Prove why  
17 this is not legal by showing me in the Height Act --  
18 I understand what your point is. I want  
19 clarification, because I think there is a lot of  
20 miscommunication in this question right now.

21 Did the permit authorize the construction  
22 of what's showing in these documents on A-2?

23 MS. OGUNNEYE: Yes. The permit does, as  
24 a whole.

25 CHAIRPERSON GRIFFIS: Okay.

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1 MS. OGUNNEYE: My contention is when  
2 Zoning --

3 CHAIRPERSON GRIFFIS: No, I understand  
4 your point.

5 MS. OGUNNEYE: Okay.

6 CHAIRPERSON GRIFFIS: Okay. Let's move  
7 on.

8 MR. HARGROVE: Again, could you identify  
9 the provisions in the Height Act, which, after all, is  
10 what governs this case, that permits the construction  
11 of a structure such as is depicted here in excess of  
12 the --

13 MS. BELL: Well, I think I'm going to  
14 object to that, because I know you've asked that a  
15 number of times. But the way she has explained it is  
16 she believes that the guard rails are exempt, even  
17 though they exceed the 70 feet, and that's her answer.  
18 So I don't know what else to offer.

19 MR. HARGROVE: Could you then -- I'll  
20 rephrase the question. Since you regard the rails as  
21 exempt, and since the Height Act governs this case,  
22 could you identify the provisions of the Height Act on  
23 the basis of which your conclusion of this exemption  
24 rests? What is it in the Height Act that exempts  
25 these railings, or any part of the structure, from the

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1 Height Act limits?

2 MS. OGUNNEYE: Again, unfortunately, I  
3 will not be looking for that, because it's a life  
4 safety requirement that's --

5 MR. HARGROVE: Well, precisely. Then --

6 MS. OGUNNEYE: In other words, I could  
7 have approved it without the guard rails, but they  
8 would still have had to have the guard rails. We  
9 never ever review guard rails. Whether they put it or  
10 not, in all honesty, we really don't care. But they  
11 have to have it for life safety reasons, and I think  
12 that's why the codes -- the zoning codes would have  
13 referred to them.

14 MR. HARGROVE: So you know of no basis in  
15 the Height Act for authorizing this structure.

16 MS. BELL: Well, I'm going to object to  
17 that. What's she's saying is it's not part of the  
18 measurements that they use to consider the Height Act,  
19 and she has said it three or four different ways, and  
20 there's no other way for her to say it. So there's  
21 nothing for her to identify that would respond to your  
22 question the way that you asked it.

23 MR. HARGROVE: With regard to 2503.2,  
24 which refers to the possibility of a structure  
25 occupying a yard, and 2503.3, which refers to a fence

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1 or retaining wall occupying a yard, where would you  
2 suppose the yard to be at 1819 Belmont Road? On the  
3 roof?

4 MS. OGUNNEYE: Not on the roof.

5 MS. BELL: Well, again, my -- I'm sorry.  
6 I think that's my error, sir. I'm sorry. It's really  
7 2503.2 that's the basis of her analogy, not 2503.3.

8 MR. HARGROVE: All right. I'll limit the  
9 question to 2503.2, which refers to a structure  
10 occupying a yard, and the way the railings are  
11 measured for such a structure. Now, where is the yard  
12 at 1819 Belmont Road? Is that on the ground, or is it  
13 on the roof?

14 MS. OGUNNEYE: I'm sure I mentioned  
15 earlier that, even though the section does refer to  
16 structures in required open spaces and it speaks to  
17 yardage, when it starts off it's speaking to any  
18 structure -- a structure -- and a deck is a structure.  
19 And that's the problem I'm making -- not including a  
20 building, no part of which is more than four feet off  
21 the ground.

22 And the reason they're saying that is as  
23 long as you're more than four feet off the ground, you  
24 will need to have a railing. That's pretty much what  
25 that section is alluding to. So as long as you are

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1 more than four feet off the ground, you have to have  
2 those railings, or else someone is going to fall off.

3 MR. HARGROVE: Would you read the first  
4 three lines of that provision for us?

5 MS. OGUNNEYE: .2?

6 MR. HARGROVE: Yes.

7 MS. OGUNNEYE: Yes. Okay. "A structure,  
8 not including a building, no part of which is more  
9 than four feet above the grade at any point, may  
10 occupy any yard required under the provisions of this  
11 title."

12 MS. BELL: Well, she should obviously  
13 complete the provision.

14 MR. HARGROVE: I beg your pardon?

15 MS. BELL: She should obviously complete  
16 the provision.

17 MR. HARGROVE: Well, if you wish to  
18 complete it, sure.

19 MS. BELL: Please.

20 MS. OGUNNEYE: Okay. "Any railing  
21 required by the D.C. Construction Code, Title 12,  
22 DCMR, shall not be calculated in the measurement of  
23 this height."

24 MR. HARGROVE: Thank you. And in your  
25 estimation, from your examination of the plans, does

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1 the roof deck structure at issue in this case occupy  
2 a yard?

3 MS. OGUNNEYE: Again --

4 MS. BELL: I'm going to object to that,  
5 because that's the same question that you asked  
6 before. And I think she -- her testimony was that she  
7 was using it by analogy, because railings are required  
8 under the construction code for roof decks, so you  
9 couldn't erect a roof deck --

10 MR. HARGROVE: Mr. Chairman, the witness  
11 is perfectly capable of answering the simple factual  
12 question as to whether this roof deck occupies a yard,  
13 and therefore, brings us within the scope of this  
14 provision.

15 CHAIRPERSON GRIFFIS: Right. Last time,  
16 Ms. Ogunneye, do you have another answer to that  
17 question?

18 MR. HARGROVE: Does it occupy a yard, or  
19 not?

20 MS. OGUNNEYE: It occupies -- it's a  
21 structure in open space, so it is occupying an open  
22 space. Whether or not it's a yard to me is  
23 irrelevant, because we're dealing with a structure  
24 that is sitting on a roof.

25 MR. HARGROVE: It's irrelevant, not --

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1 E-V-E-N-I-N-G S-E-S-S-I-O-N

2 (5:00 p.m.)

3 MS. OGUNNEYE: And it's a permanent  
4 structure.

5 MR. HARGROVE: It's irrelevant,  
6 notwithstanding the fact that the provision clearly  
7 refers to structures that --

8 CHAIRPERSON GRIFFIS: You've already asked  
9 the question. You've gotten her answer. Let's move  
10 on to the next subject.

11 MR. HARGROVE: I have no more questions.

12 CHAIRPERSON GRIFFIS: Okay. Ms. Brown,  
13 questions of Ms. Ogunneye?

14 MS. BROWN: Very briefly.

15 CHAIRPERSON GRIFFIS: That's fine.

16 MS. BROWN: Very simple yes or no  
17 questions. Have you had the opportunity to review the  
18 opposition to the appeal filed by Montrose?

19 MS. OGUNNEYE: I believe I did.

20 MS. BROWN: And are you aware of the list  
21 of examples provided in that statement about the  
22 buildings that have rooftop swimming pools and guard  
23 rails that surround them that exceed the Height Act?

24 MS. OGUNNEYE: Yes, I did go through  
25 those.

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1 MS. BROWN: And is it the practice of the  
2 Zoning Administrator's office, when a new building is  
3 proposed for construction, to complete a zoning  
4 computation sheet?

5 MS. OGUNNEYE: Yes, it is

6 MS. BROWN: And is there a provision that  
7 the zoning technician review for compliance with the  
8 1910 Height Act?

9 MS. OGUNNEYE: Yes, there is.

10 MS. BROWN: And are you aware of any  
11 enforcement actions initiated by the Office of  
12 Attorney General for any of those buildings, or any  
13 other buildings in the District, for violation of the  
14 1910 Height Act because the guard rail exceeds the  
15 Height Act?

16 MS. BELL: Well, I'm going to object to  
17 that question, because I'm not sure that she's the  
18 appropriate witness to answer that. But to the extent  
19 that you have some information about what enforcement  
20 actions would be pursued by the Office of Attorney  
21 General.

22 MS. BROWN: I was going to ask, are you  
23 aware of that?

24 MS. OGUNNEYE: Right. No, none that I  
25 know of.

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1 MS. BROWN: Thank you.

2 CHAIRPERSON GRIFFIS: Okay. Yes? The ANC  
3 has a question.

4 MR. ROTH: Ms. Ogunneye, good afternoon.

5 MS. OGUNNEYE: Good afternoon.

6 MR. ROTH: I think I understand your  
7 analogy to 2503.

8 MS. OGUNNEYE: Okay.

9 MR. ROTH: Let me ask you a hypothetical  
10 question. If you had a structure whose roof was well  
11 below any height limit in a particular zone district,  
12 could it be legal for that roof to have on it a  
13 pergola or some other structure that would obstruct  
14 somebody's ability to see up to the sky?

15 MS. OGUNNEYE: Let's put it this way --

16 MS. BELL: I'm going to object, because  
17 I'm not quite sure that those facts -- are you saying  
18 that the erection of a pergola that exceeds the Height  
19 Act or --

20 MR. ROTH: No, no, no, no, no. I'm saying  
21 in a --

22 MS. BELL: -- or the construction of a  
23 pergola that's just --

24 MR. ROTH: -- in a --

25 MS. BELL: -- obnoxious to look at?

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1 MR. ROTH: No. In a -- obnoxious or  
2 pretty, in a building that was well below any height  
3 limit in any district, whether it was a Height Act  
4 case or not. Would it be possible to erect a legal  
5 pergola or some other structure --

6 MS. OGUNNEYE: And you're speaking --

7 MR. ROTH: -- above the roof?

8 MS. OGUNNEYE: -- to on the roof line.

9 CHAIRPERSON GRIFFIS: Can you erect a  
10 legal pergola?

11 (Laughter.)

12 That was the question.

13 MR. ROTH: That was the question.

14 MS. OGUNNEYE: I'm thinking about illegal.  
15 Okay. Hmm.

16 CHAIRPERSON GRIFFIS: No, you said legal.

17 MR. ROTH: Legal.

18 MS. OGUNNEYE: Oh, okay.

19 CHAIRPERSON GRIFFIS: I don't understand  
20 what the question is doing for us, then?

21 MR. ROTH: Well, let me finish.

22 CHAIRPERSON GRIFFIS: Okay. Does this  
23 pergola have a roof on it?

24 MS. OGUNNEYE: The pergola is the roof is  
25 what he's --

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1 MS. BELL: Or does it require a permit?

