

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

+ + + + +

TUESDAY,

JUNE 27, 2006

+ + + + +

The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 1:00 p.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

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

ZONING COMMISSION MEMBER PRESENT:

CAROL J. MITTEN	Chairperson
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OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Secretary (BZA)
BEVERLY BAILEY	Sr. Zoning Specialist
TRACEY W. ROSE	Sr. Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL:

LORI MONROE, ESQ.

This transcript constitutes the minutes from the Public Hearing held on June 27, 2006.

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

1:15 p.m.

CHAIRPERSON GRIFFIS: Good afternoon, ladies and gentlemen. Let me call to order our Public Hearing, our afternoon session, the 27th of June 2006. This is the Board of Zoning Adjustment for the District of Columbia and I am the Chairperson Geoff Griffis. Joining me to today is the Vice Chair Ms. Miller and representing the National Capital Planning Commission with us is Mr. Mann. A very good afternoon to you, Mr. Mann.

We are expecting our other Board Member, Mr. Etherly, shortly, however, we have a huge schedule for this afternoon, so we wanted to get underway and he will be with us very quickly. Our Zoning Commissioner is also anticipated and they will sit in as they arrive.

So moving on to our afternoon session, there's some very important aspects that I need to go through quickly and then we'll get to our cases. First of all, I would ask for everyone that's present if they would turn off cell phones and beepers, blackberries at this time, so that we do not have a disruption of the transmission and the attention of the testimony that's being provided.

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1 It should be known that there are two very
2 important ways that all our public sessions are
3 recorded and they are this way. First, the Court
4 Reporter sitting on the floor to my right is creating
5 the official transcript. Attendant to that, we ask
6 that everyone present that is going to address the
7 Board fill out two witness cards. Those witness cards
8 should be into the Court Reporter prior to coming
9 forward to address the Board.

10 And when addressing the Board, you will
11 just need to state your name and address for the
12 record once. Obviously, that will be able to give you
13 credit for your statements on the record. It should
14 also be known that we are being broadcast live on the
15 Office of Zoning's website. So you may see the
16 cameras moving once in a while, but pay no attention
17 to them. Always stay focused on the testimony you're
18 going to provide.

19 That being said, the order of procedures
20 for special exception and variances is as follows:
21 First, we will hear from the applicant. Second, we
22 will hear any Government reports attendant to the
23 application. Third will be from the ANC within which
24 the property is located. Fourth will be persons or
25 parties in support of an application. Fifth are

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1 persons or parties in opposition to an application.
2 Sixth, finally, we return to the applicant for any
3 rebuttal testimony, witnesses or summations and
4 conclusions.

5 Cross examination is permitted of all
6 witnesses by those parties in a case. The applicant
7 is a party, the ANC within which the property is
8 located is a party and the Board will establish, as
9 requested, parties in opposition or in support of an
10 application. Parties will be able to conduct cross
11 examination.

12 I will give instruction and direction as
13 to the time and also the germane direction of cross
14 examination if it seems to be going outside of what we
15 believe should be happening with the cross
16 examination, but I'll deal with that on a specific
17 nature as we get into it in particular cases.

18 It should be clearly understood that the
19 record will be closed at the conclusion of the hearing
20 on a case. So if you come forward, you present your
21 case and we close it this afternoon, which we
22 anticipate doing in several of these, it should be
23 clearly understood that the Board will not be able to
24 take any other additional information. It will not
25 deliberate or make a decision on anything that isn't

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1 in the record once the record is closed.

2 Now, we do, on occasion, ask that
3 additional information be provided to the Board and we
4 can do that in written submission or however we want
5 to do it and we will be very specific on what
6 information should be submitted into the record and
7 when it should be submitted into the Office of Zoning.
8 Those are elements that we will get to in the
9 conclusion of any hearing. Obviously, we won't let
10 you leave the room without clarity of process, so
11 don't be too concerned if that made no sense
12 whatsoever.

13 However, it should make sense that the
14 Sunshine Act requires us to conduct our hearings in
15 the open and before the public, that's what we're
16 about to do. We do enter into Executive Session both
17 during and after hearings on cases. We utilize those
18 Executive Sessions for reviewing the facts in the case
19 and sometimes we do, in fact, get into brief
20 deliberations on cases. Be assured that every
21 decision we make is then brought forth in the open and
22 before the public. These Executive Sessions and the
23 way we operate are in accordance with our rules,
24 regulations and procedures. They are also in
25 accordance with the Sunshine Act.

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1 We will make every effort to conclude our
2 afternoon hearings today at 6:00. I will update you
3 as we get closer to the 6:00 hour as it is quite
4 possible this afternoon we will go beyond that.
5 However, I'll address that as we get further into it.

6 At this time, let me say a very good
7 afternoon to Ms. Bailey with the Office of Zoning, Ms.
8 Rose and also Mr. Moy. Ms. Monroe is representing the
9 Office of Attorney General with us.

10 At this time, I believe that it would be
11 appropriate for all those members or audience present
12 if you would stand and give you attention to Ms.
13 Bailey, if you are going to address or provide the
14 Board with any testimony or evidence, she is going to
15 swear you in.

16 MS. BAILEY: Would you, please, raise your
17 right hand?

18 (Whereupon, the witnesses were sworn.)

19 CHAIRPERSON GRIFFIS: Excellent. Thank
20 you all very much. At this time then, we can
21 entertain preliminary matters. Preliminary matters
22 are those which relate to whether a case will or
23 should be heard today, requests for postponements,
24 withdrawals, whether proper and adequate notice has
25 been provided, these are elements of preliminary

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1 matters.

2 If you are on the schedule or you think
3 that there is a hearing on the schedule that should
4 not proceed today for some manner, I would ask that
5 you come forward and have a seat as Mr. Nettler has
6 done to indicate of having a preliminary matter. But
7 first, before we get to Mr. Nettler, I'll ask if Ms.
8 Bailey is aware of any preliminary matters for the
9 Board's attention.

10 MS. BAILEY: Mr. Chair, Members of the
11 Board, good afternoon.

12 CHAIRPERSON GRIFFIS: Good afternoon.

13 MS. BAILEY: Yes, sir, there are two that
14 the staff has.

15 CHAIRPERSON GRIFFIS: Excellent.

16 MS. BAILEY: The first is Application No.
17 17457, application of 3DG/3400 11th Street LLC. That
18 application was withdrawn, Mr. Chairman.

19 CHAIRPERSON GRIFFIS: Excellent. Thank
20 you. And therefore, no action of the Board would be
21 required.

22 MS. BAILEY: None, sir.

23 CHAIRPERSON GRIFFIS: The second?

24 MS. BAILEY: The second has to do with
25 Application No. 17492 of Jeff B. Speck and Samuel

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1 Hankins.

2 CHAIRPERSON GRIFFIS: Excellent.

3 MS. BAILEY: There was a request for
4 postponement of that case, sir.

5 CHAIRPERSON GRIFFIS: Very well. And I
6 believe that we have heard from all of those parties.
7 Is anyone here present to address or wants to speak to
8 17492? It has already been put on our schedule on
9 July 11th in the afternoon at the request of the
10 applicant, had notification. Is there anyone here
11 present that wanted clarification or needed additional
12 comment on that? Very well. That would be moved then
13 to the 7th -- 11th rather of July.

14 Anything else, Ms. Bailey?

15 MS. BAILEY: No, sir. It's just official
16 now, yes.

17 CHAIRPERSON GRIFFIS: Excellent. Thank
18 you. Mr. Nettler?

19 MR. NETTLER: Good afternoon. Richard
20 Nettler. In the matter of BZA Case No. 17737, I
21 represent the Tabard Inn, which is registered as a
22 party in that matter. If you may recall, this matter
23 first came before the Board. I'm moving to dismiss
24 the matter.

25 CHAIRPERSON GRIFFIS: Oh, you are?

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1 MR. NETTLER: Yes, I am. If you remember,
2 this matter came before the Board, I believe, at first
3 in November or December at which time the Board made
4 it quite clear to the applicant, who was, at that
5 time, requesting additional time to change their
6 plans, that the Board was going to be very circumspect
7 in giving them additional time to do that,
8 particularly since the proposal that had been
9 presented at that time had previously been rejected in
10 another form by the Zoning Commission years before
11 then.

12 The applicant did revise that proposal,
13 made a presentation before the Board in January of
14 this year, the proceedings were continued since there
15 were a number of issues that the Board had asked the
16 applicant to address and come back before it with
17 information, and since we did not have time to present
18 any other part of the case, at that time, and it was
19 rescheduled for February, actually for February 28th
20 of this year.

21 At the February 28th date, the Board was
22 advised that the Historic Preservation Review Board
23 had, in fact, rejected the application and the
24 applicant advised the Board at the beginning of that
25 hearing that they were seeking a continuance, because

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1 they were going to go back to the review board with
2 changes in the design and get some further
3 clarification from the review board about what it is
4 they could develop on that site.

5 I think the Office of Planning probably
6 said it best, at that time, when it said that in light
7 of the denial by the Historic Preservation Review
8 Board, I do not think that the plans in front of us
9 now are a reliable indicator of what the final project
10 is going to look like, since there would have to be
11 substantial changes made to the project, which might
12 also require the Mayor's agent to review it as well,
13 if it was to go forward.

14 The applicant never made any --

15 CHAIRPERSON GRIFFIS: I'm sorry, but I
16 need to interrupt you briefly.

17 MR. NETTLER: Sure.

18 CHAIRPERSON GRIFFIS: Because this is a
19 case that's further on in the afternoon and I want to
20 make sure that everyone actually is here present.

21 MR. NETTLER: Well, go ahead.

22 CHAIRPERSON GRIFFIS: Is the applicant
23 present and their representative? I mean, do we have
24 anyone else here? You're with the ANC?

25 MR. NETTLER: I'm not aware that they were

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1 given a different time other than 1:00 to appear.
2 Actually, as the schedule was that we had, it was
3 supposed to be on earlier today than it was now
4 appearing on the schedule that we have as we came in
5 here today. So I'm surprised that they are not here,
6 since I understood that they were going to be here.

7 CHAIRPERSON GRIFFIS: Right.

8 MR. NETTLER: At least be here, not
9 necessarily present anything.

10 CHAIRPERSON GRIFFIS: Yes, I would think
11 they would also.

12 MR. NETTLER: So I don't know if their not
13 being here is an indication of the same attitude they
14 have taken with the Historic Preservation Review
15 Board, which is to --

16 CHAIRPERSON GRIFFIS: An interesting
17 thought.

18 MR. NETTLER: -- which is to not file
19 anything and not to appear before the ANC and not to
20 have any discussion about the project since February,
21 but if it is or isn't, is really not the point,
22 because the point is the project hasn't changed.

23 CHAIRPERSON GRIFFIS: Right.

24 MR. NETTLER: It has no possibility of
25 ever being built, because it has been denied already.

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1 CHAIRPERSON GRIFFIS: But my point would
2 just be --

3 MR. NETTLER: There has been no appeal
4 taken of it.

5 CHAIRPERSON GRIFFIS: -- just the
6 efficiency of time. Obviously, your motion is going
7 to need to be addressed, unless we have you repeat
8 yourself. I want to make sure that everyone is here
9 so that they can hear it addressed by you, rather than
10 me trying to restate it.

11 MR. NETTLER: I understand. And my
12 concern is that I don't know when they're going to
13 show, if they show up, but my concern is that as was--
14 as we talked about this in December, I think we also
15 talked about it in January, you know, the resources of
16 those who are here and opposed to the project,
17 including those who have an ability to stay for this
18 proceeding are not as unlimited as it seems to be of
19 the applicants. And it has become a hardship for many
20 of the people to continue to come here, some of whom
21 were not part of our case, but who have told me that
22 they are here in opposition who themselves could not
23 spend the entire day here.

24 CHAIRPERSON GRIFFIS: Okay.

25 MR. NETTLER: And I --

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1 CHAIRPERSON GRIFFIS: Before we get too
2 far into those kind of statements, because those,
3 obviously, need to be balanced and addressed by the
4 applicant or owner, I think what we should do is
5 proceed with the first case, which is just a
6 continuance, which will not take that long. The
7 others are starting to drop off fast, as you have
8 heard.

9 MR. NETTLER: Yes.

10 CHAIRPERSON GRIFFIS: We will get to the
11 point of which we will call the case, at which point
12 they would be required to have been here at 1:00, as
13 you have said. Obviously, when we call the case, they
14 will need to be here and I think we could take this up
15 as a preliminary matter. But let me just ask you for
16 quick clarification. You are indicating that we
17 should take up a motion to dismiss the case in its
18 entirety.

19 MR. NETTLER: Correct.

20 CHAIRPERSON GRIFFIS: Because the last
21 filings were not revised as were anticipated?

22 MR. NETTLER: And not only as anticipated,
23 but as claimed that they would be by the applicant in
24 its request for an extension of time.

25 CHAIRPERSON GRIFFIS: Okay. I think I

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1 understand that. So that's where we can pick it up
2 when they are here. Okay. Right. When we get to it.
3 Thank you very much for that clarification.
4 Excellent. Thank you, Mr. Nettler.