2 MR. ROTH: Or could it have a covering on  
3 it of some sort?

4 CHAIRPERSON GRIFFIS: Do you mean covering  
5 like keep out the rain?

6 MR. ROTH: Any kind of covering.

7 MS. OGUNNEYE: Well, I think I can answer  
8 what --

9 CHAIRPERSON GRIFFIS: I don't know. I've  
10 been through a lot of these, and the amount of  
11 covering and --

12 MS. OGUNNEYE: What happens is once you  
13 have your roofline defined, anything above that  
14 roofline would be treated as a penthouse structure.  
15 So if you had a roof above that deck, then it would be  
16 part of your penthouse structure, and it would be  
17 subject to the 18 foot, 6 inches height.

18 In other words, where your roofline ends,  
19 that's the end of your building height. Anything  
20 beyond that is considered a roof structure. So, for  
21 instance, 1819 put a pergola above that, it could, for  
22 all intents and purposes, be a penthouse structure at  
23 that point.

24 MR. ROTH: Okay. That's fine. Now, 2503  
25 I think we agree, at least explicitly as opposed to by

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1 analogy, refers only to side yards and rear yards and  
2 specifically required side yards and rear yards.  
3 Isn't that right?

4 MS. OGUNNEYE: I don't see it that way.  
5 I mean, the particular paragraph itself does not speak  
6 to side yard or --

7 MR. ROTH: Well, the provisions of 2503.1  
8 through 2503.4 all describe "any yard required under  
9 this title." And 2305 -- 2503.5 refers to any side or  
10 rear yard that is required by this title.

11 MS. OGUNNEYE: The .03 defines at which  
12 point whether it's more than four feet above the  
13 ground or not.

14 MR. ROTH: I don't think -- let me try to  
15 rephrase my question, because I don't think you're  
16 understanding what I'm asking.

17 MS. OGUNNEYE: Okay.

18 MR. ROTH: If we look at 2503, and the  
19 explicit terms of 2503 --

20 MS. OGUNNEYE: Right.

21 MR. ROTH: -- am I correct that the only  
22 required spaces, the only required open spaces that  
23 2503 refers to are rear yards, side yards, or other  
24 yards required by this title?

25 MS. OGUNNEYE: I can only answer that with

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1 a statement. And, again, all we are extracting is the  
2 fact that railings are requirements by the --

3 MR. ROTH: I didn't ask about railings.  
4 I asked specifically whether you see explicitly in  
5 2503 -- and I understand that you're reasoning by  
6 analogy. Do you see anything in 2503 that refers to  
7 or applies to explicitly anything other than rear  
8 yard, side yard, or a yard required by this title?

9 MS. BELL: Well, I'm going to object to  
10 that question because I think -- first of all, I think  
11 we're talking about 2503.2. But that aside, I  
12 think --

13 MR. ROTH: No. I'm asking about 2503.

14 MS. BELL: Okay. Well, that's not at  
15 issue here.

16 MR. ROTH: Well, why don't you allow me to  
17 finish my line of questions, because the Chairman  
18 previously referred to the title of 2503.

19 MS. BELL: Well, as I said, two things.  
20 First of all, I think -- I think the structures in  
21 required open spaces covers the entire provisions, but  
22 we pointed out that it was two that was by analogy,  
23 not three. And that aside, my other objection is I  
24 think that "yard" is defined in the zoning  
25 regulations, and that is just -- and that's the

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1 applicable definition, instead of saying rear yard,  
2 side yards, or what have you.

3 To the extent that "yard" is used in this  
4 provision, it would be the definition that applies in  
5 the zoning regs, which is not limited to rear yard and  
6 side yard.

7 MR. ROTH: The question was rear yard,  
8 side yard, or any other kind of yard required by this  
9 title.

10 MS. BELL: Well, my --

11 MR. ROTH: All right. Let's do this.  
12 I'll allow the language of the section to speak for  
13 itself.

14 Next question. Is it your position, is it  
15 the position of the Zoning Administrator, that a roof  
16 is a "required open space"?

17 MS. OGUNNEYE: If you have your deck space  
18 up there, I guess it would be, because you'll be up  
19 there -- it would be occupiable space at that point.

20 MR. ROTH: So it's the Zoning  
21 Administrator's position that a roof --

22 MS. OGUNNEYE: When it's being used for  
23 recreation purposes --

24 MR. ROTH: How about in this case?

25 MS. OGUNNEYE: -- it does allow you to use

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1 the rooftop as part of your required residential  
2 recreation space. So from that standpoint, you could  
3 look at it as a required open space.

4 MR. ROTH: How about --

5 MS. OGUNNEYE: It just happens to be up in  
6 the air.

7 MR. ROTH: How about in this case? In  
8 this case, is it the Zoning Administrator's position  
9 that the roof is a required open space?

10 MS. OGUNNEYE: It is a proposed recreation  
11 space, because I guess people will be using it, which  
12 is why the railings are being --

13 MR. ROTH: Is it required? Is it a  
14 required open space within the meaning of the zoning  
15 regulations?

16 MS. OGUNNEYE: Is what a required open  
17 space?

18 MR. ROTH: The roof.

19 MS. OGUNNEYE: A roof is a requirement for  
20 a building or a structure. Now, whether or not you  
21 have recreation space on it --

22 MR. ROTH: Let me phrase it differently.

23 MS. OGUNNEYE: Okay.

24 MR. ROTH: Is the rooftop in this case a  
25 required open space?

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1 MS. BELL: Well, I'm going to object.  
2 You've asked it a number of times, and she has  
3 answered to -- the best way she has been able to  
4 answer it. So --

5 MR. ROTH: Final --

6 MS. BELL: -- there's nothing else.

7 MR. ROTH: Final question. If I  
8 understand what you're saying, and I'm not sure I do,  
9 but if I understand what you're saying, you're saying  
10 you want to analogize the roof in this case to 2503,  
11 because you believe -- and before, I might add, you  
12 used the words "open space," you didn't use the words  
13 "required open space" in responding to previous  
14 questions -- but you believe that 2503 applies by  
15 analogy.

16 Now, if you look at 2503.1, 2503.1 says,  
17 "Every part of a yard required under this title shall  
18 be open and unobstructed to the sky from the ground  
19 up." Is it the Zoning Administrator's position that  
20 every part of a roof shall be open and unobstructed to  
21 the sky from the ground up?

22 MS. OGUNNEYE: No. I believe when I first  
23 made my statement I was specific to the fact that the  
24 railing is what was being extracted. Now, if I were  
25 to approve it without the railings, it would be all

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1 within the intent of the regulations.

2 Now, the railings normally and generally  
3 are never ever regulated by zoning, only by the D.C.  
4 code. So you're asking me things that are outside of  
5 my discipline.

6 MR. ROTH: Well, the question in this case  
7 is, first, is it appropriate for the Zoning  
8 Administrator by analogy to apply 2503.2 to the  
9 railings on this roof deck, but also, secondarily, and  
10 I take this from the Chairman's question before about  
11 what the Title 2503 is, whether it's fair to apply  
12 2503 at all in this case?

13 And the question I'm asking you is  
14 whether, if a roof -- if a rooftop is, in fact, a  
15 required open space under 2503. Is it the Zoning  
16 Administrator's position that every part of a roof  
17 must be open and unobstructed to the sky?

18 MS. OGUNNEYE: I'm sure I never said that  
19 the roof is --

20 MR. ROTH: That's why I'm asking you.

21 MS. OGUNNEYE: -- open to the sky. All  
22 I'm saying is in cases -- I'm sorry?

23 CHAIRPERSON GRIFFIS: Is it yes or no?

24 MS. OGUNNEYE: For which one?

25 CHAIRPERSON GRIFFIS: His question.

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1 MS. BELL: It was compound, but --

2 MR. ROTH: No, it wasn't compound. Is it  
3 the Zoning --

4 MS. OGUNNEYE: I'm not comfortable with  
5 the way he's wording the question. I mean, again --

6 CHAIRPERSON GRIFFIS: That's fine. I  
7 think it's fairly clear he's asking you --

8 MS. OGUNNEYE: -- it's either a roof or  
9 it's a roof that's being used as occupiable space, as  
10 a deck. What's under contention is the actual deck on  
11 the roof, which is a structure on its own that happens  
12 to be on the rooftop.

13 MR. ROTH: What's also under contention is  
14 whether 2503 at all is analogous to, and should be  
15 applied to, a roof deck situation?

16 MS. OGUNNEYE: And may I ask how you would  
17 expect me to apply a roof deck in general?

18 MR. ROTH: Well, you can't ask me the  
19 questions, but we'll save that for another time. I  
20 think -- I think, again --

21 MS. OGUNNEYE: Okay.

22 MR. ROTH: I don't think I've ever gotten  
23 an answer to my question. I think, Mr. Chairman, yes  
24 or no would be an appropriate answer.

25 CHAIRPERSON GRIFFIS: Right.

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1 MR. ROTH: Would you like me to repeat it?

2 CHAIRPERSON GRIFFIS: Ask it one more  
3 time.

4 MS. BELL: Do you remember the question?

5 MS. OGUNNEYE: He wants to repeat it.

6 MR. ROTH: Is it the Zoning  
7 Administrator's position that a rooftop is required to  
8 be open and unobstructed to the sky, that every part  
9 of a rooftop is required to be open and unobstructed  
10 to the sky?

11 MS. OGUNNEYE: Yes, if it's space that's  
12 being used for recreational purposes.

13 MR. ROTH: Thank you, Mr. Chairman.

14 CHAIRPERSON GRIFFIS: We will take the  
15 Board questions now.

16 VICE CHAIRPERSON MILLER: Ms. Ogunneye?

17 MS. OGUNNEYE: Yes.

18 VICE CHAIRPERSON MILLER: I just want to  
19 follow up. If you conclude that railings are exempt  
20 under our regulations as life safety -- for life  
21 safety reasons, building code, or 2503, for the  
22 reasons that you articulated, how does that lead to  
23 their being exempt under the Height Act?

24 MS. OGUNNEYE: Well, again, my -- my  
25 understanding is whatever -- when you're doing your

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1 Height Act, you go to the maximum height of the roof  
2 or the parapet, whichever, you know -- well, depending  
3 on the type of roof it is.

4 Now, there are cases where -- well, no,  
5 there are not cases. The measurement is usually to  
6 the highest point of the roof or the parapet. Now,  
7 being that the roof deck is going to be occupiable  
8 space, then we treat that -- the deck floor as being  
9 subject to the height requirement. And once that's  
10 below the Height Act, I mean, the railings -- again,  
11 the railings have always been exempt, in an unwritten  
12 way I suppose.

13 I mean, I'm yet to see any review that's  
14 -- that railings are not applied to a deck. It just  
15 doesn't happen. There are no roof decks or any decks  
16 out there that don't have railings or guard rails on  
17 them.

18 VICE CHAIRPERSON MILLER: Okay. I mean,  
19 so basically I hear you saying, based on past  
20 practices --

21 MS. OGUNNEYE: Yes.

22 VICE CHAIRPERSON MILLER: -- and based on  
23 the distinction with respect to occupiable space?

24 MS. OGUNNEYE: Right.

25 VICE CHAIRPERSON MILLER: And then, I

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1 think you also said life -- for life safety reasons  
2 and the requirements there under the building code.

3 MS. OGUNNEYE: Correct.

4 MS. BELL: And can I just offer something  
5 here? I think we're talking about two separate  
6 things. I believe her testimony was that the  
7 exemption from the Height Act was relying on that  
8 long-standing practice of not applying it.

9 For the purposes of analysis, I think she  
10 was adding the 2503.2 as part of the discussion. So  
11 I -- somehow they've been intertwined as the same  
12 thing, as the same basis.

13 VICE CHAIRPERSON MILLER: So you're saying  
14 that was just offered for analogy, not for --

15 MS. BELL: Yes, that's what she was trying  
16 to say. She was really relying on -- and that's why  
17 I asked her before -- the long-standing practice that  
18 guard rails be for safety, because they are -- you  
19 know, predominantly safety railings are exempt from  
20 the Height Act measurements I guess is the best way of  
21 saying it.

22 VICE CHAIRPERSON MILLER: Also, is there  
23 any other evidence of this long-standing practice of  
24 railings being exempt from the Height Act? For  
25 instance, does the Zoning Administrator keep policy

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1 statements on file, or anything like that?

2 MS. BELL: And, you know, I would be glad  
3 to provide -- because we haven't provided any filings  
4 in this case, because I jumped in just a few days ago.  
5 I would be glad to provide something on that point, if  
6 the Board -- since the Board has already asked for I  
7 guess a copy of the permit, I would be glad to.

8 VICE CHAIRPERSON MILLER: Okay. That's  
9 all my question.

10 CHAIRPERSON GRIFFIS: Anything else? Any  
11 other questions from the Board? Very well. Thank you  
12 very much, Ms. Ogunneye.

13 MS. OGUNNEYE: Thank you.

14 MS. BELL: Thank you.

15 CHAIRPERSON GRIFFIS: Let's move ahead.  
16 Let's hear from the Intervenor, or I'm -- yes, let's  
17 do that.

18 If you'd like to cede your position to the  
19 ANC, that would --

20 MS. BROWN: I would not -- I was just  
21 simply making sure that we hadn't skipped a step  
22 before the Intervenor goes.

23 CHAIRPERSON GRIFFIS: Are we taking you on  
24 as the owner? That's fine with me. Actually, that  
25 would probably be the best, if the ANC wanted to --

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1 are you presenting a case at this point, or your  
2 letter?

3 MR. ROTH: I guess our letter and our  
4 legal argument.

5 CHAIRPERSON GRIFFIS: Okay. Why don't we  
6 do that, then, and Ms. Brown will follow up, and then  
7 we'll have rebuttal and closings.

8 MR. ROTH: I suppose it would be  
9 appropriate to ask if the Office of Planning should  
10 come before me.

11 (Laughter.)

12 CHAIRPERSON GRIFFIS: Yes, that's true.  
13 But we're not hearing from the Office of Planning on  
14 this one.

15 MR. ROTH: Okay. Thank you, Mr. Chairman,  
16 members of the Board. For the record, my name is Alan  
17 Roth, and I'm the Chairperson of ANC-1C. Hopefully,  
18 in the record you will find a report submitted by ANC-  
19 1C dated October 3, '05, which followed our ANC  
20 meeting of October 2nd, at which this appeal was  
21 considered, discussed, and voted on.

22 And by a unanimous seven to zero roll call  
23 vote, not surprisingly in light of the history of the  
24 case, ANC-1C voted in support of the KCA's appeal for  
25 the reasons previously set forth by KCA. We trust

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1 that the BZA will give that position the great weight  
2 required by law.

3 There are four specific points that I'd  
4 like to make. The first is that I believe you've  
5 heard today from DCRA, and I believe that Montrose is  
6 making the same argument, that you should examine the  
7 deck and railing here as though they are two separate,  
8 distinct, and independent entities. They are not.  
9 They are part and parcel of one structure covered by  
10 the permit.

11 In the only issue raised in the prior KCA  
12 appeal on which the KCA, we think, has prevailed, the  
13 Board ruled that a roof deck that exceeded the 70-foot  
14 Height Act limit in this zone was illegal. And so it  
15 would be improper for DCRA now to try to create a  
16 fiction in which the walking surface of a deck  
17 suddenly mysteriously exists independently of the  
18 railings that are fastened to it, and that whether for  
19 life safety purposes or otherwise -- and I'll get to  
20 the life safety issue in a moment -- whether for life  
21 safety purposes or otherwise, is essential to this  
22 roof deck, to this walking surface, because it's  
23 ludicrous to think that somebody would put a patio  
24 floor on a roof with no railing around it if they  
25 intended people to be up there using it for recreation

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1 or entertaining or for other purposes.

2 And by the same token, it's ludicrous to  
3 think that somebody would put a railing around  
4 particularly a rowhouse roof or a section of a  
5 rowhouse roof, if the roof wasn't going to be  
6 regularly used by people for recreation or  
7 entertaining or what have you.

8 And I don't see any basis in the  
9 regulations or any basis in any other law for  
10 entertaining this fiction that there are two separate  
11 roof deck elements here. They are part and parcel of  
12 the same structure, and the structure exceeds the  
13 70-foot height limit under the Height Act.

14 So how did we get to this point? Well,  
15 we've heard Ms. Ogunneye's testimony today, but I  
16 would also like to read to you from some of her  
17 testimony back in the first KCA appeal -- that's Case  
18 Number 17109 -- on March 16, 2004, because her  
19 testimony on this point on that day consisted of  
20 basically two assertions -- first, that the roof deck,  
21 even though it exceeded 70 feet, was governed solely  
22 by Section 411 of the zoning regulations and was not  
23 subject to the Height Act.

24 The Board, in its oral decision and vote,  
25 even after it reversed its position on the roof

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1 structure setback issue, stuck to its earlier position  
2 on the roof deck question and rejected Ms. Ogunneye's  
3 interpretation. The BZA, as we understand and we hope  
4 your decision will say when it's written, said that a  
5 roof deck may not violate the Height Act. So we can  
6 put that DCRA argument aside for a moment.

7 Second, she was asked this series of  
8 questions and gave this series of answers by counsel  
9 for DCRA. Ms. Gilbert, who was the attorney for DCRA  
10 at the time asked, "On what basis did the Zoning  
11 Administrator determine that it was permissible to  
12 accept the railing -- to accept the railing, allow the  
13 railing to go above the four feet"?

14 And Ms. Ogunneye responds, "Because the  
15 railings are required by the construction code for  
16 life safety reasons."

17 And Ms. Gilbert then asked, "And are there  
18 any specific provisions in the zoning regulations that  
19 allow that, or any analogous provisions in the zoning  
20 regulations that allow a railing to not be included in  
21 the determination of the height?"

22 And Ms. Ogunneye responds, "Yes. Section  
23 2503."

24 Okay? Now, the truly responsive answer to  
25 Ms. Gilbert's question would have been, "No, there are

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1 no specific provisions that apply to roof decks.  
2 There is only a provision in Section 2503 that  
3 pertains to railings on structures built less than  
4 four feet above grade in required rear yards." That's  
5 what 2503.2 says.

6 2503 has absolutely nothing to do with  
7 roof decks. It has a provision about railings  
8 required by the construction code, but the words used  
9 in that sentence are "this height." "This height"  
10 refers back to the four feet in that provision, four  
11 feet above grade.

12 How one makes a giant leap from Section  
13 2503 in someone's back yard up to the top of a five-  
14 story apartment building is beyond me.

15 Now, the question was raised before, and  
16 I think, Mr. Chairman, you were alluding to this  
17 question. Did Congress really intend to lock in the  
18 concept of whatever they thought of as life safety  
19 back in 1910? The answer to that question is that  
20 Congress never anticipated that there would ever be  
21 living space that high up.

22 Congress never contemplated and never  
23 intended that people be able to occupy space above the  
24 Height Act limit. And so we're back to the question  
25 of: what is the Height Act limit? Because no safety

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1 measures up there would be required if Congress didn't  
2 intend for anybody ever to be up there in the first  
3 place.

4 Now, life safety is not fundamentally a  
5 zoning issue. We've got construction codes, we've got  
6 electrical codes, we've got fire codes, we've got all  
7 kinds of codes, and certainly there are some  
8 provisions in the zoning regulations that are there  
9 because of life safety questions -- the one pertaining  
10 to rear yards, for example, being one of them.

11 But the Council and the Zoning Commission  
12 are the legislative authorities in regard to life  
13 safety questions. If it's a zoning matter, the Zoning  
14 Commission can address that question and legislate a  
15 roof deck provision. If it's a life safety matter  
16 outside the zoning area, the Council can legislate  
17 those provisions.

18 The Council can amend the laws. The  
19 Congress can amend the law. They haven't done so.  
20 They've never done so. And it's our position that at  
21 this point, for the Board of Zoning Adjustment to come  
22 to the conclusion that somehow or other you can leap  
23 from a required rear yard provision and apply that to  
24 a railing on a roof that exceeds the Height Act limit,  
25 strikes me as being legislating, not interpreting.