5 With that then, are there any other
6 preliminary matters for the Board's attention at this
7 time? Okay. In which case, Ms. Bailey, why don't we
8 call the first case on the afternoon schedule?

9 MS. BAILEY: Mr. Chairman, that's a
10 continuation from the June 6, 2006 Public Hearing
11 session and it's Application No. 17483 of RLA
12 Redevelopment Corporation, pursuant to 11 DCMR 3103.2,
13 for variances from the residential recreation space
14 requirements under section 773, and a variance from
15 the loading berth requirements under subsection
16 2201.1. This is to allow the construction of a new
17 mixed-use, that's residential/retail building, in the
18 C-2-B District. The property is located at 1414
19 Belmont Street, N.W., Square 2660, Lot 235.

20 CHAIRPERSON GRIFFIS: Thank you. Are we
21 ready?

22 MR. BLANCHARD: Yes. Good afternoon.

23 CHAIRPERSON GRIFFIS: Let me just make
24 note of the filings that were put into the record and
25 you're going to address those. Is that correct?

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1 MR. BLANCHARD: That's correct.

2 CHAIRPERSON GRIFFIS: Okay. Is there
3 anyone else -- let me just get the landscape here. Is
4 there anyone else here attendant to Case No. 17483,
5 which is the Application of the RLA Redevelopment
6 Corporation, that is here for this this afternoon?
7 Mr. Spalding from the ANC, of course. Excellent.
8 Anyone else? Very well. Let's move ahead.

9 MR. BLANCHARD: Mr. Griffis, Lyle
10 Blanchard from Greenstein, DeLorme and Luchs, on
11 behalf of the RLA RC, the applicant in this case. We,
12 as requested by the Board, filed additional material
13 on the 20th of June. That material included some
14 revised plans and further development of our practical
15 difficulty statement on the recreation, the
16 residential recreation space.

17 In that statement, I'll just recap it
18 briefly. We had told the Board we would consider
19 expanding the RS, either on the rooftop or in the
20 courtyard and after much deliberation and review,
21 determined that the rooftop was not the best
22 alternative and page 2 of our statement goes into that
23 detail. A lot of those concerns are ongoing
24 operational issues and maintenance issues and the
25 expenses attached thereto, also some security and

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1 noise issues that are interrelated. And as a result--

2 CHAIRPERSON GRIFFIS: I'm sorry, security
3 and noise regarding the rooftop?

4 MR. BLANCHARD: Right. And let me
5 explain. There are some private, you'll recall from
6 the mezzanine level plans, spaces.

7 CHAIRPERSON GRIFFIS: Oh, from making it
8 the residential recreation.

9 MR. BLANCHARD: Right.

10 CHAIRPERSON GRIFFIS: I gotcha. Okay.

11 MR. BLANCHARD: So you would have both
12 public and these private spaces and they are so close
13 together that access to private units on the top
14 floor, etcetera.

15 CHAIRPERSON GRIFFIS: Right. Okay.

16 MR. BLANCHARD: Noise, etcetera. So the
17 preferable option is in the courtyard and we
18 eliminated four of the -- actually, there were six
19 parking spaces in the courtyard. We eliminated four
20 of those. Actually, we moved all of them out of the
21 courtyard, eliminating four, retaining two and we
22 tried to animate that space showing how it would be
23 materials, ideas and materials, fence heights,
24 furniture and uses.

25 We mentioned in the report that

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1 unfortunately neat ideas like bar-b-qe is not a good
2 idea with a stick building, because of the fire
3 issues, fire safety issues. But to have it used sort
4 of for meetings, family meetings, family gatherings,
5 condo association meetings, unstructured play and
6 exercise activities, things of that nature.

7 And that's where we are. This is an
8 affordable building, a lot of affordable housing, some
9 affordable retail. We would like to, obviously,
10 retain the two spaces in the drive aisle. We did meet
11 with DDOT. DDOT is not exactly on board, but we
12 believe based on the turning diagram that we submitted
13 with our June 20th submission, that the turning
14 radiuses are feasible for a 30 foot truck to maneuver
15 in and out of there.

16 So that's where we are. Again, we had a
17 variance from the 55 foot loading berth providing
18 really a 40 foot loading berth that will easily
19 accommodate a 30 foot truck and also provide a loading
20 platform at grade. The developer's representative and
21 the architect are here to answer any questions.

22 CHAIRPERSON GRIFFIS: Excellent. Any
23 questions?

24 VICE CHAIR MILLER: I think you did an
25 excellent job responding to our concerns. I just

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1 wanted to ask you, I wasn't sure if I heard you
2 correctly. Did you say, does DDOT have some concerns
3 about the loading area or no?

4 MR. BLANCHARD: DDOT and I don't know if
5 this is in the record, but they provided me with a
6 copy yesterday of a memoranda dated Friday. I don't
7 know if you have that in the record. You should.

8 VICE CHAIR MILLER: Oh, let's see. We're
9 just seeing it now.

10 MR. BLANCHARD: Oh.

11 BOARD MEMBER MANN: What's the date on the
12 memorandum that you are referring to?

13 MR. BLANCHARD: DDOT's memorandum? The
14 23rd.

15 BOARD MEMBER MANN: Okay.

16 MR. BLANCHARD: I advised DDOT of our
17 deadline for filing on June 20th and, you know, they
18 didn't file by the 20th, but they did file something
19 and it is more or less in support after meeting with
20 them several times. However, there is no real clear
21 explanation for why they don't think our diagrams work
22 and why we would have to eliminate one of the two
23 parking spaces. So we would like to move forward with
24 the two spaces, C-36 and C-37.

25 CHAIRPERSON GRIFFIS: Questions?

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1 VICE CHAIR MILLER: So basically, what we
2 have before us is that they don't think it will work,
3 but we don't know why and you don't know why? Is that
4 correct?

5 MR. BLANCHARD: Right.

6 VICE CHAIR MILLER: Okay.

7 MR. BLANCHARD: Right.

8 MR. GARDENAS: Ms. Miller, one of their
9 concerns, first of all, we present to them the 20 foot
10 truck radius and that was the first thing we presented
11 to them. They came back and asked for the 30, which
12 is what we gave them. And it works fine. We made our
13 minor modification to the curb cut and it works fine.
14 And they were concerned about unloading and loading
15 the truck, but if you look at the diagram, we left a
16 5 foot space between the fence and the parking spaces.
17 So that's what I -- when I met with them, that was one
18 of their concerns, but I was surprised when I got the
19 letter as well. It's not clear why they don't agree
20 to that.

21 MS. CHUNG: One of --

22 COURT REPORTER: Miss, I'm sorry, you're
23 going to have to speak at the table. The hand mike is
24 not working.

25 MS. CHUNG: We originally looked at a 20

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1 foot truck and submitted that to DDOT. They thought
2 that worked and it was fine, but they requested the 30
3 foot truck. And we had our civil engineer look at the
4 turning radius and maneuverability of a 30 foot truck.
5 And as you can see from the diagram, it works with the
6 curb cut. It works with the parking spaces that we
7 have.

8 The concern that they brought up was kind
9 of the queuing area where they are going to unload and
10 so we left a 5 foot clear area where they can unload
11 and walk to the back side of the unit, if they need to
12 come into the building, or they can go into the front
13 of the building. So we left that buffer.

14 CHAIRPERSON GRIFFIS: So that's a CMU wall
15 now?

16 MS. CHUNG: Yes.

17 CHAIRPERSON GRIFFIS: How high?

18 MS. CHUNG: It's about 6 feet.

19 CHAIRPERSON GRIFFIS: And it's a 3.0 door?

20 MS. CHUNG: Wide.

21 CHAIRPERSON GRIFFIS: Just like a gate?

22 MS. CHUNG: No, it could be a 4 foot door.
23 It could be a 4 foot door.

24 CHAIRPERSON GRIFFIS: I know, but what's
25 it showing?

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1 MS. CHUNG: It's showing a 3 foot door.

2 CHAIRPERSON GRIFFIS: Okay. So now, if I
3 read this correctly, off of Belmont it's kind of
4 unceremonial. It's a loading dock, CMU wall, two
5 parking spaces?

6 MS. CHUNG: The CMU wall is it's a ground
7 face. The building, the vocabular of the exterior
8 wall is metal panels, corrugated metal panels, flat
9 panels and ground face.

10 CHAIRPERSON GRIFFIS: Sure.

11 MS. CHUNG: Or smooth face CMU, so I don't
12 think it's not an attractive type thing. I think we
13 are carrying that material all the way through. So
14 we're carrying that material on the side wall as well.

15 CHAIRPERSON GRIFFIS: What's going to get
16 loaded in there?

17 MS. CHUNG: Loaded and unloaded?

18 CHAIRPERSON GRIFFIS: Yes.

19 MS. CHUNG: Things for the retail and
20 potentially movers for the apartment uses.

21 MR. BLANCHARD: Type of UPS, yes.

22 CHAIRPERSON GRIFFIS: Cool.

23 MR. BLANCHARD: Again, Mr. Griffis, this
24 is our compromise on the 55 foot loading berth.

25 CHAIRPERSON GRIFFIS: Indeed.

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1 MR. BLANCHARD: So we have tried to
2 provide a 40 foot loading berth that will serve as a
3 dual purpose with the 20 foot service delivery area.
4 Most deliveries will be small delivery trucks, the UPS
5 size, 20 foot truck.

6 CHAIRPERSON GRIFFIS: Right.

7 MR. BLANCHARD: There will be the
8 occasional move-in or move-out of a resident.

9 CHAIRPERSON GRIFFIS: Right.

10 MR. BLANCHARD: From one of the
11 residential units.

12 CHAIRPERSON GRIFFIS: But it seems like
13 you have made what seems to me and appears potentially
14 to be a nicely landscaped courtyard. I was thinking
15 it probably would be easier and more cost-effective if
16 that was actually just almost like a rod iron type
17 fence with two big gates. One was locked down and the
18 other could open up. And if you are loading or
19 unloading, especially moving, those open up, you bring
20 it in, you bring it out, you feed the retail here or
21 not. I was just kind of surprised to see it's kind of
22 a bunkered piece, but, you know, that's -- I don't
23 need to change that. That's not really my concern.

24 Frankly, I see how this works. I can see
25 why DDOT would have some concern about the turning

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1 radius, but heck, we've seen tighter, right? And
2 there is not a lot of coming and going out of there in
3 terms of those other parking spaces. I wonder how
4 those parking spaces are going to be controlled? I
5 have more programming and design layout concerns than
6 the turning radius concerns. But other questions?

7 VICE CHAIR MILLER: I just have one other
8 one. With respect to the private recreational space,
9 did you quantify somewhere how much private space you
10 are providing?

11 MR. BLANCHARD: Yes, Ms. Miller. We just
12 handed to Mr. Moy just before the hearing --

13 CHAIRPERSON GRIFFIS: We have it in front
14 of us.

15 MR. BLANCHARD: -- this new revised chart.

16 VICE CHAIR MILLER: Okay.

17 MR. BLANCHARD: Which --

18 MS. CHUNG: We have provided 22,173 square
19 feet of private recreational space, which totals this
20 public rec space and private rec space, totals 3,939
21 square feet, almost 9 percent.

22 VICE CHAIR MILLER: So the 9 percent is
23 both total?

24 MS. CHUNG: Is the total, yes.

25 VICE CHAIR MILLER: Both together?

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1 MS. CHUNG: Yes, cumulatively.

2 VICE CHAIR MILLER: Okay. Thank you.

3 CHAIRPERSON GRIFFIS: Okay. Anything
4 else? We'll take a moment. Yes, any other questions?

5 VICE CHAIR MILLER: It looks like there is
6 a minor discrepancy between your chart and your
7 supplemental statement. For instance, I think that it
8 says in the statement that it's 3.9 percent of -- the
9 residential recreation space is 3.9 percent and in the
10 chart it might say 4 percent.

11 MR. BLANCHARD: Yes, we just rounded up to
12 4.

13 VICE CHAIR MILLER: You rounded it up.
14 So, I mean, if we were looking for the most accurate,
15 it's in the statement?

16 MR. BLANCHARD: It's --

17 VICE CHAIR MILLER: Is that correct, 3.9?

18 MR. BLANCHARD: Right.

19 VICE CHAIR MILLER: Okay. Thank you.

20 CHAIRPERSON GRIFFIS: Anything else?
21 Okay. No other questions? I don't think this is a
22 huge issue, but is it anticipated that there is
23 additional information? Maybe I'm not clear on what
24 the DDOT letter is stating that was handed to us today
25 and forgive us for not having that before we went out

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1 here. So we're all kind of speed reading this
2 through. But they are not entirely satisfied with the
3 turning radius of the 30 foot truck or they are, as
4 far as the supplemental plan?

5 MR. BLANCHARD: They are satisfied with
6 the fact that the turning radius works, but I'm at
7 best reading into their intent here. And I even had
8 a colloquy with them yesterday about well, if we move
9 that one space 2 feet, 3 feet, would it make a
10 difference? And I didn't get no we have already filed
11 our report, no, no, no, no.