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1 Third point. Montrose, again, makes the  
2 argument about precedent. And I think Mr. Hargrove,  
3 in his opening, did a fine job of discussing what the  
4 meaning of "precedent" is, so I won't go back over the  
5 same ground, other than to say that clearly counsel's  
6 definition of "precedent" is not the same definition  
7 of "precedent" that we have.

8 The same comment as to the photos and the  
9 list of buildings attached.

10 There is no case cited by Montrose, there  
11 is no case cited by DCRA, that this Board has ever  
12 decided, in which this question was ever presented.  
13 And, indeed, it wasn't until this building became the  
14 focus of attention that this Board was even called on  
15 to decide whether it had jurisdiction to consider a  
16 Height Act challenge.

17 And so it stands to reason, in light of  
18 the fact that you faced a question of first impression  
19 in 17109, that no previous case would have ever  
20 addressed the question of whether a railing on top of  
21 a roof that exceeded the Height Act limit was or was  
22 not legal.

23 And I go back to a red light analogy that  
24 I used in the prior proceeding. Just because somebody  
25 runs a red light repeatedly and gets away with it,

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1 just because several people have run the same light  
2 repeatedly, just because the police officer is  
3 sleeping in his patrol car on the corner while the red  
4 light is being run and those people get away with it,  
5 doesn't mean it wasn't illegal.

6 And the hard question that you face -- and  
7 I understand that it's difficult -- but the hard  
8 question that you face is whether it's time to say,  
9 you know what, this stuff has been slipping through  
10 for a very long time. This is the first case we have  
11 had where the question has been squarely presented to  
12 us, and we come to the conclusion that it is not  
13 proper under the Height Act, under a Congressional  
14 enactment, to allow that practice to continue.

15 Finally, I hesitate to bring this up, but  
16 I -- I do it only because Montrose's counsel, in their  
17 brief, made a point of it right at the beginning,  
18 right on page 2. The Chairman's statement at the  
19 conclusion of the decision -- or during the  
20 decisionmaking process on 17109 was not a Board  
21 decision. It was not a Board clarification, which is  
22 the way it was characterized in the brief.

23 It was what we are taught in law school is  
24 called obiter dicta. I hate to use too much Latin.  
25 Not just dicta. Dicta would just be something said in

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1 a decision that really wasn't necessary to the  
2 decision or the holding in the case.

3 What obiter dicta means -- that it goes so  
4 far beyond the issues presented that it probably ought  
5 not to have been said at all. And with all due  
6 respect, Mr. Chairman, I was very disappointed by  
7 that.

8 I can only hope that you've heard enough  
9 today to reconsider your earlier statement and see the  
10 wisdom of granting this appeal, because I think that  
11 we're entitled to that. I'm going to quote to you,  
12 Mr. Chairman, from another case, and these are your  
13 words. "As a mayoral appointee and chairman, what is  
14 of greatest concern to me is preserving the integrity  
15 and functioning of this Board as well as ensuring that  
16 -- ensuring the public that every party will receive  
17 an objective, unbiased, thoughtful, and fair  
18 consideration of his or her case."

19 And continuing on, "Our charge here is not  
20 to give privileged individuals what they demand. Our  
21 charge is to impartially hear the presentations of  
22 applications, both for and against, weigh the facts,  
23 deliberate, and decide." I know that's what you  
24 strive for. Mr. Chairman, I know you personally  
25 outside this room, and I know that that is what you

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1 intend.

2 And I hope that you will go back and  
3 rethink the comments that you made in the earlier case  
4 on a question that was not before you at the time, on  
5 a question where evidence had not been appropriately  
6 presented, on an issue that should have been reserved  
7 for another day.

8 Thank you.

9 CHAIRPERSON GRIFFIS: Thank you very much.  
10 Appreciate all those points, and I do -- do believe --  
11 I absolutely stand behind my last comments and do  
12 think that we strive strongly to provide that.  
13 Interesting symmetry in that when that statement was  
14 made, actually, with the previous statement as one  
15 might in deliberation, and a single member may cast  
16 out a sentence or two, and who knows where it evolves  
17 to, or devolves as they say.

18 That being said, I think the Board  
19 obviously is a membership of five, and on this case we  
20 have numerous great minds looking at this. So let's  
21 go directly to the points that you made, because I  
22 think they're critical and pertinent, but I need some  
23 clarification.

24 First of all, you started off saying, "We  
25 have deck and railing, two items. How can they

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1           logically be" -- and you said -- I think your word was  
2           absurd to think there are two elements there, just  
3           one.  However, do I -- how do I understand that and  
4           digest that when, in fact, the entire -- the entire  
5           case that we're revolving around is about structures  
6           and roof structures?

7                         We have a building, we have a penthouse,  
8           each of which are dealt with differently.  In fact,  
9           there are numerous elements, according to the zoning  
10          regulations, that are dealt with differently.  I'm not  
11          sure what your point was, then, that -- how can we not  
12          take certain things as different, building/penthouse  
13          different?

14                        MR. ROTH:  You can have a penthouse  
15          without a roof deck.  But I don't think you can have  
16          a roof deck without a railing.  They are part and  
17          parcel of the same structure.

18                        CHAIRPERSON GRIFFIS:  But you can't have  
19          a penthouse without a building.

20                        MR. ROTH:  Well, that's true.  But --

21                        CHAIRPERSON GRIFFIS:  And they're dealt  
22          with differently, with height, with setbacks, with  
23          use, with --

24                        MR. ROTH:  I understand.

25                        CHAIRPERSON GRIFFIS:  -- numerous things.

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1 MR. ROTH: My argument is that it would be  
2 a fiction to try to separate the railing from the  
3 walking surface in this case. They are part and  
4 parcel of the same thing.

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. ROTH: And for purposes of the Height  
7 Act, to me it doesn't make any logical sense to  
8 suggest that Congress would have intended that  
9 railings fastened to a roof deck somehow or other are  
10 exempt from the height limit that they contemplated.

11 CHAIRPERSON GRIFFIS: Okay. So I think I  
12 understand, then, in terms of KCA's statement, they  
13 were saying, as they concluded, that you wouldn't --  
14 I think that's part and parcel -- you wouldn't build  
15 something that violates the building code, but you  
16 certainly wouldn't vote something else. I see where  
17 you're connecting those. That makes some sense, I  
18 gather.

19 You made another statement, though, about  
20 this occupancy, and I wasn't clear on what the point  
21 was of that, because it seems to me that the position  
22 of the statement, which you signed on, did actually  
23 indicate that the -- oh, you were indicating that  
24 Congress, in the Height Act, didn't anticipate  
25 occupancy of the roof?

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1 MR. ROTH: I don't think Congress  
2 anticipated the use of space above the limit they set  
3 to be used as living space, to be used as space that  
4 people would occupy.

5 CHAIRPERSON GRIFFIS: Okay. I guess my  
6 trouble is there's a lot of terms there. I mean,  
7 occupancy is different than living. Is it, or is it  
8 not?

9 MR. ROTH: I don't believe that Congress  
10 intended that human beings, in the ordinary course, as  
11 opposed to for maintenance or construction or other  
12 things that people might occasionally have to go up  
13 there for, and that Congress specifically enumerated  
14 some exceptions for, I don't think Congress  
15 anticipated or intended that space above the limit  
16 that it set would be regularly used by human beings as  
17 part of their -- I don't know what the word is --  
18 habitation?

19 CHAIRPERSON GRIFFIS: So, but Congress  
20 didn't anticipate people up on the roof on a sunny  
21 day, then.

22 MR. ROTH: I can't say I know that a  
23 Congressman never believed that somebody would take  
24 their towel or their blanket and climb up through  
25 their hatch on the roof on a sunny day and lie out

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1 there. What I'm saying is they didn't intend for that  
2 space to be regularly used by the occupants of the  
3 building.

4 CHAIRPERSON GRIFFIS: And just talking  
5 about intent, because, you know, we have to value  
6 that, but you gleaned, obviously, on your studies of  
7 this intent -- no, okay.

8 Any other questions?

9 VICE CHAIRPERSON MILLER: Yes. I'd like  
10 to ask you, why would the Council have to legislative  
11 a life safety provision such as safety rails but not  
12 have to legislate penthouse over a stairway?

13 MR. ROTH: Well, I'm not sure I understand  
14 the question. But my understanding -- but my  
15 understanding of the division of -- I guess the  
16 separation of powers in the District is that the  
17 Zoning Commission is empowered to, in effect,  
18 legislate zoning regulations, and the Council is not.

19 VICE CHAIRPERSON MILLER: Yes. Let me --

20 CHAIRPERSON GRIFFIS: But it's fairly  
21 specific.

22 VICE CHAIRPERSON MILLER: Perhaps you  
23 weren't here when we -- I asked the question of Mr.  
24 Hargrove, too, because it's in the -- well, it's in  
25 the joint prehearing statement, and we've all looked

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1 at the history that exists on the Height Act.

2 And I -- there was a 1953 Corporation  
3 Counsel opinion that said penthouses over elevator  
4 shafts set forth in D.C. Official Code 6-601.05(h),  
5 which is among the specifically enumerated exemptions  
6 from the Height Act. It said that that may be  
7 construed to include penthouses over stairways.

8 They didn't say that they needed the  
9 Federal Government or the City Council or the Zoning  
10 Commission to amend the statute or anything, that you  
11 could read into that provision an interpretation that  
12 wasn't specifically enumerated there.

13 MR. ROTH: I think I understand your  
14 question now.

15 VICE CHAIRPERSON MILLER: Okay.

16 MR. ROTH: And my point is this.  
17 Certainly, in the interpretation of a statute, or the  
18 interpretation of a regulation, there are some things  
19 that are fair, for lack of a better word, for this  
20 Board or DCRA to reason by analogy with.

21 You know, I would say it's fair for DCRA  
22 or this Board to say, "Well, when elevators were  
23 invented, the same structure on the roof that  
24 previously enclosed a stairwell could now enclose an  
25 elevator." I don't think that's true when you talk

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1 about a regulation written to apply to decks down in  
2 a yard.