12 CHAIRPERSON GRIFFIS: I see. So they are
13 saying that they would be satisfied, fully satisfied
14 if a 30 foot loading berth were provided?

15 MR. BLANCHARD: Right.

16 CHAIRPERSON GRIFFIS: And what you are
17 showing is a 20?

18 MR. BLANCHARD: Is a 40. Well, we are, in
19 essence, providing a 40 foot space that can operate as
20 a 30 foot berth with a 10 x 12 foot platform.

21 CHAIRPERSON GRIFFIS: Right.

22 MR. GARDENAS: Yes.

23 MR. BLANCHARD: And all of their requests
24 from them were can the 30 foot truck maneuver in and
25 out. And our drawings, our last -- the final page of

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1 our drawings that we submitted with the June 20th
2 submission show the turning radius of this truck
3 backing into the delivery bay and pulling out into the
4 delivery bay.

5 CHAIRPERSON GRIFFIS: And that's what DDOT
6 saw though?

7 MR. BLANCHARD: That's right.

8 CHAIRPERSON GRIFFIS: I mean, they weren't
9 totally secured that that worked.

10 MR. BLANCHARD: I think they were being
11 extremely overly cautious.

12 COMMISSIONER MITTEN: I think one way to
13 interpret it is that what was being proffered in the
14 beginning is that they were requesting, and correct me
15 if this is not correct, a waiver from the requirement
16 to have a 55 foot berth, but they would provide a 200
17 square foot platform and a delivery space, 20 x 12, as
18 required, in order for this to be now the 30 foot
19 berth that DDOT is seeking. It can't also be the
20 platform and delivery space.

21 MR. BLANCHARD: Well, let me try a
22 different way of saying that.

23 COMMISSIONER MITTEN: Okay.

24 MR. BLANCHARD: And that is we're
25 providing the 20 foot delivery, service delivery space

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1 and the 200 square foot platform and asking for a
2 waiver of the 55 foot berth.

3 COMMISSIONER MITTEN: Yes.

4 MR. BLANCHARD: And DDOT has asked okay,
5 configure those two things that you are providing in
6 such a way that a 30 foot truck could also utilize
7 them.

8 COMMISSIONER MITTEN: Right. It's just
9 that I think it's a question of what you are providing
10 in lieu of the relief that you are receiving.

11 MR. BLANCHARD: Right.

12 COMMISSIONER MITTEN: So you can't,
13 according to the regulations, like layer these things
14 and say well, today it's a 30 foot berth.

15 MR. BLANCHARD: Right.

16 COMMISSIONER MITTEN: And tomorrow it's
17 going to be a platform and a delivery area.

18 MR. BLANCHARD: That's why I haven't
19 changed our variance request --

20 COMMISSIONER MITTEN: Okay.

21 MR. BLANCHARD: -- to say no, Board, we
22 now are taking off -- we're taking everything off the
23 table.

24 COMMISSIONER MITTEN: Okay.

25 MR. BLANCHARD: We don't want a 55 foot

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1 berth. We don't want a 20 foot service delivery area.
2 We don't want a 200 square foot platform. In lieu of
3 those three things, we want a 30 foot berth.

4 COMMISSIONER MITTEN: Okay.

5 MR. BLANCHARD: I haven't done that.

6 COMMISSIONER MITTEN: Okay.

7 MR. BLANCHARD: I have said this is what
8 we are providing, the 200 square foot platform, the 20
9 foot bay, service delivery berth. But in response to
10 DDOT's request, we have configured those in such a way
11 that the 30 foot truck could utilize.

12 COMMISSIONER MITTEN: Right. So the
13 missing link in the DDOT opinion is whether or not
14 having this either or, can't be both, would be
15 sufficient.

16 CHAIRPERSON GRIFFIS: But we're not
17 anticipating another report from DDOT.

18 MR. BLANCHARD: No.

19 CHAIRPERSON GRIFFIS: So we have what we
20 have.

21 MR. BLANCHARD: Right.

22 CHAIRPERSON GRIFFIS: Good clarifications
23 all. While she is off-camera, do you want to take
24 down that name tag and maybe put up the correct one?
25 Fabulous. We now welcome Carol Mitten. Thank you.

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1 Very well. Any other questions, comments? Did the
2 ANC have comments on the additional submission of
3 testimony that was here?

4 MR. SPALDING: Neither the local
5 association in which this project is being built, nor
6 the ANC has held a regularly scheduled meeting in the
7 -- since we learned of the changes that have been
8 made, so we have no official comments.

9 CHAIRPERSON GRIFFIS: Okay. What about
10 unofficial?

11 MR. SPALDING: The response has generally
12 been resigned disappointment. There was a very
13 specific concern about parking on this site, which is
14 one of the reasons that on this NCRC parcel we
15 originally supported another application, because it
16 provided more parking. This is an area where we do
17 have more than the usual problems with parking. So
18 the loss of the parking is a concern to both the local
19 neighbors, the local neighborhood association and the
20 ANC. But we do want to see this building constructed,
21 so we will probably resignedly follow your direction
22 on this.

23 CHAIRPERSON GRIFFIS: Interesting choice
24 of words. Comments?

25 VICE CHAIR MILLER: Mr. Spalding, am I not

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1 correct though that at the last hearing you stated
2 somewhat a resigned disappointment in the failure to
3 provide enough residential recreation space?

4 MR. SPALDING: Yes, but that's
5 counterbalanced by the specific geography of this
6 block and the specific neighbors concerned with
7 parking. This block is not served by traditional
8 alleys and so all of the existing residents are using
9 on-street parking and the parking is a very serious
10 concern in this specific part of the neighborhood. It
11 does outweigh the arguments either side on recreation
12 space.

13 CHAIRPERSON GRIFFIS: Okay. I think
14 that's helpful in terms of just addressing some of the
15 past official comments that were made and bringing
16 them up to date. Any other questions, comments? Is
17 there anyone else here that was anticipating that they
18 would provide or address the Board in Application
19 17483? Very well. Did you want to make any closings,
20 limited?

21 MR. BLANCHARD: Very briefly.

22 CHAIRPERSON GRIFFIS: Good.

23 MR. BLANCHARD: Thank you, Mr. Griffis.
24 We believe we have now provided the documentation the
25 Board has requested and responded to their concerns

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1 and would like its support for the plans as revised.
2 And in that, this is an affordable housing development
3 and with affordable retail and trying to get permits
4 applied for and all of those good things to help the
5 community, we would prefer a Bench decision with a
6 summary order, if that's possible.

7 CHAIRPERSON GRIFFIS: Excellent. I
8 appreciate that and I think that request is an
9 excellent one. I am not prepared to go forward today
10 on this. I would like to take a look at this a little
11 bit further and juxtapose some of the past facts in
12 evidence that we have in light of what we're really
13 balancing here and I think, actually, Mr. Spalding has
14 put it well in terms of the proposed residential rec
15 utilization and the parking.

16 Unless others are of the mind to continue
17 today and deliberate this for a Bench decision, in
18 which case I would easily support the majority in
19 that. Okay. Let me open it up to others.

20 BOARD MEMBER ETHERLY: If I can just jump
21 in, Mr. Chair, thank you very much. I would tend to
22 agree with your gut feeling. I think the applicant
23 has to be applauded for coming back, essentially,
24 addressing a number of the questions and observations
25 that were raised by the Board. I think Mr. Spalding's

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1 testimony also draws into stark relief, essentially,
2 what is a balancing act and how has to be conducted as
3 part of this analysis.

4 There is the project as it has been
5 proposed and there is the project with these wonderful
6 modifications in an effort to address some of the
7 issues that were raised in our earlier proceeding. So
8 I think rather than try to shoehorn a decision today,
9 it's probably going to be served to be somewhat
10 thoughtful and methodical in looking at this. So I
11 would support setting this off for decision.

12 CHAIRPERSON GRIFFIS: Excellent.

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

15 CHAIRPERSON GRIFFIS: Thank you, Mr.
16 Etherly. Others? Any comments, questions?

17 COMMISSIONER MITTEN: Mr. Chairman?

18 CHAIRPERSON GRIFFIS: Yes?

19 COMMISSIONER MITTEN: There is one thing
20 that I would like to get into the record, if we could,
21 which is I think the concern of the Board was either
22 generated or amplified by the Office of Planning
23 report in which they had said they can't recommend
24 approval of the residential recreation space variance
25 to the extent requested, which is what sort of lead to

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1 fleshing this out.

2 And I think we need a response from the
3 Office of Planning as to whether or not they have
4 revised that position, so that we can give -- I mean,
5 we have to give the ANC great weight, but we also
6 have to give the Office of Planning great weight, but
7 we don't know what their reaction is to it. And if it
8 was said prior to my arrival, I apologize.

9 CHAIRPERSON GRIFFIS: No, we haven't heard
10 from Office of Planning.

11 COMMISSIONER MITTEN: So I don't know if
12 that would be something that you would want to do in
13 testimony or in a supplemental report.

14 CHAIRPERSON GRIFFIS: Are you prepared to
15 address that, Mr. Cochran?

16 MR. COCHRAN: Yes, Mr. Chair. The Office
17 of Planning thinks this is an adequate compromise on
18 residential recreation space, but there is something
19 else we would encourage the Board to consider, which
20 is we're now looking, if you're on the south side of
21 Belmont, at two parking spaces and a loading berth.
22 That's probably going to be 60 to 70 feet wide.

23 So if you're not taking a Bench decision
24 today, we would encourage you to look at ways to
25 ameliorate the appearance of that space, be it with a

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1 decorative gate or something like that. It's going to
2 interrupt the pedestrian experience on Belmont Street.

3 CHAIRPERSON GRIFFIS: I'll say. But we
4 don't have that. I mean, I think that's well said.
5 However, I want to set this for the 11th of July. We
6 can certainly keep the record open for design changes
7 or we could try and condition it. I'm not sure how we
8 address it totally. I'm not sure where it actually
9 goes or how it directly goes to the variance
10 requested, but it is very substantive in its nature.
11 But I'm open to the comments of others.

12 VICE CHAIR MILLER: I'm just wondering,
13 since we're hearing from Office of Planning, whether
14 Office of Planning has any comment on the DDOT letter.

15 MR. COCHRAN: Office of Planning hasn't
16 seen the DDOT letter, hasn't seen it yet.

17 CHAIRPERSON GRIFFIS: Okay.

18 BOARD MEMBER ETHERLY: And perhaps
19 finally, Mr. Chair, while we're peppering Mr. Cochran,
20 who is being a good sport with this on some questions,
21 with regard to the observation that was raised by the
22 ANC in response to question regarding the compromise
23 on recreation space and the loss of the additional
24 parking, is it OP's sense or is it your sense that you
25 would want to err on the side of introducing that

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1 additional recreation space at the expense of the
2 additional parking that's lost?

3 MR. COCHRAN: Absolutely. The applicant
4 is already providing parking well in excess of that
5 required.

6 BOARD MEMBER ETHERLY: Thank you. Thank
7 you, Mr. Chair.

8 CHAIRPERSON GRIFFIS: Okay. Ms. Mitten,
9 you were the one that brought up the issue. Is that
10 satisfactory for your deliberation on this case in
11 terms of Office of Planning or would you want a
12 written supplemental report?

13 COMMISSIONER MITTEN: No, I just wanted to
14 make sure it got in the record.

15 CHAIRPERSON GRIFFIS: Excellent.

16 COMMISSIONER MITTEN: So I'm --

17 CHAIRPERSON GRIFFIS: I think that was a
18 good point and I'm glad we addressed it and had Mr.
19 Cochran address that. I don't see anything else that
20 would be required in terms of keeping the record open
21 for. In terms of the design parameters of that area
22 that Mr. Cochran has just addressed, I absolutely
23 agree, it could use a little bit of a relook or a
24 detailed look, I would say.

25 I think the space, the design of the

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1 program is there. Now, how you animate those might
2 well be served. However, to hold the record open or
3 to delay our processing on this, I don't think serves
4 us or the applicant certainly. So I would be open to
5 setting this to the 11th of July, closing the record
6 today, unless there is other requirements. Very well.
7 If there's nothing else --

8 VICE CHAIR MILLER: I just wanted to ask
9 if the record might be left open for them to submit
10 any further design elements with respect to that gate,
11 should they choose to?

12 CHAIRPERSON GRIFFIS: We'll make a very
13 official ruling that we will not reject additional
14 design documents that tend to delight and amuse us,
15 but others will be returned. Okay. And obviously,
16 I'm sure the representative of the applicant who knows
17 full well the design will continue on this in those
18 areas that obviously aren't under the direct review
19 and approval. And so there it is. Appreciate it.
20 And I don't think there is anything additional.

21 We have these documents in the record,
22 which is excellent. We appreciate the additional work
23 on this and the additional shortened version just to
24 make sure we have this clarified and questioned. I
25 think it was easier to have, although tortured

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1 questions by us at times, at least some clarity of
2 those diagrams. So that will help and serve for our
3 deliberation.

4 That being said, is there any other
5 questions procedurally that I can answer?

6 MR. BLANCHARD: Just, Mr. Griffis, if we
7 are held to some condition in the Board's eventual
8 order on the 11th that we have flexibility with design
9 issues, so that, you know, since I'm not sure how
10 design issues will evolve in the plans as submitted to
11 DCRA and eventually approved by permit. Some language
12 and maybe I'll proffer that in any filing.

13 CHAIRPERSON GRIFFIS: That would be
14 excellent. In which case, were you anticipating
15 submitting a proposed order, findings and facts on
16 this? Indeed. Then we can keep the record open for
17 that proposed and I think that would be an excellent
18 remedy and an address to the Office of Planning's
19 issue.

20 Okay. That being said, if there's nothing
21 further, is there any other questions procedurally?
22 Very well.

23 MR. BLANCHARD: Thank you.

24 CHAIRPERSON GRIFFIS: We'll have that in
25 a week before the 11th, obviously, in time that

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1 Wednesday by 3:00, which would be what date, Ms.
2 Bailey?

3 MS. BAILEY: July 5th, Mr. Chairman.

4 CHAIRPERSON GRIFFIS: Excellent. If we
5 can do that, obviously, do it before the 4th would be
6 tremendous, but on the 5th it will get out to us in
7 time for the 11th. Very well. If there's nothing
8 further thank you all very much. Appreciate it.
9 Appreciate your time and we'll take all of this under
10 advisement and we will call this for decision on the
11 11th of July.

12 That being said, let's move ahead.

13 MS. BAILEY: Application No. 17495 of
14 Douglas George Jefferies, pursuant to 11 DCMR 3103.2,
15 for a variance from the penthouse setback provisions
16 under subsection 400.7(b), a variance from the lot
17 area requirements under section 401, a variance from
18 the lot occupancy requirements under section 403, a
19 variance from the rear yard requirements under section
20 404, a variance from the side yard requirements under
21 section 405, a variance from the open court
22 requirements under section 406, a variance from the
23 nonconforming structure provisions under subsection
24 2001.3, and variances from the alley width and alley
25 structure height provisions under subsections 2507.2

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1 and 2507.4, to allow the conversion of two existing
2 single-family dwellings into one single-family
3 dwelling. The property is zoned in the R-3 District
4 at premises 1520 22nd Street, N.W., and 2210 Q Street,
5 N.W., Square 2510, Lots 806 and 813.

6 CHAIRPERSON GRIFFIS: Excellent. Thank
7 you very much, Ms. Bailey. Let's continue this. I'm
8 just going to have you introduce yourselves. State
9 your name and address for the record, if you wouldn't
10 mind.

11 MR. JEFFERIES: Douglas Jefferies, 2208
12 1/2 Q Street, N.W.

13 CHAIRPERSON GRIFFIS: Excellent. And with
14 you?

15 MR. PALMERA: Jaime Palmera, 1012 Irving
16 Street, N.W., Washington, D.C.

17 CHAIRPERSON GRIFFIS: Great. And well,
18 there it is. Let's move right into it.

19 MR. JEFFERIES: Thank you very much for
20 seeing this case. I do have witnesses here. I'm
21 slightly sensitive to their time being a work day. I
22 don't know what the protocol is, forgive me, but is
23 there a way we could get our witnesses in just in case
24 some of them have to leave?

25 CHAIRPERSON GRIFFIS: Sure.

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1 MR. JEFFERIES: Great.

2 CHAIRPERSON GRIFFIS: It's your case. You
3 can bring them up right now if you would like.

4 MR. JEFFERIES: Oh, okay. Here we are.

5 CHAIRPERSON GRIFFIS: Who else is here for
6 this case, just to get a landscape on Application
7 17495? Are there other persons that aren't being
8 called as part of the applicant's case presentation?
9 Other persons that are going to provide testimony? Is
10 the ANC represented today.

11 MR. JEFFERIES: Yes. No, the ANC is not
12 represented, but they have given full support.

13 CHAIRPERSON GRIFFIS: Sure, sure. We'll
14 get to that. I just wanted to see if they are here.

15 MR. JEFFERIES: Okay.

16 COMMISSIONER MITTEN: If I could, I just
17 want to put something on the record.

18 CHAIRPERSON GRIFFIS: Excellent.

19 COMMISSIONER MITTEN: In case it impacts
20 a question or two that I might ask, which is I just
21 want to say that I have been in Mr. Jefferies' house,
22 although Mr. Jefferies wasn't there at the time. His
23 house was -- I just want --

24 CHAIRPERSON GRIFFIS: This is going to get
25 interesting.

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1 COMMISSIONER MITTEN: You don't recognize
2 me. I didn't sneak into your house. Your house was
3 either on or going to be on the Dupont Circle House
4 Tour a couple of years ago and I was the person who
5 did the write-ups of the houses, so I have been in Mr.
6 Jefferies' house in that context. I just wanted to
7 say that.

8 CHAIRPERSON GRIFFIS: Okay. Is that going
9 to prejudice you in hearing this application?

10 COMMISSIONER MITTEN: I'm more familiar
11 with this house than many people may be.

12 CHAIRPERSON GRIFFIS: Okay. Any other
13 questions from the Board? Mr. Jefferies, do you have
14 any difficulties with Ms. Mitten continuing on this
15 case?

16 MR. JEFFERIES: I don't think so.

17 CHAIRPERSON GRIFFIS: Were you rejected on
18 the house tour?

19 MR. JEFFERIES: No.

20 CHAIRPERSON GRIFFIS: There we are. We'll
21 keep on track here. Okay. Very well. Ms. Mitten,
22 obviously, we would assume and I think you would state
23 that you can impartially judge this case, even though
24 you have been in the house present. If that's the
25 case, let's move ahead. All right.

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1 What do we have? We've got a whole line
2 up of witnesses. Is that correct?

3 MR. JEFFERIES: That's correct.

4 CHAIRPERSON GRIFFIS: Very well.

5 MR. JEFFERIES: They are all neighbors
6 that represent -- I think you have a poor color copy
7 of a satellite picture, thank you to Google.

8 CHAIRPERSON GRIFFIS: Yes.

9 MR. JEFFERIES: And those are all the
10 names of the neighbors and I think 8 of the 11 have
11 submitted letters of full support. And I know that
12 this is an uphill battle with nine variances, so I
13 rallied my troops and we're going to do our best.

14 CHAIRPERSON GRIFFIS: Yes.

15 MR. MORGAN: I would be happy to start.

16 CHAIRPERSON GRIFFIS: Good.

17 MR. MORGAN: My name is Scott Morgan. I'm
18 at 2236 Q Street. I'm here as a neighbor in full
19 support of Doug's new house and making two houses into
20 one, but also here on a professional basis, since I
21 have been with Home and Garden Television as a host
22 and reporter for 10 years. I have traveled the
23 country looking at precisely projects like this that
24 are bold, innovative, great architecture design and I
25 just think this is the kind of vibrant architecture

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1 you want in the city, that you are asking for in the
2 city and that it's in my neighborhood I'm just
3 thrilled about. So, you know, I would say, you know,
4 go with it.

5 CHAIRPERSON GRIFFIS: HGTV ever do
6 noncompliant zoning accreditations? Okay.

7 MR. MORGAN: I know a special episode
8 coming up.

9 CHAIRPERSON GRIFFIS: That may well be.
10 We can star in it at that point.

11 MR. MORGAN: Yes, exactly.

12 CHAIRPERSON GRIFFIS: Okay. Excellent.

13 MS. BRACKEN: Okay. Good afternoon, Anne
14 Bracken from 2206 Q Street, immediate neighbor to
15 Doug. The project Doug is currently living in has
16 been nothing but an improvement to our neighborhood.

17 CHAIRPERSON GRIFFIS: Okay.

18 MS. BRACKEN: It was a low unattractive
19 carriage house and now is quite an interesting
20 addition to the neighborhood. The parcel of land that
21 he currently wants to change is an equally
22 unattractive brown stucco building that is stuck back
23 in the 1930s, I think, when it was originally built
24 out or whatever. We fully support his addition. I
25 mean, this combining of the two projects will be an

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1 attractive enhancement. It's an alley. He is doing
2 good things in the alley. He helps keep the alley
3 clean. He helps keep the rats out of it. It helps
4 make the whole neighborhood nice and we appreciate
5 that.

6 CHAIRPERSON GRIFFIS: It's fascinating.
7 You share that alley with this proposed redevelopment.

8 MS. BRACKEN: I do indeed, because I have
9 a garage immediately adjacent to the property that he
10 is talking about developing and I still fully support
11 it.

12 CHAIRPERSON GRIFFIS: I see. Okay. It's
13 interesting. We'll obviously get deep into this
14 probably after you all have left.

15 MS. BRACKEN: I can stay.

16 CHAIRPERSON GRIFFIS: And our peculiarity,
17 of course, is the Zoning Regulations and how it deals
18 with alley structures. But that's an interesting
19 perspective to have on how this, in particular, helps
20 to animate or at least maintain a higher quality of
21 experience in that alley, if not quality of life.

22 MS. BRACKEN: Well, some of the
23 intangibles that you can't be aware of, and I'm not
24 sure they are pertinent to your decision, but as a
25 resident of the alley, Doug has planted flowers, has

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1 put gardens in. He has turned it into an attractive
2 green spot as part of our neighborhood, which I think
3 everybody benefits from. I know I certainly do.

4 CHAIRPERSON GRIFFIS: Okay. Excellent.
5 Excellent. Thank you.

6 MR. JEFFERIES: Sure. Al?

7 MR. HAYS: If you'll pardon me, I have
8 some trouble getting up and down from the chair.

9 CHAIRPERSON GRIFFIS: Whenever you're
10 comfortable.

11 MR. HAYS: My name is Alan Hays. I live
12 at 2234 Q Street, N.W., and am a neighbor of Doug's.
13 Our garage empties out into the alley that Doug lives
14 on. We have lived there for 19 years and during that
15 19 year period, someone has been -- resided in both of
16 these structures, so this isn't a change in use of the
17 structure. The comments that Mrs. Bracken just made
18 without repeating them, I support fully.

19 One other thing that Doug did which I
20 thought was sort of interesting is that in the alley
21 there is a dumpster that belongs to the apartment
22 building and he not only put flowers on the wall
23 behind the dumpster, but he painted the dumpster, so
24 that it blends in with the wall behind it.

25 CHAIRPERSON GRIFFIS: Excellent. Thank

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1 you very much.

2 MR. HAYS: And we support his project
3 fully.

4 CHAIRPERSON GRIFFIS: Excellent.

5 MS. WHITING: Hi, my name is Jacqueline
6 Whiting.

7 CHAIRPERSON GRIFFIS: I'll just have you
8 turn on the microphone. You touch the bottom there.
9 Excellent.

10 MS. WHITING: Hi, my name is Jacqueline
11 Whiting and I'm from School for Friends and we are
12 tenants at the Church of the Pilgrim, which is in the
13 back of Jeff's building. And we just have a little
14 bit of a concern about once they start the building
15 the safety of the children. These are ages 2 to 5 and
16 we are there from 8:00 to 6:00 in the morning and
17 we're just concerned that when they are building that
18 they make sure that debris is not falling on the
19 children while we're outside on the playground. And
20 the school has been located in the church for 25 years
21 and I've been there 20 years. And I saw the building,
22 the new remodeling of the other facility of his. So
23 we're just concerned about when they are building,
24 making sure of the safety for the children outside
25 while they are playing.

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1 MR. JEFFERIES: That was a concern of
2 their's in the past when we did the other
3 construction, so we built up, I think it was, like an
4 18 or 20 story plywood temporary -- sorry, a very
5 large wall, so that if anything did fall out during
6 construction, it would stay in. So we would do the
7 same. We would promise to do the same thing is build
8 a wall during construction, so that none of that
9 happens, because we are all very close to that alley.

10 CHAIRPERSON GRIFFIS: Excellent. I missed
11 the 18 or 20 story temporary construction before.
12 That would have been a site to see.

13 MR. JEFFERIES: The wall was an eyesore.

14 CHAIRPERSON GRIFFIS: It probably would
15 have gotten quite a bit of attention across this
16 federal city. You know, Ms. Whiting's testimony
17 brings up an interesting issue. My child actually
18 attended School for Friends, so I'm familiar with that
19 playground and that area and it just brought back a
20 remembrance of I was not on the Board for the previous
21 one and came on right after that. So I will disclose
22 that. In fact, if you feel that I should not continue
23 on this case, I would be happy to recuse myself, but
24 I'll leave that to you, unless there are questions
25 from the Board in addition to that.

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1 MS. BRACKEN: Mr. Griffis, may I also
2 offer that my children, too, attended School for
3 Friends.

4 CHAIRPERSON GRIFFIS: Yes.

5 MS. BRACKEN: And I was, indeed, an
6 attending parent during Mr. Jefferies' first
7 construction period and there was no harm or incidents
8 involving the children during that construction phase.
9 Jackie, am I correct?