3 VICE CHAIRPERSON MILLER: Well, it sounds  
4 like you're saying that --

5 MR. ROTH: And take that and apply it to  
6 a roof.

7 VICE CHAIRPERSON MILLER: No, I'm not  
8 talking about that. But let's just -- let's just  
9 focus on this -- this anticipation, because you -- you  
10 had said that, you know, they might not have  
11 anticipated -- they may have anticipated a penthouse  
12 over a stairway, didn't anticipate elevators.

13 So we were talking before about, well,  
14 they didn't anticipate that people would be living on  
15 the roofs. So why wouldn't that be a fair situation  
16 in which to interpret that way?

17 MR. ROTH: Because, a) I don't believe  
18 that the zoning regulations give the Board of Zoning  
19 Adjustment plenary authority to decide life safety  
20 questions. If that kind of question is going to be  
21 included in the zoning regulations, it needs to be put  
22 in there by the Zoning Commission.

23 And the only basis that I have heard  
24 expressed by DCRA, the only regulatory basis I've  
25 heard expressed by DCRA for importing that, is a

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1 regulation that has absolutely nothing to do with  
2 roofs.

3 Now, DCRA has certainly been free at any  
4 point along the way, and so has anybody else, to go to  
5 the Zoning Commission and say, "Hey, you know, we've  
6 had this Height Act issue come up, and we think we  
7 need a zoning regulation to address the question of  
8 whether or not railings on roof decks do or don't  
9 count toward height limits," and how that fits with  
10 the Height Act, and whether or not we ought to do that  
11 anyway because it's a life safety issue.

12 And I suppose all along the way, if we're  
13 not dealing with Height Act cases, and if the Height  
14 Act question never directly arises, it's perfectly  
15 within the ambit of DCRA to say, "Well, it was a life  
16 safety matter. Just as a construction code matter,  
17 we're going to require railings around roof decks."

18 That's not the same thing as saying that  
19 this Board or DCRA have the authority to reach out and  
20 take a provision that has absolutely nothing to do  
21 with roofs and legislative it, in effect, to say, oh,  
22 we're going to apply that now to roofs. That's the  
23 job of the Zoning Commission. That's the job of the  
24 Council.

25 VICE CHAIRPERSON MILLER: Thank you.

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1 MR. ROTH: Sure.

2 CHAIRPERSON GRIFFIS: Mr. Parsons?

3 COMMISSIONER PARSONS: Mr. Chairman,  
4 unfortunately, I have another commitment and have to  
5 leave. Generally, you were going to assess things  
6 about 6:00. I'm 15 minutes early. Certainly, I will  
7 read the record of the transcript when available, but  
8 I simply can't stay.

9 CHAIRPERSON GRIFFIS: Indeed. Ms. Brown,  
10 how much time do you need to present?

11 MS. BROWN: Ten minutes.

12 CHAIRPERSON GRIFFIS: Wow. Good. We're  
13 continue tonight and finish this evening, I believe,  
14 as long as we -- well, none of us are going to be able  
15 to go too late as we've started very early this  
16 morning. But let's get as far as we can, and we'll  
17 provide Mr. Parsons with a transcript and all of the  
18 submissions.

19 Okay. Any other questions? Follow up  
20 questions? Very well. Do we have any cross? Yes,  
21 Mr. Hargrove? Ms. Brown?

22 MS. BROWN: No cross.

23 CHAIRPERSON GRIFFIS: DCRA have any cross?

24 MR. HARGROVE: No cross.

25 CHAIRPERSON GRIFFIS: Excellent. Let me

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1 ask, then, while both of you are at the table, why  
2 don't we take it just very quickly -- just for  
3 clarification, we are here, of course, looking at this  
4 element and whether it goes towards counting --  
5 towards the height of a building, the measurement of  
6 the building.

7 I think putting it in a different  
8 direction, where is it that the Board should look to  
9 to find that this definitively counts towards the  
10 height of a building, either in the regulations or the  
11 Height Act?

12 MR. ROTH: Are you asking either of us?

13 CHAIRPERSON GRIFFIS: Absolutely.  
14 Actually, I'm asking both, if -- but either of you can  
15 answer.

16 MR. ROTH: I'm going to defer to Mr.  
17 Hargrove, because he's more of an expert than I am.

18 MR. HARGROVE: Unfortunately, I know more  
19 about the Height Act than I ever wanted to know.

20 CHAIRPERSON GRIFFIS: Yes.

21 MR. HARGROVE: The answer is that the --  
22 the people that administer the permitting process have  
23 to look at both, and if the Height Act is involved,  
24 because of the height of the building on the  
25 particular street in question, that governs, because

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1 the Height Act, an act of Congress, trumps the zoning  
2 regulations, which was --

3 CHAIRPERSON GRIFFIS: What is it that --  
4 what is it and where is it that indicates that this is  
5 a measuring point for a building?

6 MR. HARGROVE: If I'm not mistaken, the  
7 Height Act itself specifies the measuring point. I'd  
8 have to consult the text. There is also a measuring  
9 point specification in the zoning regulations, which  
10 would govern in the case of a building which does not  
11 raise a Height Act question.

12 But if the building is going to exceed the  
13 Height Act, then whatever are the provisions with  
14 regard to measurement or any other thing in the Height  
15 Act, those provisions will govern.

16 CHAIRPERSON GRIFFIS: Okay. So the lack  
17 of this being enumerated by name indicates that it is  
18 not allowable and counts towards building height under  
19 the Height of Buildings Act of 1910, in your opinion,  
20 is that correct?

21 MR. ROTH: Yes. By name --

22 MR. HARGROVE: By name or by anything else  
23 enumerated that's even remotely close to it.

24 CHAIRPERSON GRIFFIS: Then, the Height of  
25 Buildings Act allows similarities to be taken from the

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1 elements that they enumerate?

2 MR. HARGROVE: Well, I think we've heard  
3 already in the discussion or the exchange that Board  
4 Member Miller and I had that there are certain  
5 circumstances in which historically adaptations have  
6 been made.

7 CHAIRPERSON GRIFFIS: So adaptations can  
8 be made to that.

9 MR. HARGROVE: And I don't think we've  
10 ever argued that that's not the case. I think what  
11 we've suggested is that they have to fall within the  
12 ambit of what Congress intended, and Congress clearly  
13 did not intend for human beings regularly to be able  
14 to entertain themselves on the roof of their building,  
15 if that building exceeded the Height Act.

16 CHAIRPERSON GRIFFIS: Hmm. Interesting.  
17 Why do you suppose that would be? They didn't like  
18 rooftop parties?

19 (Laughter.)

20 MR. HARGROVE: I can tell you I have  
21 neighbors now that don't like rooftop parties.

22 VICE CHAIRPERSON MILLER: Do you see any  
23 distinction between what Congress intended and what  
24 Congress anticipated in your analysis?

25 MR. ROTH: I do. I also believe that

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1 there are many instances in which Congress fails to  
2 anticipate new developments, and there's a simple  
3 solution to that problem. It's called the amendment  
4 process.

5 VICE CHAIRPERSON MILLER: Okay. So what  
6 you are saying, though, is not that they didn't intend  
7 -- they didn't want people to be on the roof. You're  
8 just saying they didn't anticipate people being on the  
9 roof. Is that right?

10 MR. ROTH: I don't know whether they  
11 didn't anticipate it or didn't want it.

12 VICE CHAIRPERSON MILLER: All you're  
13 saying is --

14 MR. ROTH: All I know is that we've now  
15 had more than 90 years in which if they didn't like  
16 what they said in the first place they could have  
17 written it differently.

18 CHAIRPERSON GRIFFIS: Okay. Excellent.  
19 Thank you very much.

20 Let's move ahead.

21 MS. BROWN: Thank you, Mr. Chairman, and  
22 members of the Board. I think that we've confused the  
23 issue more than we needed to. It's very much a  
24 straightforward issue, a simple question that we have  
25 here, and that's whether or not -- roof surface, and

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1 I disagree with Mr. Roth's and KCA's analysis that you  
2 have to look at them in combination. You don't. The  
3 roof surface, the patio surface, is a finish to the  
4 roof. It is completely legal to get a building permit  
5 application to finish your roof in slag, you can  
6 finish it in tar, or you can finish it in tile if you  
7 want. As long as it's below the Height Act, it's  
8 permitted. You can get a separate permit for it.

9 The next question is to the railing. And  
10 the railing is whether or not you can have it above  
11 the Height Act, and I think it's pretty clear that it  
12 is allowable under the long-standing interpretation of  
13 the 1910 Height Act.

14 I guess I'd better back up and make sure  
15 that you all did receive the opposition that was filed  
16 by Montrose. That helps keep my remarks brief.

17 CHAIRPERSON GRIFFIS: Absolutely. It's  
18 Exhibit Number 21 in the record.

19 MS. BROWN: Thank you. We do have a long-  
20 standing legislative interpretation by the Zoning  
21 Administrator's office that the railings are permitted  
22 above the Height Act. And as you -- as noted in the  
23 exhibit to our submission, we have pools on rooftops  
24 and we have railings and fences that protect those.

25 Each one of those buildings, when it was

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1 constructed, went -- had a zoning computation filled  
2 out by the Zoning Administrator's office. There's a  
3 check box for the 1910 Height Act. So we know that it  
4 was scrutinized for the 1910 Height Act.

5 We've heard KCA and the ANC make the  
6 argument that it's just like people running a red  
7 light, that the policeman was asleep and just didn't  
8 catch them. Well, that analogy fails because we would  
9 have to have the Zoning Administrator's office reverse  
10 course and say, "I was asleep at the switch. I made  
11 a mistake. These permits should not have been issued  
12 for these buildings." That's not what we're hearing  
13 today. We're hearing that it is their long-standing  
14 interpretation that you can have these railings above  
15 the Height Act.

16 I think the crux of analyzing this issue  
17 for the railing is the term "human occupancy." We've  
18 been hearing a lot about that today, and it's the  
19 assumption that if you have living space on a roof  
20 that somehow that constitutes human occupancy under  
21 the 1910 Height Act.

22 We don't have to look any further than the  
23 1953 Office of Corporation Counsel opinion that sets  
24 out a discussion on that, and it very clearly says  
25 that human occupancy is enclosed space. We do not

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1 have enclosed space on this roof. It is open space.  
2 It's not required open space, but it's open space that  
3 does not provide shelter for human occupancy.