10 MS. WHITING: There wasn't, but we're just
11 concerned to make sure.

12 MS. BRACKEN: You have every right to be
13 concerned.

14 CHAIRPERSON GRIFFIS: Sure, sure.

15 MS. BRACKEN: And I think that everybody
16 is equally concerned, but there was no incident with
17 the first construction project.

18 CHAIRPERSON GRIFFIS: Right. Good. And
19 that's good testimony to bring. Mr. Jefferies, do you
20 have any difficulty in me continuing on this case?

21 MR. JEFFERIES: Not at all.

22 CHAIRPERSON GRIFFIS: Okay. Let's go
23 right to it. So the concern from the School for
24 Friends is about the construction phase. Is that
25 right?

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1 MS. WHITING: Yes.

2 CHAIRPERSON GRIFFIS: And the
3 safeguarding?

4 MS. WHITING: Yes.

5 CHAIRPERSON GRIFFIS: Has there been any
6 concern that you are bringing today in terms of your
7 testimony the permanent situation? Is there any
8 concern?

9 MS. WHITING: No. We were just concerned
10 once they start building --

11 CHAIRPERSON GRIFFIS: Okay.

12 MS. WHITING: -- that it's something to
13 protect anything from falling while we're on the
14 playground outside.

15 CHAIRPERSON GRIFFIS: Indeed. Because
16 that's right on the property line which shares the
17 playground area for the kids.

18 MS. WHITING: Yes, yes.

19 CHAIRPERSON GRIFFIS: Okay. And that's an
20 excellent concern to bring up and I certainly believe
21 that the applicant and the Board will address that as
22 would be appropriate as we continue. Okay. Anything
23 else? Yes?

24 MR. JEFFERIES: One other witness.

25 CHAIRPERSON GRIFFIS: Oh, yes, indeed.

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1 I'm going to need a microphone near you.

2 MS. HAYS: Hi, Donna Hays at 2234 Q
3 Street, N.W. I'm involved very much with the Historic
4 Preservation Group and Sheridan-Kalorama.

5 CHAIRPERSON GRIFFIS: Yes.

6 MS. HAYS: And this has been on our table
7 for about three times and reviewing everything of
8 which we are very much encouraged. And we do
9 appreciate new architecture and this is an appropriate
10 place for it. I had the plans on my dining room
11 table.

12 CHAIRPERSON GRIFFIS: In the back alley?
13 New architecture in the back alley is appropriate? We
14 won't take that as the fundamental statement of the
15 historic.

16 MS. HAYS: Okay.

17 CHAIRPERSON GRIFFIS: Okay. Good.

18 MS. HAYS: So we had, I had the plans on
19 my dining room table for several weeks and many of the
20 neighbors came in and looked at them. We are a
21 neighborhood that works very well together.

22 CHAIRPERSON GRIFFIS: Sure.

23 MS. HAYS: So everybody is aware and I can
24 encourage you to appreciate all the comments that have
25 been previously made.

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1 CHAIRPERSON GRIFFIS: Excellent. Thank
2 you very much, Ms. Hays. We do appreciate that. And
3 you haven't seen any occurrence or you're not aware of
4 any negative impact on the potentially additionally
5 animating this alley building as proposed?

6 MS. HAYS: I have not. As I said, I have
7 had the plans for, you know --

8 CHAIRPERSON GRIFFIS: Sure.

9 MS. HAYS: I think it was last November on
10 my table for several weeks.

11 CHAIRPERSON GRIFFIS: Sure.

12 MS. HAYS: And I handed them out to people
13 and people came in the house.

14 CHAIRPERSON GRIFFIS: Good. Do you think
15 the --

16 MS. HAYS: No, no, nobody said anything.

17 CHAIRPERSON GRIFFIS: Yes.

18 MS. HAYS: I mean, of course, you know,
19 you're always concerned when there is things happening
20 in the alley.

21 CHAIRPERSON GRIFFIS: Sure.

22 MS. HAYS: But we do work together on all,
23 you know, of those type of problems.

24 CHAIRPERSON GRIFFIS: Excellent.

25 MS. HAYS: Or not problems whatever they

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1 may be.

2 CHAIRPERSON GRIFFIS: In your opinion, in
3 your basis of the historic nature of the area, is this
4 a unique property?

5 MS. HAYS: Oh, it's very unique. I mean,
6 this business about 20 -- he doesn't own any property
7 on 22nd Street. He doesn't even abut 22nd Street.
8 But, you know, the address is, you know, 22nd Street,
9 it isn't even near 22nd Street. This is in the alley
10 between Q Street and 23rd Street.

11 CHAIRPERSON GRIFFIS: Are there any other
12 unique --

13 MS. HAYS: So you can see how things have
14 changed around. This is, you know, originally a
15 carriage house probably.

16 CHAIRPERSON GRIFFIS: Sure.

17 MS. HAYS: For horses or something. I
18 mean, where he is presently putting his garage used to
19 hold horses.

20 CHAIRPERSON GRIFFIS: Right.

21 MS. HAYS: And then the apartment up
22 above.

23 CHAIRPERSON GRIFFIS: Kind of similar
24 there, horses, cars.

25 MS. HAYS: Yes, yes. It was a carriage

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1 house.

2 CHAIRPERSON GRIFFIS: Sure.

3 MS. HAYS: Then probably up above was a
4 residence for help.

5 CHAIRPERSON GRIFFIS: Along with a
6 swimming pool for help. Okay. Good. Let me ask you
7 a question and put you on the spot, Ms. Hays. There
8 is a green area, kind of a triangle just across the
9 alley from you. Do you know who owns that or what
10 that is used for?

11 MS. HAYS: Across? Oh, across Q Street?
12 Oh, no, that's owned by the church.

13 CHAIRPERSON GRIFFIS: It is. Okay.

14 MS. HAYS: Yes, and it is definitely owned
15 and I did check it on the Zoning Maps one day and I'm
16 positive about that.

17 CHAIRPERSON GRIFFIS: Excellent.

18 MS. HAYS: It is owned by the church.

19 CHAIRPERSON GRIFFIS: Okay.

20 MS. HAYS: And the wall there is also
21 owned by the church.

22 CHAIRPERSON GRIFFIS: Good. Very well.
23 Any other witnesses?

24 MR. JEFFERIES: I have no other witnesses.

25 CHAIRPERSON GRIFFIS: Excellent.

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1 Questions from the Board?

2 BOARD MEMBER ETHERLY: Just very briefly,
3 Mr. Chair. I want to direct this to Mr. Morgan.
4 First of all, thank you all for your testimony. Mr.
5 Morgan, your experience perhaps can be somewhat
6 instructive here or maybe majorly instructive here.

7 MR. MORGAN: All right.

8 BOARD MEMBER ETHERLY: But perhaps as you
9 will here, not to suggest kind of where the Board's
10 questions and the direction may go, but part of the
11 tension I would guess with this application is the
12 whole issue of alley structures and how you deal with
13 alley structures. And clearly, the Zoning Regulations
14 have very specific thoughts about the size, the
15 dimensions, if you will, of those structures.

16 Perhaps once again, because we have the
17 benefit of your presence here, could you maybe speak
18 a little bit and obviously this could maybe be a two
19 hour show for HGTV, I don't know. But what's your
20 sense of the struggle that urban environments, in
21 particular, are going through with regard to this
22 issue of alley structures? Because I think one of the
23 pieces that we're going to struggle with is the notion
24 of the dimensions of the proposed addition and the
25 impact of those dimensions taken in consideration with

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1 what the Zoning Regs attempt to do with regard to size
2 on alley properties.

3 That's perhaps a very open-ended question,
4 but I'm just kind of curious with you here.

5 MR. MORGAN: I can answer that. That's a
6 great question. I can answer it. Both nationally and
7 the things I have seen from Chicago to San Francisco
8 to Seattle where they are struggling with this alley
9 urban use of buildings and how do you make them
10 functional and attractive at the same time. Probably
11 more specifically would be something like Cady's Alley
12 in Georgetown, which we have also covered a number of
13 times for the show and that's also mixed-use, which
14 our alley is not, but the number of things, the number
15 of variances you have to take into account which are,
16 in their case, commercial, residential, historical not
17 to mention the water rights and how close they are to
18 that canal.

19 That went incredibly well in Cady's Alley.
20 The people live right above some of those furniture
21 stores right there. So I don't view this as much
22 different oddly enough. I think what Doug is trying
23 to do is take what really is an eyesore and make it
24 really bold and inventive. I've seen the drawings,
25 too, also at Donna's house, but also I studied them on

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1 my own. I even showed them to a producer at Home and
2 Garden Television and we're in discussion of how we
3 might actually be able to film this.

4 And we might debate little things about
5 it, but that's -- this is exactly what the country is
6 doing as they are pushing that edge, is to -- in my
7 opinion, it's not too big. It's not too tall. It's
8 just about right. I have seen similar buildings in
9 Seattle. I can mention the one in Georgetown and it
10 fits.

11 And also, something else that isn't said
12 yet is how well it will match, I think, Doug's current
13 house, which has already been approved, already built.
14 We all love it and yet this will be an extension
15 thereof, not something separate. And I hope I
16 somewhat answered your question.

17 BOARD MEMBER ETHERLY: Okay. No, it was
18 a fairly open-ended question, but I just wanted to
19 kind of invite a little bit of conversation, because
20 again I think one of the key tensions here is going to
21 be grappling with that issue of size and scope.

22 MR. MORGAN: Yes.

23 BOARD MEMBER ETHERLY: Because I think the
24 regulations clearly try to minimize the dimensional
25 impact on these alleys.

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1 MR. MORGAN: Yes. I think it's also
2 because of where it is, the church really is a lot
3 taller than his proposed structure as is the apartment
4 building.

5 BOARD MEMBER ETHERLY: Okay.

6 MR. MORGAN: So in terms of whether it
7 will dwarf the alley or the neighborhood buildings, I
8 think on the opposite.

9 BOARD MEMBER ETHERLY: Okay.

10 MR. MORGAN: They are taller than his
11 proposed structure is.

12 BOARD MEMBER ETHERLY: Okay.

13 MR. MORGAN: So I think it would look
14 really great.

15 BOARD MEMBER ETHERLY: Thank you.

16 MR. MORGAN: Yes, thank you.

17 BOARD MEMBER ETHERLY: Thank you.

18 MS. HAYS: May I just have one moment? I
19 think the one reason none of us have any concerns is,
20 A, where the structure is going will not overshadow
21 anyone's property. It's not going to dwarf any of our
22 existing structures. Like we said, it's surrounded by
23 taller buildings. Secondly, it's not gobbling up
24 green space or open space or space that, frankly, you
25 could do anything more attractive than what he is

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1 proposing with.

2 Whatever may be over-building variance he
3 is requesting is a piece of dirt today. It's -- or
4 cement. It's space that is not functional for any
5 other purpose. So, again, we don't find it disruptive
6 as a neighborhood, because we think it will be a
7 visual enhancement to the neighborhood and not detract
8 from any open green space or access to airflow --

9 BOARD MEMBER ETHERLY: Okay.

10 MS. HAYS: -- in any way.

11 BOARD MEMBER ETHERLY: Thank you.

12 CHAIRPERSON GRIFFIS: Great. Anything
13 else? Any other questions?

14 COMMISSIONER MITTEN: I have a question.

15 CHAIRPERSON GRIFFIS: Yes.

16 COMMISSIONER MITTEN: And I think this
17 goes -- I'm going to take the Office of Planning's
18 concern and take it a little bit farther, and part of
19 my ability to ask this question or part of my
20 reasoning for asking this question is because I have
21 been in your house and it's a perfectly nice house.
22 So you have an idea and you want to combine the house
23 with the house next door, but as we heard testimony,
24 it has been that way for several decades, two houses.

25 So what is the compelling reason other

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1 than your desire to have a bigger house? What is the
2 compelling reason to do this, and by extension, which
3 creates the occasion for all these variances and also
4 is, I think, part of the reason why the Office of
5 Planning has a concern is like what is compelling you
6 to go up?

7 So can you answer that because that really
8 is the core? For me that is the core of this and for
9 all the wonderful things that happen, and you have
10 clearly been a good steward of your existing property,
11 we have -- there is a degree of inflexibility in the
12 zoning ordinance. It's old and it's not as modern as
13 it should be. So I don't have any issues with what
14 you're trying to do, but we are -- you know, we are
15 here to follow the mandate of the ordinance. So what
16 can you do with that?

17 CHAIRPERSON GRIFFIS: Before you answer
18 that, could I just get just a brief clarification
19 because I think Ms. Mitten brings up an excellent
20 point.

21 But is it more appropriately phrased can
22 they establish what their practical difficulty is in
23 complying with the regulations, because I have a
24 little concern that the threshold test is not the
25 applicant to prove why they want to do this, but

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1 rather in wanting to do this what is the practical
2 difficulty in fully complying with the regulation. Is
3 that an appropriate --

4 COMMISSIONER MITTEN: That's probably a
5 better way to say what I was trying to say. So given
6 that there is no outright prohibition on combining the
7 two structures, what is it about the two structures
8 that dictates the solution that you have devised as
9 opposed to one that complies with the zoning?

10 BOARD MEMBER ETHERLY: Okay.

11 CHAIRPERSON GRIFFIS: Excellent.

12 COMMISSIONER MITTEN: I think between the
13 two of us --

14 MR. JEFFERIES: I have an opening
15 statement that I haven't read and I don't know that
16 it's necessary at this point, but it kind of helps, so
17 it's the list of reasons for you to consider it. I
18 understand there is a three prong test in order to
19 pass this and one of those is hardship and I know it's
20 not natural to think of this case as a hardship case.

21 CHAIRPERSON GRIFFIS: Actually, it would
22 be practical difficulty not hardship. Hardship would
23 go to a use variance which --

24 MR. JEFFERIES: Okay.

25 CHAIRPERSON GRIFFIS: -- I don't think

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1 you'll make and you certainly don't want to try today.

2 MR. JEFFERIES: Okay.

3 CHAIRPERSON GRIFFIS: But we're staying on
4 an area issue.

5 MR. JEFFERIES: Okay. So practical
6 difficulty.

7 CHAIRPERSON GRIFFIS: Right.

8 MR. JEFFERIES: Well, not from my personal
9 -- because, as Ms. Mitten said, she has been in my
10 home. It is -- it was a one room studio and now it's
11 a one bedroom house. I have a growing family. My
12 divorced sister with three kids, my parents, they all
13 come to visit me. Is this what you're talking about,
14 practical difficulty? Can you -- sorry, this isn't
15 the time to define practical difficulty to me, I
16 guess, but --

17 CHAIRPERSON GRIFFIS: Why don't you just
18 start with your statement and then --

19 MR. JEFFERIES: All right.

20 CHAIRPERSON GRIFFIS: -- we'll ask
21 questions.

22 MR. JEFFERIES: All right.

23 CHAIRPERSON GRIFFIS: And direct you
24 there.

25 MR. JEFFERIES: This is my house. It's

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1 2208 1/2 Q Street. I have been there for 12 years
2 since 1994. I rented the carriage house for five
3 years until I was able to purchase it in 1999. I, in
4 fact, started a personal training business there which
5 outgrew it and I moved it. It's a local reputable
6 gym, results the gym today on Capitol Hill and Dupont.
7 So I do have real roots in this neighborhood and I
8 would like to stay.

9 I knew that someday I would outgrow this
10 house as a one bedroom house, but by happenstance a
11 few years ago I had the opportunity to buy the house
12 next door. It's the only other house in the alley.
13 The house was last renovated in the '70s so it
14 naturally became housing for GW students before it
15 became empty.

16 I personally moved into the alley when I
17 was 26 and now, less than a year from my 40th
18 birthday, my perspective on life has changed and this
19 one bedroom house is no longer practical for me or my
20 family. Connecting the two houses is a way that I can
21 stay in my home and grow into my adult life.

22 I understand that the Office of Planning's
23 major concern is not the design, but the precedence
24 that it might set for all other alley dwellings that
25 would want a third floor. In my case it's a half of

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1 a third floor in the back of the building. But after
2 you review my particular circumstance, I think you
3 will agree that there are very few buildings, if any,
4 in D.C. that would fit the criteria that my house
5 happens to meet and if they do, then I would say that
6 you should consider their variance.

7 I'm told that very few variances have full
8 support from the neighbors, ANC, HPRB and Fine Arts
9 and it's with this strong support and my thorough
10 application and the information provided to you today
11 that I ask your consideration for these variances.

12 You asked if it could be done. You know,
13 the reason I need a third floor. To convert these two
14 homes into one, it is going to cost a lot of money.
15 I need to get a construction loan and the house is not
16 appraised a high enough value as a two bedroom house,
17 but it does as a three bedroom house with a two car
18 garage and that is why that is.

19 Now, I could bring that third bedroom down
20 into the garage area, but then it doesn't reduce the
21 density of cars in the alley or in the parking lot and
22 that is something that is desirable from the city and
23 from the neighbors. So by being able to put that
24 small third bedroom up there, I can now make a two car
25 garage, take out parking out -- cars off the street.

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1 If it remains as two homes, then it's an unrenovated
2 home. It would become student housing again and I
3 would hold onto it until the values went up and it
4 could become affordable to me.

5 There is no opposition currently. The six
6 floor apartment building across the alley from me
7 casts a shadow on my entire house from 3:00 on, so
8 with a third floor addition I would add some light to
9 it. Reducing the density in the alley by making two
10 alley homes into one is desirable by both the city and
11 neighbors. The project takes two cars. I'm repeating
12 myself, sorry.

13 This has been my home for 12 years. It's
14 a freestanding home. Most of the requests for
15 variances in this case are preexisting conditions. I
16 gave you the exhibits, the handouts. There was an
17 article that states that these laws are very outdated
18 and the reason that these laws were in existence at
19 first, I'm sure you know, is to reduce poverty and
20 disease from alley dwellings that had inadequate
21 plumbing, and I have been told that it's widely
22 accepted that these laws are outdated and need
23 updating. I don't know if that is widely recognized,
24 but that is what I have been told.

25 And, lastly, I am requesting an 8 foot

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1 leniency on this building going instead of 25 feet to
2 33 feet. And while we could definitely reduce the
3 ceiling height on each floor, it would definitely
4 reduce the value and the enhancement and it would make
5 a large impact, but it could be done.

6 And, lastly, there have been substantial
7 adjustments to this design in response to the request
8 from ANC, HPRB and Fine Arts. This process started in
9 1994 and there is also an exhibit I have given you
10 behind that color copy of all the meetings that have
11 taken place. We have worked very closely with all
12 these organizations and made major changes, including
13 pushing the third floor bedroom all the way back so
14 that it's invisible from Q Street.

15 So if you're on Q Street, you look down
16 the alley, you can't even see it. Reducing the
17 height, we have already reduced the height. We have
18 retained the cornice in the front of the building
19 which was off the -- but they wanted -- everybody
20 wanted that on, so we kept that. We changed the
21 textures to satisfy certain preferred looks by the
22 above-mentioned groups and that's all. Those are my
23 comments, sir.

24 CHAIRPERSON GRIFFIS: Excellent.

25 MR. JEFFERIES: I'll put an ending to it.

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1 MR. PALMERA: Well, I would like to just
2 say that this site is very unique to begin with. You
3 have seen already it's in the middle of a block. It
4 doesn't front any street. It's landlocked. It's
5 towered by higher buildings. You have heard already
6 there is no negative impact whatsoever that anybody
7 can think of other than causing the request for a
8 variance.

9 We have sit down extensively with all
10 these agencies and neighbors to try to make the best
11 possible design, and we think that what we're
12 presenting today is communitive and collaborative
13 work. That sums everything.

14 The addition that we're requesting is 600
15 square feet. It's on the back of the property and it
16 holds a bedroom and a bathroom. And towards of the
17 front of the property we have an indoor balcony
18 covered with a roof structure. The meetings that we
19 had with HPRB at the beginning of the process, we were
20 a little bit more aggressive with what we wanted to
21 do.

22 It was a taller building. The roof at the
23 front of the house projected a little bit over the
24 canopy. It was a little bit more modern and we
25 started to tone it down to address the comments, as

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1 well as the Sheridan-Kalorama Historic Association
2 comments. Fine Arts did not have any negative
3 response or comment.

4 So I guess what we would like to highlight
5 here is that the project is -- the project that we
6 want you guys to review and hopefully approve today is
7 it's a small addition to an alley house that would
8 greatly improve the property and the experience of
9 that alley with very minimal impacts to the
10 surroundings, to the Zoning Plan and the height, I
11 guess, that the -- the key variance in play here, I
12 think we would agree, is the height and the setbacks
13 of the property.

14 The setbacks for this house requires the--
15 the zoning says it's a 20 foot setback and right now
16 it's a nonconforming structure. We have a 5 foot
17 setback and in order to comply, we will have to bring
18 the addition of the project towards the front. And,
19 again, that will cause more of an aesthetics dilemma.

20 Again, hearing HPRB, we wanted to have
21 everything towards the back, so we had the addition
22 all the way to the back and on the corner we tried to
23 create another terrace to lower the height of the
24 building so it's visible from a parking lot which you
25 have to access through the church. So we tried to

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1 address that was well.

2 The height of the structure, it's only 3
3 feet, 4 feet higher than the existing house, but 8
4 feet higher than the zoning requires and is reduced in
5 highness. Of course, this is going back, so the
6 highest point that we're dealing with is that 33 feet
7 which is at the highest point of the roof towards the
8 back. Other than that, the height of the building
9 reduces. So we can argue that the building is not as
10 tall as you can first perceive it from the front.

11 And, as well, there is one way to measure
12 the height. The allowable height for this roof to be
13 is the width of the alley plus the setback of the
14 building towards the property line, in this case will
15 be 25 feet. Our addition is 12 foot 2 inches farther
16 back from that, so in total it's 37 feet 2 inches. So
17 that addition at 33 plus feet is actually 37 feet from
18 the front of the building -- from the side of the
19 building across the alley. Was that clear?

20 CHAIRPERSON GRIFFIS: It was very clear to
21 me.

22 MR. PALMERA: Okay.

23 UNIDENTIFIED SPEAKER: Is that clear?

24 CHAIRPERSON GRIFFIS: No, but go ahead.

25 Let me just get some clarification. Your name again

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1 is?

2 MR. PALMERA: Jaime Palmera.

3 CHAIRPERSON GRIFFIS: Oh, so you're the
4 architect?

5 MR. PALMERA: Yes.

6 CHAIRPERSON GRIFFIS: Excellent, which is
7 exactly where we need to be especially talking about
8 height and the measurement. So what I have understood
9 you just to say is look, the regulations say you
10 measure the alley based on the width of the alley and
11 the setback of the structure.

12 However, what you're looking at and you
13 want us to look at is the perceived visual and massing
14 impact. If you took that same type of measuring
15 requirement and only applied it to the addition on
16 top, you would have not the 25 feet, but you would
17 have the additional setback of 12.5 feet that you
18 could add onto the height of that building. Is that
19 correct?

20 MR. PALMERA: Yes, that's what I said.

21 CHAIRPERSON GRIFFIS: Okay. So,
22 obviously, that's not the way it's --

23 MR. PALMERA: Right.

24 CHAIRPERSON GRIFFIS: -- specifically done
25 in the regulations, but the analogy or the

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1 illustration is understood. But let me ask you
2 directly on this because I'm not sure I understand how
3 you measured the height of this building.

4 You measured to the top part of the
5 ceiling on the additional floor?

6 MR. PALMERA: If you have -- I'm sure you
7 have in the drawings sections of the house.

8 CHAIRPERSON GRIFFIS: Uh-huh.

9 MR. PALMERA: We measured --

10 CHAIRPERSON GRIFFIS: Let's start with A4
11 and if we look at the elevation, it will show that the
12 32 feet 1 inch goes to the tip of that, of the
13 overhang on the open balcony area.

14 MR. PALMERA: Right.

15 CHAIRPERSON GRIFFIS: Okay. Now, if we go
16 to the cross section, too, on that same sheet, we have
17 33 feet 7.5 inches and it is measured to the center
18 line of the front to the ceiling.

19 MR. PALMERA: That is the height that we
20 have --

21 CHAIRPERSON GRIFFIS: Okay.

22 MR. PALMERA: -- said as the official
23 height because it measures to where the interior is on
24 that third floor.

25 CHAIRPERSON GRIFFIS: Okay. Good. Now,

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1 I understand what the overrun on the elevator would
2 be, which is measuring 40 feet, I believe. If we go
3 back to the elevation, which I had that, there is a
4 note 26 which talks about the smooth stucco. What is
5 in that area?

6 MR. PALMERA: I'm sorry, where is that,
7 26? I'm sorry.

8 CHAIRPERSON GRIFFIS: It's your note 26
9 which is just talking about the material, but it
10 points to the area I'm interested in.

11 MR. PALMERA: Uh-huh.

12 CHAIRPERSON GRIFFIS: We have a ceiling
13 height, but then it seems to be we have additional 3
14 feet on that or so.

15 MR. PALMERA: Okay. In this parcel we
16 have a roof deck on that roof, so that will be --

17 CHAIRPERSON GRIFFIS: So that's a solid
18 enclosure guard rail, soft guard rail around the roof
19 deck?

20 MR. PALMERA: Correct.

21 CHAIRPERSON GRIFFIS: On top of the
22 additional story.

23 MR. PALMERA: It's of habit to protect,
24 you know, the architect.

25 CHAIRPERSON GRIFFIS: Sure. Okay.

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1 Interesting. And what is your interior ceiling height
2 on that floor?

3 MR. PALMERA: On the bedroom we're
4 talking?

5 CHAIRPERSON GRIFFIS: Is it 13 feet?

6 MR. JEFFERIES: No, bedroom, bedroom,
7 third floor bedroom?

8 MR. PALMERA: If we go to page A6, the
9 lowest ceiling height is 7 foot 6 and at the top of
10 the roof on the bedroom, there is no specific
11 dimension to that, but if I try to add it's about 12
12 to 13 feet.