4 And that was the whole interpretation that  
5 they were getting to with this is they knew that  
6 people could be up on the roof. They just couldn't be  
7 there for shelter purposes. And the fact that they  
8 are having an elevator engineer have a sheltered room  
9 within the penthouse that was a question -- does that  
10 constitute human occupancy? And he said, "Well, no,  
11 because it's just for maintenance of the building."

12 And we don't even have to get to that  
13 question, because we don't even have a shelter here.  
14 So I think that's very clear. And, you know, it's --  
15 what happens if we have a decision that says you can't  
16 have people occupying the roof, not as a shelter but  
17 as recreational space. We have the DD regulations  
18 that allow developers to go up to the maximum height  
19 under the 1910 Height Act. If they have a residential  
20 building, they have required residential rec space.

21 We have numerous buildings in the DD zone  
22 that have rooftop rec space, and some of those are  
23 identified in the photographs that are attached to the  
24 exhibit. So all of a sudden, are we saying that we no  
25 longer permit that? Do we no longer permit swimming

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1 pools on tops of roofs with this decision? I think  
2 that that clearly is contrary to the intent and long-  
3 standing interpretation of the Zoning Administrator's  
4 office.

5 And I think that pretty much summarizes my  
6 comments. I refer you back to the full brief that we  
7 did submit on this issue. I'm happy to answer any  
8 questions.

9 CHAIRPERSON GRIFFIS: Excellent. Thank  
10 you very much. Questions from the Board? Mr.  
11 Etherly?

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

14 If you could, Mrs. Brown, I'd like to turn  
15 your attention to Exhibit 21, your opposition to  
16 Intervenor Montrose, LLC, submittal. I just wanted to  
17 walk through Exhibit C, which I thought was helpful  
18 and perhaps bridge I believe a question that Mr. Roth  
19 was attempting to get at in the exchange with Mrs.  
20 Miller perhaps, and that is the issue of some of the  
21 illustrative pergola pictures that you've offered.

22 For example, in Exhibit C, the first  
23 building that you have denoted -- and I'm looking at  
24 Exhibit C-1, it's two photographs -- the first, the  
25 top-most photograph is of 400 Massachusetts Avenue,

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1 Northwest.

2           Based on your familiarity or knowledge of  
3 this particular illustration here, do you have a sense  
4 of at what point in this building structure's height  
5 it rises above the Height Act limitation? And by that  
6 I mean, is it -- as you note, the caption says  
7 residential building, 400 Massachusetts Avenue,  
8 Northwest, roof deck and pergola above applicable  
9 limits of Height Act. Do you know where the -- where  
10 the -- where it exceeds the Height Act, that point?  
11 Do you know where that comes in this particular  
12 building?

13           MS. BROWN: My understanding is that if  
14 you look at the apex of the building, the rounded  
15 corner --

16           BOARD MEMBER ETHERLY: Yes.

17           MS. BROWN: -- if you go all the way up to  
18 the top of that point, that is the height limit. And  
19 then, if you follow that line around, you can see that  
20 the pergola rises above that.

21           BOARD MEMBER ETHERLY: Okay. So is it  
22 your contention -- or under your interpretation, would  
23 it be your argument that a pergola similar to what we  
24 have here in this -- in Exhibit C-1, at  
25 400 Massachusetts Avenue, could be built without

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1 limitation, as long as it's interpreted to be part of  
2 the -- part of the safety railing, so to speak?

3 Perhaps it's -- I'm perhaps putting the  
4 question somewhat inartfully, given the lateness of  
5 the day. But do you kind of see what I'm getting at?  
6 Perhaps I'm trying to kind of get a sense of what's  
7 the logical limit or the extent of your position. Is  
8 there some limit that caps the height of a railing?

9 Let's say you're at 60 -- let's say you're  
10 at 69 feet, so your roof -- the roof floor falls below  
11 the Height Act limitation. Is there a limit to the  
12 height of the railing that you could introduce for  
13 safety purposes?

14 MS. BROWN: My response to that is that  
15 you have to look to the intent and purpose of the 1910  
16 Height Act. And if it's for fire safety reasons, if  
17 it's for perhaps view sheds on the horizon of the  
18 District, then it seems logical that if your -- a  
19 penthouse is permitted to an additional -- well, I  
20 guess it's under the Zoning Code. But if the  
21 penthouse is allowed to exceed the Height Act, then  
22 the pergola would be able to extend to the same  
23 height.

24 BOARD MEMBER ETHERLY: Now, perhaps with  
25 this discussion that we've had around the custom, the

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1 approach of custom as it relates to how railings have  
2 been treated by the ZA over the years, under your  
3 contention, once again, is there -- is there some  
4 limit to the height of a pergola in this particular  
5 instance?

6           Once again, coming back to the  
7 400 Massachusetts Avenue, Northwest, example, what  
8 would be -- if I'm a builder who wants to build below  
9 the Height Act, but I want to introduce a pergola at  
10 the top-most -- on the roof, is there a limit to the  
11 height? How do I determine, or where would I look to  
12 determine how high I could go with that pergola on the  
13 roof?

14           MS. BROWN: I think that you would turn to  
15 the zoning regulations, because it's my -- I'd have to  
16 go back and refresh my memory of reading the 1910  
17 Height Act, but I don't believe that the 1910 Height  
18 Act prescribes a limit on the height of roof  
19 structures. I believe that's a factor of the zoning  
20 regulations, so you have to read them in tandem.

21           BOARD MEMBER ETHERLY: Okay. That  
22 concludes my questions for the moment, Mr. Chair.  
23 Thank you.

24           CHAIRPERSON GRIFFIS: Thank you. Other  
25 questions for the Board? Ms. Miller?

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1                   VICE CHAIRPERSON MILLER: Yes. Ms. Brown,  
2 I know it's your position that the railings are exempt  
3 from the Height Act. I don't know if you want to use  
4 that word exactly, but I -- I want to ask you what  
5 your theory is for that exemption. Is it long-  
6 standing practice? Is it some interpretation of the  
7 Height Act?

8                   MS. BROWN: It's a couple of things. We  
9 know from the 1953 Office of Corporation Counsel  
10 opinion that the 1910 Height Act is not a static  
11 document. It is something that has to be interpreted  
12 as changed conditions come into play, and that's  
13 specifically what they are addressing here.

14                   And the fact that residential rec space is  
15 going on rooftops, that people are allowed to use  
16 their roofs, are allowed to go up to that level, it  
17 seems only natural that building code restrictions for  
18 life and safety would come into play. And it's  
19 another element where you have to read them in tandem.

20                   And I believe it's the long -- it is the  
21 long-standing practice of the Zoning Administrator's  
22 office that safety railings are permitted to exceed  
23 the Height Act as a roof structure element.

24                   VICE CHAIRPERSON MILLER: Is there a  
25 provision in the Height Act that you can point to that

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1 would --

2 MS. BROWN: No. There is the list of  
3 enumerated exceptions. A roof railing is not listed  
4 among them. Neither are air conditioning units,  
5 neither are antennas, but we know that all of those  
6 are permitted -- all of those have been permitted.  
7 It's a long-standing interpretation that those  
8 elements can go on roofs, even though they're not part  
9 of the 1910 Height Act.

10 VICE CHAIRPERSON MILLER: And is that  
11 because they're within the spirit of 6-601.05(h)?

12 MS. BROWN: And I assume that's the exact  
13 provision of the Height Act?

14 VICE CHAIRPERSON MILLER: Right. That  
15 sets forth the exceptions.

16 MS. BROWN: Sounds familiar. Yes, because  
17 it's with the intent and purposes of the Height Act,  
18 and that you can't look to the -- as noted in the  
19 Corporation Counsel opinion, it's not unambiguous, the  
20 exact language.

21 We do have to look beyond the exact words,  
22 and that's how they got to their interpretation. And  
23 I believe that's how the Zoning Administrator has  
24 gotten to its long-standing interpretations and  
25 allowing railings, antennas, flagpoles, anything else

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1 that's not listed on the Height Act.

2 MS. BELL: Excuse me. We have to leave.  
3 DCRA has to leave. But I would ask leave to contact  
4 Ms. Bailey tomorrow if there is something that the  
5 Board would like from the Government in concluding  
6 this appeal.

7 CHAIRPERSON GRIFFIS: Do you have any  
8 cross of Ms. Brown?

9 MS. BELL: No.

10 CHAIRPERSON GRIFFIS: Okay.

11 MS. BELL: Thank you.

12 VICE CHAIRPERSON MILLER: Okay. As a  
13 follow up on that, procedurally, those structures that  
14 are listed specifically as exempt under the Act  
15 pursuant to that provision, 6-601.05(h), chimneys,  
16 smokestacks, okay -- okay. Now, you have here a  
17 structure that you are asserting is in the spirit of  
18 that, like the penthouse over the elevator, okay, and  
19 should be exempt for that reason.

20 My question is: in that case, would the  
21 applicant be required to seek a waiver in that I  
22 believe that provision allows for waiver from the  
23 Height Act.

24 MS. BROWN: That authority has been  
25 delegated to the building -- I have an interpretation

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1 from the Zoning Administrator that I'll be happy to  
2 supply for the record. But that authority to waive  
3 that requirement has been delegated to its either the  
4 Zoning Administrator or the building code official in  
5 issuing the permit.

6 VICE CHAIRPERSON MILLER: So, but just by  
7 issuing the permit, that's sufficient? There's no  
8 official waiver? I mean, do they say, you know, the  
9 Zoning Administrator is waiving --

10 MS. BROWN: I don't have an answer for  
11 that today.

12 VICE CHAIRPERSON MILLER: Okay. That's in  
13 the letter or the notice that you have that you could  
14 submit?

15 MS. BROWN: I have something that gets to  
16 that question. I don't what the current practices of  
17 the Zoning Administrator's office or building code  
18 officials are in that matter.

19 VICE CHAIRPERSON MILLER: Okay. But were  
20 you involved in the process at issue here with respect  
21 to the railings?

22 MS. BROWN: Was I --

23 VICE CHAIRPERSON MILLER: Montrose. I  
24 mean, I know they were --

25 MS. BROWN: I did not secure the permit on

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1 behalf of Montrose, no.