13 UNIDENTIFIED SPEAKER: 12.7.

14 MR. PALMERA: 12.7 actually, yes. There
15 is a dimension there, 12.7. And the pitch of the
16 roof, what I have done is even take the one that we
17 have designed already before for the other house.

18 CHAIRPERSON GRIFFIS: Right.

19 MR. PALMERA: And in this section, I guess
20 you can understand a little better the parapet wall
21 that you were asking about.

22 CHAIRPERSON GRIFFIS: Excellent. Okay.
23 Mr. Etherly?

24 BOARD MEMBER ETHERLY: Thank you very
25 much, Mr. Chair. Just kind of one question, but it's

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1 going to try to massage a little bit of the ripple
2 effect of complying with the Zoning Regulations. As
3 I think one of the earlier questions kind of
4 indicated, it might have been my colleague, Mrs.
5 Mitten, the issue of what happens architecturally if
6 you are compelled to comply with the Zoning
7 Regulations.

8 So I just want to make sure I understand
9 that. I'm not quite at the variance test yet, but I
10 just want to understand the architectural impact. So
11 if you had to comply with the Zoning Regulations as
12 written, what kind of changes would result from that?

13 MR. PALMERA: Okay. There's two roads
14 that we could go. One is try to squish everything in
15 the allowable height and which I would like to see, it
16 would be the 25 feet height or the 29 feet that the
17 current house that he lives on will apply. So,
18 actually, if I may, there's two options here that we
19 prepared, kind of like an extreme case.

20 BOARD MEMBER ETHERLY: Um-hum.

21 MR. PALMERA: One is where the design fits
22 within the 29 feet height. What we do is reduce the
23 ceiling height of the two existing floors in the
24 house. We will be reframing everything and reducing
25 the height, and then the pitch of the roof will be,

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1 you know, reduced. It will seem more of an almost
2 flat roof, which I would say it loses architectural,
3 you know, style and wouldn't match as the current
4 house.

5 The ceiling heights are reduced.
6 Everything fits, but it's a lot more compact. As
7 well, by reducing the ceiling height of the other
8 floors and retaining the existing front facade of the
9 house, the interior balcony that we have as we step
10 out of the bedroom, instead of having a 3 foot wall in
11 front of you, you will have almost like a 5 feet wall.
12 So your search for light and views and air, you know,
13 are obstructed by a 5 foot wall and, you know, it's
14 not a best solution.

15 MR. JEFFERIES: So that's also a result
16 because the cornice, he was asked to keep that.

17 MR. PALMERA: Right.

18 MR. JEFFERIES: If we could have taken the
19 cornice down, I guess we could have brought that wall
20 down, you know? Do you understand that?

21 BOARD MEMBER ETHERLY: Um-hum. Okay.

22 MR. PALMERA: Then the other option will
23 be, you know, if there is no addition whatsoever
24 allowed for this house then, well, that means no
25 addition and then Doug will prefer to have the

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1 bedrooms and everything in those two floors and remove
2 the parking from the interior of the space and have
3 alley or street parking.

4 BOARD MEMBER ETHERLY: Okay. And with
5 regard to parking as you currently deal with it, Mr.
6 Jefferies, you have one parking pad or do you have
7 kind of multiple spaces that you utilize?

8 MR. JEFFERIES: I have one legal parking
9 pad.

10 BOARD MEMBER ETHERLY: Okay. Okay. And
11 that would be where the -- is that a white vehicle,
12 silver vehicle that's indicated at the --

13 MR. JEFFERIES: Yes.

14 BOARD MEMBER ETHERLY: -- lower picture
15 there?

16 MR. JEFFERIES: The white vehicle. That
17 is the legal spot, yes.

18 BOARD MEMBER ETHERLY: Okay. Excellent.
19 Thank you, Mr. Chair. Thank you.

20 MR. JEFFERIES: Thank you.

21 CHAIRPERSON GRIFFIS: Ms. Miller?

22 BOARD MEMBER ETHERLY: Thank you, Mr.
23 Chair.

24 VICE CHAIR MILLER: Mr. Jefferies, I
25 wanted to follow up with you because -- especially on

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1 this practical difficulty prong, because it seems
2 fairly obvious that this is a unique house and we're
3 not hearing any adverse impacts. So I just want to
4 focus on the practical difficulties, because I think
5 I heard it within your opening statement and I would
6 like to zero in on it, because you know your case a
7 lot better than I do at this point, and I have some
8 assumptions, but I just want to lay it out.

9 Okay. So as far as what Ms. Mitten was
10 saying, you know, what was leading up to this, it
11 sounded like from your opening statement that you
12 originally had one dwelling which has only one bedroom
13 in it and you wanted to expand, okay, and that there
14 are certain constraints on your expanding, in any
15 event, because it's an Historic District. And it
16 sounds like most likely you would need a variance in
17 any event to expand. Is that correct in any way? I
18 mean --

19 MR. JEFFERIES: Yes, that is correct.

20 VICE CHAIR MILLER: Okay.

21 MR. JEFFERIES: And one twitch was it was
22 a one room unit, no bedroom at first, and I expanded
23 it to a one bedroom.

24 VICE CHAIR MILLER: Okay.

25 MR. JEFFERIES: It was a one -- a studio

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1 room.

2 VICE CHAIR MILLER: Okay.

3 MR. JEFFERIES: And the bedroom and living
4 room and everything was in one room.

5 VICE CHAIR MILLER: Okay. Because this is
6 not uncommon where we hear -- but if people are in a
7 small dwelling and then they are thinking of having a
8 family and they want to stay within the District and
9 they want to expand and they might be nonconforming or
10 in a Historic District and they have to seek relief.

11 So then now, with respect to the other
12 structure, were you saying that that was for student
13 housing and that it's expensive to renovate that
14 leaving it on its own without connecting it to the
15 other?

16 MR. JEFFERIES: That is correct. A dear
17 old woman, Brenda, was my neighbor for 10 years. She
18 lived a very long life. She passed on. It hadn't
19 been renovated since she bought it which I don't even
20 know, may be 25, 30 years ago. It still has the same
21 appliances and everything. And if I were to rent it
22 for anything other than -- even if I want to rent it
23 for student housing, I'm going to have to put serious
24 money into it.

25 Anything more than that, it would be an

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1 exorbitant amount. It's completely dilapidated at
2 this point. The college kids kind of brought it to a
3 whole new low and now it's exempted.

4 VICE CHAIR MILLER: Okay.

5 MR. JEFFERIES: Was I going in the
6 direction you're looking for?

7 VICE CHAIR MILLER: Yes, exactly.

8 MR. JEFFERIES: Okay.

9 VICE CHAIR MILLER: I mean, it sounds like
10 that for you to expand it all, you have practical
11 difficulties. So this is the solution that you
12 sought, which makes sense, since you own the whole
13 property at this point.

14 MR. JEFFERIES: That's right.

15 VICE CHAIR MILLER: And what was the
16 connection that you were saying though between the
17 construction loans and your expansion options?

18 MR. JEFFERIES: Yes. I can afford to keep
19 it as a rental unit. It would pay my expenses. I
20 would like to make it one unit, reduce the density and
21 reduce the parking and have a home with at least a
22 guest bedroom for some friends or my family.

23 In order to do that, I need to qualify for
24 a bank loan and in order for the building, the house,
25 to be appraised at a high enough value for me to get

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1 the money from the bank, it has to be a three bedroom,
2 two car garage house. As a two bedroom, no garage, it
3 doesn't qualify high enough for me to get a loan to do
4 the construction.

5 VICE CHAIR MILLER: Okay. The other thing
6 we haven't touched upon, and OP may get to this, but
7 is the variance related to the elevator? Is there
8 some practical difficulty related to the elevator?

9 MR. JEFFERIES: Yes.

10 VICE CHAIR MILLER: Okay.

11 MR. JEFFERIES: To put the elevator inside
12 the structure would be a lot more expensive. It's a
13 lot more difficult, I think just structure and, I'm
14 missing that word again, density, just the cost
15 associated with trying to put that inside the building
16 versus putting it on the outside in between the two
17 houses that exist already.

18 Oh, why do I need an elevator? My
19 parents, my aging parents, and I had an ACL
20 replacement in my knee last year. I don't have any
21 problems with it currently, but I do love this
22 neighborhood. I love my neighbors. I love everything
23 about it. I want to stay there and, you know, if I
24 live long enough that I need an elevator to get to my
25 bedroom, I'm psyched. Well, not psyched that I need

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1 the elevator, that I'm old enough to live that long to
2 need one.

3 VICE CHAIR MILLER: Okay. Thank you.

4 CHAIRPERSON GRIFFIS: Anything else?
5 Excellent. We have a couple more questions, but you
6 had indicated that some of your witnesses may need to
7 leave, so I would --

8 MR. JEFFERIES: Well, did.

9 CHAIRPERSON GRIFFIS: Okay. Good. I
10 don't want you to feel --

11 MS. BRACKEN: I'm just so fascinated, I
12 want to stay.

13 CHAIRPERSON GRIFFIS: This is great. That
14 is great. Glad to hear that.

15 MS. WHITING: I got to go back to school.

16 CHAIRPERSON GRIFFIS: Indeed. Thank you
17 very much. We do appreciate you being here.
18 Actually, before you leave, let me just ask one
19 question in terms of impact. You had indicated that
20 mostly it's a construction impact.

21 Has there been any light and air impact
22 that you have seen or you're aware of that might be of
23 concern?

24 MS. WHITING: No, but the last time that
25 they did the building they did have the wall up.

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1 CHAIRPERSON GRIFFIS: Right.

2 MS. WHITING: And the kids were really
3 fascinated with some of the trucks.

4 CHAIRPERSON GRIFFIS: Sure.

5 MS. WHITING: So sometimes we did go out
6 in the parking lot.

7 CHAIRPERSON GRIFFIS: Right.

8 MS. WHITING: To look at the foot-loader
9 or whatever.

10 CHAIRPERSON GRIFFIS: Yes, yes, yes. But,
11 see, the permanent, what is being proposed in terms of
12 the addition and all, you don't see that as having any
13 sort of negative impact on the play area or the
14 outside area?

15 MS. WHITING: No. My director is on
16 sabbatical leave and he said he is for it, but just
17 the safety of the playground while we're outside.

18 CHAIRPERSON GRIFFIS: Excellent. Great.
19 Thank you very much.

20 MS. WHITING: Uh-huh.

21 CHAIRPERSON GRIFFIS: We do appreciate you
22 taking the time to be down here. Okay. That being
23 said, of course, you're all free to stay and be amused
24 because we are very -- however, if you do need to
25 leave, we'll let it go at that.

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1 Let me ask you very quickly on -- you have
2 applied for a variance under 2507.2 which reads in our
3 regulations "A one-family dwelling shall not be
4 erected or constructed on an alley lot unless the
5 alley lot abuts the alley 30 feet or more in width and
6 has the alley access to the street," etcetera.

7 But you have testified and, in fact, in
8 the written submission there is testimony that says
9 that this is an existing one-family dwelling. Is that
10 correct?

11 MR. JEFFERIES: Yes, it is an existing,
12 yes.

13 CHAIRPERSON GRIFFIS: Well, then aren't we
14 in 2507.3 which actually just goes to -- I'm not sure
15 it makes a world of difference, but this isn't a
16 construction of a one-family dwelling, but the
17 renovation of one.

18 MR. JEFFERIES: That's correct.

19 CHAIRPERSON GRIFFIS: Okay.

20 MR. PALMERA: I think when I was preparing
21 these documents, I mean, expediting them, I think how
22 we thought of it is that even though we have two
23 existing residentials, we are creating one by
24 combining them.

25 CHAIRPERSON GRIFFIS: Right.

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1 MR. PALMERA: And probably that's the
2 variance that requires --

3 CHAIRPERSON GRIFFIS: Interesting. Not
4 very helpful from your end, however.

5 MR. PALMERA: I mean, this --

6 CHAIRPERSON GRIFFIS: Again, it's still
7 the same variance in some respects, but the conversion
8 and alteration and remodeling that you're proposing,
9 I imagine, exceeds one-half of the value of the
10 structure?

11 MR. PALMERA: Exceeds one-half of the
12 value of the structure?

13 MR. JEFFERIES: Yes, close, yes.

14 CHAIRPERSON GRIFFIS: Well, it's an
15 interesting point because you wouldn't need a variance
16 if it didn't come from that section. I mean, as you
17 say, you're here for an awful lot, but the others are
18 -- well, the others don't cause me as much difficulty
19 as the two in 2500 or 2507.

20 MR. JEFFERIES: Right.

21 CHAIRPERSON GRIFFIS: And that being the
22 big one and 2507.4 we can get to, which is the height
23 and how you measure the height. So I think we may
24 just have additional information on that submitted
25 into the record if you can't answer that right now.

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1 MR. JEFFERIES: This sounds like a very
2 important issue. Could we go back to it for a second?