2 VICE CHAIRPERSON MILLER: Okay. Does  
3 Montrose have any other type of letter from the Zoning  
4 Administrator with respect to application of the  
5 Height Act?

6 MS. BROWN: No. What has been submitted  
7 to the record is -- my understanding is the complete  
8 record on this permit.

9 VICE CHAIRPERSON MILLER: And is it your  
10 position that the safety railings are within the  
11 spirit of that provision because they address safety?

12 MS. BROWN: Yes.

13 VICE CHAIRPERSON MILLER: Any other --

14 MS. BROWN: I think it's just common sense  
15 that if you're going to have engineers maintaining the  
16 roof, the elevator shafts, the -- any of the  
17 equipment, or even the roof itself, that once they  
18 start going out there that -- inspecting that there  
19 might be a pathway that's established and you put a  
20 railing on it just for safety purposes. It's just  
21 common sense.

22 VICE CHAIRPERSON MILLER: And I think the  
23 Appellant would probably argue, then, you just have  
24 the roof, you know, three feet lower. but

25 CHAIRPERSON GRIFFIS: You still get a

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1 fall --

2 (Laughter.)

3 A roof is a roof.

4 VICE CHAIRPERSON MILLER: Anyway --

5 CHAIRPERSON GRIFFIS: Which would prevail,  
6 the Height of Buildings Act or OSHA?

7 VICE CHAIRPERSON MILLER: That's all my  
8 questions. Thank you.

9 MS. BROWN: If I could just make one point  
10 of clarification. The original roof deck on this  
11 building that was taken down and then this new one  
12 substituted, there were beams and sleepers, and those  
13 elements did rise above the 70-foot height limit, and  
14 it was -- I think it was even back in as early as June  
15 2004 that Montrose spoke again with the Zoning  
16 Administrator to come up with an -- to understand the  
17 interpretation of putting the -- if the walking  
18 surface of the patio is below the 70-foot height limit  
19 that that would comply.

20 And it's -- so it's been an ongoing  
21 process. It wasn't strictly relying on the February 1  
22 oral decision of this Board.

23 CHAIRPERSON GRIFFIS: Okay.

24 VICE CHAIRPERSON MILLER: Oh, one other  
25 thing. With respect to the argument about 2503,

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1 structures in open spaces, well, I'm just curious  
2 whether you think that -- I understand that you're  
3 saying times have changed, and there are residential  
4 recreation requirements for the roof decks. Do you  
5 think it's limited to where it's required?

6 MS. BROWN: I think the interpretation of  
7 the analogy to 2503 is helpful in informing the Zoning  
8 Administrator making a decision, looking at the  
9 totality of all the regulations and the zoning -- each  
10 component of the zoning regulations and the components  
11 of the 1910 Height Act, and you look to any provision  
12 to help inform your decision. I think that that's my  
13 understanding of what transpired.

14 VICE CHAIRPERSON MILLER: Thank you.

15 BOARD MEMBER ETHERLY: Mr. Chair, if I  
16 could, let me come back to a little bit of the  
17 discussion that we've had regarding dicta, or even  
18 obiter dicta, as I -- as we have been reminded, taking  
19 me back to my first years of law school.

20 Is it your sense, Mrs. Brown, that the  
21 Board reached the issue of railings in the prior  
22 proceeding?

23 MS. BROWN: I believe it did, but I also  
24 know that until a written decision is issued that --

25 BOARD MEMBER ETHERLY: It's difficult to

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1 say.

2 MS. BROWN: -- it's difficult to say.

3 BOARD MEMBER ETHERLY: It would be  
4 impossible to say.

5 MS. BROWN: But --

6 BOARD MEMBER ETHERLY: Okay.

7 MS. BROWN: -- I don't even need to get  
8 there, because I know that it's a long-standing  
9 interpretation of the Zoning Administrator's office.  
10 I mean, it's -- it helps, it informs. I agree with  
11 the position that we found in the transcript. But  
12 it's the decision of this Board and what happens when  
13 we get the written order as well that helps tell us  
14 where we end up.

15 BOARD MEMBER ETHERLY: Okay. Let me just  
16 be sure that I'm clear with respect to precisely what  
17 is happening with regard to the walking surface in the  
18 roof membrane at the roof of the structure, and by  
19 that I mean, could you just walk through very briefly  
20 exactly what is happening up to the height limitation  
21 that you're identifying here? By that, I just want to  
22 be sure I'm clear that I understand.

23 As you've described, I believe you have a  
24 walking surface that falls below the 70-foot height  
25 limitation. Correct? Or is there something else

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1 that's happening before you get to -- after you get to  
2 the walking surface and the height limitation? I just  
3 want to be sure I'm clear with regard to --

4 MS. BROWN: It's the actual walking  
5 surface that is one-half inch below the 70-foot height  
6 limit. That there are supports for that walking  
7 surface, that it attaches to something, and, you know,  
8 I refer to the drawings under Exhibit B to our  
9 submission, and --

10 BOARD MEMBER ETHERLY: And that would be  
11 drawing A-2? And I'll --

12 MS. BROWN: Yes.

13 BOARD MEMBER ETHERLY: -- show that for  
14 the -- for your benefit.

15 MS. BROWN: Yes.

16 BOARD MEMBER ETHERLY: I'm looking at this  
17 drawing here.

18 MS. BROWN: Yes.

19 BOARD MEMBER ETHERLY: Okay. And there is  
20 an illustration or a caption box that reads, "New  
21 patio walk surface is at minimum half-inch below 70-  
22 foot height."

23 MS. BROWN: Yes.

24 BOARD MEMBER ETHERLY: Thank you, Mr.  
25 Chair.

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1 Thank you, Ms. Brown.

2 CHAIRPERSON GRIFFIS: Anything else? Any  
3 other questions? Mr. Hargrove?

4 MR. HARGROVE: Thank you, Mr. Chairman.  
5 Let me just briefly review the points in our argument  
6 in support of this appeal and try to comment --

7 CHAIRPERSON GRIFFIS: I'm sorry. There's  
8 ample time, but do you have any cross examination or  
9 -- I don't know how we're going to do this --

10 MR. HARGROVE: I'm sorry.

11 CHAIRPERSON GRIFFIS: -- but just  
12 questions of analysis regarding the legal assertions  
13 you've just heard?

14 MR. HARGROVE: No.

15 CHAIRPERSON GRIFFIS: Okay. Mr. Roth, did  
16 you have any legal questioning?

17 MR. ROTH: Just one. Just one, Mr.  
18 Chairman.

19 CHAIRPERSON GRIFFIS: Sure.

20 MR. ROTH: Ms. Brown, I assume that you  
21 would agree that except in very extraordinary and  
22 unusual circumstances it would not ordinarily be  
23 contemplated that the residents of a building would  
24 sunbathe, read the paper, entertain, on a flagpole, an  
25 antenna, or an air conditioning unit. Is that

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1 correct?

2 MS. BROWN: You bet.

3 MR. ROTH: Thank you.

4 MS. BROWN: I'm not sure what the point of  
5 the question is, but --

6 MR. ROTH: Thank you.

7 CHAIRPERSON GRIFFIS: If there's nothing  
8 else, thank you very much, Ms. Brown.

9 We'll go to you, Mr. Hargrove, for closing  
10 remarks.

11 MR. HARGROVE: The first point I'd like to  
12 make in summation, which is particularly important in  
13 light of the wanderings of the proceedings this  
14 afternoon, is that this case is simpler than the  
15 proceedings this afternoon would suggest. This case  
16 is governed by the Height Act.

17 The zoning regulations have no bearing or  
18 relevance on this issue, except via Section 2510.1,  
19 which requires the Zoning Administrator to observe the  
20 Height Act in all of its decisions, and, of course,  
21 it's binding on this Board.

22 So regulations about how big a railing you  
23 can have in a yard, or regulations of any other sort,  
24 are not relevant. Obviously, because in the case of  
25 the side yard regulations they don't apply by their

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1 terms, but, more importantly, because this case is  
2 governed by an act of Congress -- the Height Act.

3 Now, the Board, looking at that Act, has  
4 determined in KCA 1 that the structure there violates  
5 the Height Act. And as you recall, our position is  
6 that the burden is on DCRA, the Zoning Administrator,  
7 the Intervenor, to show some basis in the Height Act  
8 for distinguishing the two cases, and we suggest that  
9 that burden has not been discharged.

10 The Height Act doesn't make any  
11 distinction between portions of the structure that are  
12 above or below the Act, exempting a structure that  
13 exceeds the Act because its feet are below the Act,  
14 and so on. That sort of distinction has to be made if  
15 we're going to admit part of this structure, the  
16 railing, but not admit the rest of it, or if we're  
17 going to exclude part of this structure, the railing,  
18 and admit the part that is below the Height Act.

19 In any event, secondly, this structure is  
20 barred under the Height Act because of the two  
21 limitations that were clarified and articulated in the  
22 1953 opinion of the Corporation Counsel, which has  
23 been much at issue in this afternoon's discussion.

24 Those are that the -- any permitted  
25 structure must be attendant to the functioning of the

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1 building. It must be necessary for the mechanical  
2 functioning of the building. And, secondly, it cannot  
3 be for human occupancy.

4 Now, it is true, as we have all  
5 acknowledged, that the result of that opinion was to  
6 take an existing category of permitted structures --  
7 namely, mechanical equipment -- and expand it to  
8 include other sorts of mechanical equipment which were  
9 not envisaged at the time of the drafting of the Act  
10 because they did not come into existence. But that  
11 expansion is hedged in by the twin limitations that  
12 I've just mentioned.

13 Now, Montrose has argued that that same  
14 opinion limits the sort of structure that is to be  
15 regarded for human -- as for human occupancy to  
16 enclosed structures. The opinion simply doesn't say  
17 that.

18 The opinion happened to be dealing with an  
19 enclosed structure -- namely, a penthouse -- but  
20 nowhere does the opinion say the Height Act was  
21 intended to limit the prohibition on human occupancy  
22 to structures that are designed for human occupancy  
23 that are enclosed, or to imply or -- imply or assert  
24 that structures that were open but were intended for  
25 human occupancy were okay. It simply is not there.

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1           This is manufactured out of whole cloth.  
2           This is an important opinion, but it simply does not  
3           say that. And it's a logical fallacy to imply from  
4           what the opinion does say the conclusion that is  
5           suggested by Montrose in their position paper.

6           Now, the question as to whether there are  
7           precedents for the proposition that railings are  
8           permitted under the Height Act, even if they exceed  
9           the Height Act limit, we said at the beginning that we  
10          have no evidence of any BZA decision, any Zoning  
11          Commission decision, asserting this. We have no  
12          evidence even that the issue has been raised before  
13          those Boards.

14          Similarly, we have no evidence that the  
15          Zoning Administrator has had any long-standing  
16          practice. Both DCRA and Montrose support their -- the  
17          proposition that there's this long string of  
18          precedents, simply by pointing to these non-complying  
19          buildings. That's not the way precedent is made in a  
20          legal system, and we'll have to have better than that  
21          before this Board can operate on the assumption that  
22          there is precedent.

23          I might observe that suppose there were a  
24          BZA decision in 1978, or a Zoning Administrator  
25          determination that we could hold in our hand and read

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1 in 1984, that these railings are permitted. This  
2 Board would be compelled, in fidelity to the law that  
3 governs this case, to reexamine that decision or that  
4 interpretation and try to determine whether, in fact,  
5 it was consistent with the regulation -- with the  
6 legislation, because, obviously, the Zoning  
7 Administrator does not have the free reign to  
8 determine what the interpretation of the Act is.

9 That interpretation has to be subject to  
10 the scrutiny of this Board as to whether it is a  
11 reasonable interpretation of the Act, but we're not in  
12 that situation. We have no evidence, other than the  
13 assertion that this is the long-standing practice, and  
14 a bunch of buildings that are not in compliance and  
15 have railings exceeding the Height Act.

16 Let me mention the question of safety  
17 devices. The simple way to deal with that question is  
18 to reassert that this Act is governed by the Height  
19 Act. It's not governed by the Construction Code.  
20 It's not governed by the zoning regulations. It's not  
21 even governed by legislation of the Council, if there  
22 is any with respect to what you have to do to make a  
23 structure safe.

24 And if it is suggested that the Height Act  
25 must be interpreted to allow devices that are intended

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1 for safety purposes to exceed the Act because its  
2 drafters were concerned with safety, we've addressed  
3 that I think conclusively. Quite the contrary is the  
4 case, because if the drafters were aware of safety  
5 considerations they -- and wish to include exceptions  
6 in order to enhance the safety of a structure, they  
7 would have done so, and they didn't.

8 The enumeration in the Act is exclusive,  
9 and, consequently, there is no basis for asserting  
10 that somehow, to use the phrase that has been used  
11 previously, it's only common sense, or it's only  
12 natural to think that the Height Act ought to allow  
13 these railings.

14 If it is, in fact, only natural and only  
15 common sense, and if it is in fact better policy to  
16 allow railings or -- or ferris wheels or any other  
17 structure on the top of a roof that is not currently  
18 allowed, then that is not the role of this Board.  
19 It's the role of the legislature, and we'll see what  
20 the legislature does in order to dispose of that  
21 question.

22 So to conclude, as a member of the Board  
23 suggested a moment ago, if you can't build these  
24 things without violating the Height Act, and if you  
25 can't build them without violating the Construction

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1 Code, change the elevation of the building.

2 This permit, which authorizes a structure  
3 which exceeds the Height Act, which is for human  
4 occupancy, which is not intended to support the  
5 functioning of the building, nor has anything to do  
6 with the functioning of the building, this permit was  
7 issued in error. It should be revoked, and the  
8 offending structure should be removed.

9 And thank you again very much for your  
10 attention.

11 CHAIRPERSON GRIFFIS: Thank you very much.  
12 Excellent.

13 I don't have anything else on our agenda,  
14 then, for this case. Specifically, we had notioned  
15 one aspect to keep the record open, as I recall, and  
16 that was for Montrose to submit I believe it was cases  
17 attendant to this, or a policy paper, or --

18 VICE CHAIRPERSON MILLER: I have something  
19 -- a notice from DCRA re their having waiver authority  
20 delegated to the Zoning Administrator. But I also  
21 have -- DCRA had said that they could submit  
22 documentation reflecting long-standing policy with  
23 respect to including railings in -- or not including  
24 railings in the height measurements under the Height  
25 Act. Two things.

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1 CHAIRPERSON GRIFFIS: Anything else?

2 Ms. Bailey, do you have anything else?

3 Yes, go ahead.

4 MS. BAILEY: Sorry, Mr. Chairman. It's  
5 really simple. DCRA had indicated that they would  
6 file the permit I think that was referenced --

7 CHAIRPERSON GRIFFIS: Excellent point.  
8 Exactly. With the second permit.

9 MS. BAILEY: Right.

10 CHAIRPERSON GRIFFIS: Or the first permit,  
11 which is not part of this appeal but was put into the  
12 record. Okay. Anything else?

13 MS. BAILEY: No, sir.

14 CHAIRPERSON GRIFFIS: Does anyone else  
15 have any recollection? Yes. Mr. Hargrove?

16 MR. HARGROVE: I have some additional  
17 material to be submitted.

18 CHAIRPERSON GRIFFIS: Yes.

19 MR. HARGROVE: Is there going to be a time  
20 limit for that submission? And would other parties be  
21 able to submit material commenting on or in response  
22 to that material?

23 CHAIRPERSON GRIFFIS: Yes. that's what we  
24 need to set up right now. I don't see this as  
25 monumental and very substantive material that's coming

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1 in. It was more supporting of statements that were in  
2 the record already and presented today. My point in  
3 saying that is that the time is going to be limited.  
4 I think everyone involved in this wants this to go  
5 through fairly quickly in terms of its processing.

6 So that being what it is, I would like to  
7 set out two weeks for the filing of all of this  
8 information. And we'd have -- I'm going to just put  
9 this out as a draft schedule. We can have two weeks  
10 to respond to that, and then it would be set for  
11 decision. That's probably getting us close to the 6th  
12 of December decision. If we do it before that, I  
13 don't think we can hit our November decision.

14 But let me hear comments on schedule with  
15 that. Any difficulty making four weeks the whole  
16 turnaround? Mr. Hargrove?

17 MR. HARGROVE: That's quite satisfactory.

18 CHAIRPERSON GRIFFIS: Ms. Brown?

19 MS. BROWN: We'd obviously like to do it  
20 faster to get a quicker decision, but I think the  
21 materials submitted are not that complex or need a lot  
22 of rebuttal or anything.

23 CHAIRPERSON GRIFFIS: Seven days, submit  
24 the materials? Let's bring it down to a week? We're  
25 at -- that would be, then, submitted by close of

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1 business -- we'll do 3:00 on Wednesday next, which  
2 would be the 26th.

3 (Pause.)

4 Good. Let's work our way back. Ms.  
5 Bailey, I'm going to set this for a special public  
6 meeting on the 8th of November. We would have a week  
7 to submit in. That means responses to the submissions  
8 would be on the 2nd of November, 3:00.

9 Yes?

10 MR. ROTH: Mr. Chairman, ordinarily I  
11 wouldn't have a problem with the one week, but, as it  
12 happens, that Wednesday night -- I think it's  
13 November 2nd -- is our regular monthly ANC meeting.  
14 And as it also happens, we're going to be considering  
15 another case that we will be before you in the near  
16 future, and it's an exciting one.

17 And so, you know, the few days leading up  
18 to an ANC meeting, particularly when we're going to  
19 have something controversial, tend to be a little  
20 busy. If it would be possible, at least give us 'til  
21 the end of that week?

22 CHAIRPERSON GRIFFIS: To the end of the  
23 2nd? The week before the 8th? Let's get to it first  
24 -- we'll do it at a special public meeting on the  
25 15th. We'll just extend it a week. That will also

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1 give us time, because I'm a little bit concerned about  
2 getting the transcript to Mr. Parsons to read the last  
3 points of this, so we can have a full record, and that  
4 will give us some flexibility with that.

5 So the 15th of November will give them  
6 another week and a half after the 2nd for any follow  
7 up from the ANC.

8 VICE CHAIRPERSON MILLER: I just want to  
9 ask a question -- if you have any idea, and you might  
10 not, so it's fine. But the documents that I was  
11 really referencing were kind of like just factual  
12 documents. I'm not sure what kind of filings other  
13 people are going to file in response.

14 Do you see what I'm saying? They're not  
15 like legal arguments or anything.

16 MR. ROTH: I understand. I --

17 VICE CHAIRPERSON MILLER: Do you want to  
18 wait and see?

19 MR. ROTH: Well, I mean, I regret to say  
20 our experience in this case is that we end up filing  
21 responses to things we had hoped we never would have  
22 to file responses to, because argumentation  
23 accompanies those documents that we think is off base.

24 VICE CHAIRPERSON MILLER: Okay. I guess  
25 we'll wait and see.

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1                   CHAIRPERSON GRIFFIS:     So we're at a  
2                   special public meeting on the 15th. Responses limited  
3                   to that of the additional submissions into the record  
4                   would be due on the 9th at 3:00. Original submissions  
5                   are in on the -- let's do it the Friday -- Friday  
6                   next, so that's the -- is that the 28th? 3:00 on the  
7                   28th? And we can all go have a nice Halloween -- it's  
8                   been an eerie group -- and respond.

9                   Good. Ms. Bailey is going to reiterate  
10                  those, just so we're all clear and that it all made  
11                  sense.

12                  MS. BAILEY: The responses are to be filed  
13                  by Friday, October 28th. The responses to those  
14                  filings are due by November 9th. The Board will  
15                  consider a decision on the application on  
16                  November 15th at a special public meeting at 9:30 a.m.

17                  CHAIRPERSON GRIFFIS:     Excellent. Any  
18                  questions or clarifications? Additional information?  
19                  If not, then I thank you all very much. Appreciate  
20                  everyone being here this afternoon and staying late  
21                  with us. And if there's no further business for the  
22                  Board, why don't we adjourn the afternoon session.

23                                 (Whereupon, at 6:35 p.m., the proceedings  
24                                 in the foregoing matter were adjourned.)

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