3 CHAIRPERSON GRIFFIS: Um-hum.

4 MR. JEFFERIES: Your question to me was
5 specifically is this new part of the house --

6 CHAIRPERSON GRIFFIS: Let me read you
7 2507.3.

8 MR. JEFFERIES: Okay.

9 CHAIRPERSON GRIFFIS: 2507.3 and the
10 buildings on alley lots reads "An existing one-family
11 dwelling located on an alley lot that abuts an alley
12 less than 30 feet." That is your condition, correct?

13 MR. JEFFERIES: Yes, that's correct.

14 CHAIRPERSON GRIFFIS: Okay. "And which
15 shall not be converted, altered, remodeled, restored
16 or repaired for use of one-family dwelling if the cost
17 of the conversion, alteration, remodeling, restoration
18 or repairs exceeds one-half of the value of the
19 structure immediately prior to the time of conversion,
20 alteration, remodeling, restoration or repair."

21 So if you're valued at \$100,000 and your
22 renovation is \$49,000, I would assume, if my math is
23 correct and my reading of the regulations is correct,
24 you would not need relief from that section. Do you
25 agree? Yes.

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1 MR. PALMERA: What is involved in the cost
2 of that, you know, is specific for that variance.

3 CHAIRPERSON GRIFFIS: And I'm not asking
4 for your proof to expedite it.

5 MR. PALMERA: Because it's just joining
6 them.

7 CHAIRPERSON GRIFFIS: I have no clue, but
8 I'm reading you the regulations.

9 MR. JEFFERIES: Okay. I can answer that
10 question.

11 CHAIRPERSON GRIFFIS: Okay.

12 MR. JEFFERIES: Yes, I can't really
13 understand. It took me a second, sorry. I was up
14 very late preparing this. That house has been
15 appraised for \$1.8 million as is and I'm putting
16 \$700,000 into it.

17 VICE CHAIR MILLER: Which house are we
18 looking at?

19 MR. JEFFERIES: I believe I have a written
20 appraisal for the -- not for the house that I'm living
21 in.

22 VICE CHAIR MILLER: The other one.

23 MR. JEFFERIES: But for the -- yes, the
24 mud green, the mud green dump, as Andrew said.

25 COMMISSIONER MITTEN: Is that in its

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1 existing condition?

2 MR. JEFFERIES: I know I have it in
3 writing and I questioned it myself. You know, we have
4 had to go through this process and it's in writing.
5 I asked them. I requestioned it.

6 CHAIRPERSON GRIFFIS: Okay.

7 MR. JEFFERIES: I have both the appraisal
8 for \$1.8 and I have the construction proposal for
9 \$700,000.

10 COMMISSIONER MITTEN: I hope your
11 assessment is not at \$1.8. What is the assessment?
12 Do you know?

13 MR. JEFFERIES: I don't know. I bought it
14 three years ago for \$950,000.

15 CHAIRPERSON GRIFFIS: Okay. We're going
16 to keep the record open. I think we need that
17 submitted. Obviously, we're going to move ahead with
18 the other 18 variances, but that is critical to me in
19 terms of my deliberation on this because that's a huge
20 threshold to get over. I don't think we're in 2507.2.
21 That's definitive. Now that we're in 2507.3, whether
22 that's actually even required relief, we'll let you
23 document that and move ahead.

24 In terms of the height, I think we have
25 established and addressed that from the applicant's

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1 point. I'm clear on that. I'm clear on what is being
2 proposed also. Let's get to any other issues and
3 questions. We do have the other elements. The rear
4 yard and the side yards are attendant to the addition
5 on the top that we have the nonconforming structures
6 and the relief from those.

7 But if there aren't any further questions
8 from the Board or further evidence at this point or
9 testimony and case presentation, I think it would be
10 best if we move ahead unless there is anything right
11 now.

12 MR. JEFFERIES: No, sir.

13 CHAIRPERSON GRIFFIS: Okay. Good.

14 VICE CHAIR MILLER: Can I just say
15 something? It relates to my previous question and
16 then I was just looking at how the application was
17 framed, and it talks about the conversion of two
18 existing single-family dwellings into one single-
19 family dwelling.

20 CHAIRPERSON GRIFFIS: Right.

21 VICE CHAIR MILLER: So that is why I was
22 asking which dwelling are we looking at --

23 CHAIRPERSON GRIFFIS: Right.

24 VICE CHAIR MILLER: -- when we're looking
25 at the price.

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1 CHAIRPERSON GRIFFIS: And that language is
2 from your permit expediter. Is that correct?

3 MR. PALMERA: We worded it together.

4 CHAIRPERSON GRIFFIS: Sure, sure, sure.
5 I think there is probably a more clear and appropriate
6 way to do that. You're going to subdivide this into
7 a single-family?

8 MR. JEFFERIES: I'm sorry?

9 CHAIRPERSON GRIFFIS: You're going to
10 subdivide this into one house or are you keeping it
11 separate?

12 MR. JEFFERIES: It's going to be one.

13 MR. PALMERA: No, it's one.

14 MR. JEFFERIES: One dwelling.

15 MR. PALMERA: One house.

16 MR. JEFFERIES: It's going to be one
17 house.

18 CHAIRPERSON GRIFFIS: Okay. I'm not sure
19 that really would matter. I mean, I don't think -- it
20 wouldn't be my interpretation that that is a
21 conversion, but be that as it may, let's just take in
22 that information and we can get to the bottom of it.
23 I don't think it's that difficult a piece to
24 understand. Okay. Anything else? Very well. Let's
25 move ahead then.

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1 Ms. Brown-Roberts is with us from the
2 Office of Planning. Good afternoon.

3 MS. BROWN-ROBERTS: Good afternoon, Mr.
4 Chairman and Members of the Board. I am Maxine Brown-
5 Roberts from the Office of Planning and in order to
6 sort of expedite my testimony, I'm going to
7 concentrate on the height, side yard and the rear yard
8 section of the report. I think the other -- the
9 analysis speaks for itself on the other variance
10 request that we're recommending approval of. I think
11 that the applicant has met all the three prong tests
12 on all of those sections.

13 Regarding the height, the side yard and
14 the rear yard, in the Historic Presentation staff
15 report they stated that the buildings on alleys are
16 usually one story. The subject building was
17 originally a one story building where the second floor
18 was added at some unknown time. The applicant is now
19 seeking to add a third story which is unusual for
20 alley dwellings.

21 The adjacent building was a one story
22 building and the BZA in the former application granted
23 a variance for the second floor to be added to make it
24 compatible to the subject building. Although the
25 existing situation of the lot creates a somewhat

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1 unique circumstance, the Office of Planning fails to
2 see how they result in a hardship requiring the
3 construction of a third floor. There is a hardship on
4 unusual circumstance.

5 The building currently exceeds the maximum
6 height allowed and together with other nonconformities
7 does not justify a further increase in height of the
8 building. Further, the addition is creating
9 additional nonconformities as it will not meet the
10 side and rear yard requirements. The additional 8
11 feet over the height permitted will be detrimental to
12 the Zone Plan as the height limitation for alley
13 structures is designed to keep them lower than the
14 structures that front on streets.

15 As stated in HP report, this building has
16 already had a second floor addition. Secondly, the
17 adjacent building was granted a second story addition
18 to be compatible with the subject building.
19 Therefore, the addition of a third story will be out
20 of character as an alley dwelling. The additional
21 height combined with the setback relief results in a
22 building mass which is larger than anticipated for
23 alley dwellings. Denial of the height variance also
24 eliminates the need for rear and side yard variance
25 requests.

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1 We also took a position on the parking.
2 From the site visit and looking at the pictures, we
3 believe that the building can be constructed in an
4 architectural pleasing way without the third floor
5 addition. And even if the applicant can continue to
6 park on the street, he has one space and there has not
7 been any indication that that has been a problem, so
8 we believe that he can fit the space that he needs
9 within the existing structure.

10 We agree that there has been an
11 overwhelming amount of support for the application.
12 However, from none of these quarters have we seen
13 where they have addressed the variance for the
14 additional height.

15 Therefore, Mr. Chairman, the Office of
16 Planning recommends that a variance regarding the
17 nonconforming structure, the lot occupancy, lot
18 dimension, the alley lot, the court width and roof
19 structure be approved, and we also recommend the
20 denial of the variance request for the increase in
21 height. Thank you, Mr. Chairman.

22 CHAIRPERSON GRIFFIS: Excellent. Thank
23 you very much. We do appreciate that. Questions?
24 Ms. Miller?

25 VICE CHAIR MILLER: Yes. I just want --

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1 I want to follow-up on your assessment that it's out
2 of character as an alley dwelling. Usually, when
3 we're looking at character, we're looking at character
4 of a neighborhood or character in the context of
5 surrounding area. And so I'm having some difficulty
6 in understanding your point about out of character as
7 an alley dwelling.

8 For instance, if a lot of alley dwellings
9 are unattractive, and this one is different and
10 attractive but it's in a totally different area, I
11 mean, what is the significance of saying it's out of
12 character as an alley dwelling?

13 MS. BROWN-ROBERTS: The significance is
14 that alley dwellings have a certain character and I
15 agree that, you know, this community, this area, has
16 its own character.

17 But alley dwellings, I think, are a
18 special breed that they are lower than the surrounding
19 residences. Usually, those are three, four stories,
20 but the alley dwellings are -- the alley structures
21 are usually lower. And so that is the character that
22 it takes on, not really the character of the area
23 itself.

24 I don't think or the applicant hasn't
25 demonstrated to the Office of Planning anyway that,

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1 you know, taking off or reducing the height of the
2 building is going to make the building any less
3 architecturally attractive in the area.

4 VICE CHAIR MILLER: Just as a follow-up,
5 I mean, usually, you know, there is a good reason, for
6 instance, for why they are a certain way, why the
7 regulations say they should be a certain way, that
8 they should be lower than the buildings behind them,
9 for instance, and whatever this -- it's not arbitrary
10 that there is hopefully a reason.

11 In this case, does that rationale play in
12 here? Is there some reason, some negative adverse
13 impact that is being created by the height of the
14 proposed building?

15 MS. BROWN-ROBERTS: I don't know. I think
16 we depended on the Historic Preservation review
17 analysis that talked about, you know, the character of
18 the alley dwellings and how they became that. That is
19 not something that I looked into.

20 MS. BRACKEN: Ms. Miller, may I just add
21 that -- may I, sir?

22 CHAIRPERSON GRIFFIS: Yes, okay.

23 MS. BRACKEN: Well, it's interesting to me
24 that she is talking about the character of the alley
25 when, in fact, the character of the alley has already

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1 been established by the single dwelling that Mr.
2 Jefferies --

3 CHAIRPERSON GRIFFIS: I see.

4 MS. BRACKEN: -- currently occupies and
5 what we're asking for, what he is asking for, is an
6 extension or --

7 CHAIRPERSON GRIFFIS: Right. Okay.

8 MS. BRACKEN: -- additional architectural
9 enhancement.

10 CHAIRPERSON GRIFFIS: I appreciate that.
11 I think the Office of Planning is making a little bit
12 different point, but I think that's an interesting
13 perspective to have on that.

14 Ms. Miller, follow-up on that, your issue?

15 VICE CHAIR MILLER: Were you saying that
16 HPRB didn't have any problem with it being out of
17 character as far as their standards go?

18 MS. BROWN-ROBERTS: Pardon me?

19 VICE CHAIR MILLER: HPRB looked at this
20 and didn't find that it was out of character with
21 respect to HPRB's standards?

22 MS. BROWN-ROBERTS: I -- no, I don't
23 think. Again, as I said in my report, the HPRB is
24 charged with looking at the design and, you know, how
25 it fits into the area and I think that is what they

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1 looked at. They did not look at what the zoning
2 requirements are and so, you know, any applicant can
3 carry, you know, take before them a building, a
4 design. That is what they look at. They don't look
5 at how the zoning requirements are met.

6 VICE CHAIR MILLER: I just want to say, I
7 mean, I totally concur with you that they are looking
8 at different things, so sometimes we're both looking
9 at the character of the neighborhood. But that was
10 why I was asking about that question, but I'm still
11 not clear what zoning -- what negative impact that the
12 Zoning Regulations regarding the height -- I'm not
13 sure what is impacted here.

14 MS. BROWN-ROBERTS: Well, the applicant
15 has not demonstrated to us that the -- the variance
16 requirement says that they have to demonstrate that
17 there is some hardship or whatever, that they need to
18 demonstrate that. And to date we have not seen that
19 demonstration.

20 VICE CHAIR MILLER: Okay. So as I
21 understand it, it's not any negative adverse impacts.
22 It's that you don't believe they have made the
23 practical difficulty test here.

24 MS. BROWN-ROBERTS: That's exactly it.

25 VICE CHAIR MILLER: Okay. Thanks.

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1 CHAIRPERSON GRIFFIS: Other questions from
2 the Board of the Office of Planning? Does the
3 applicant have any cross examination of the Office of
4 Planning? Do you have any questions of the Office of
5 Planning?

6 MR. PALMERA: I would say that --

7 CHAIRPERSON GRIFFIS: You can just turn
8 your microphone on if you would.

9 MR. PALMERA: In the application should
10 have been the staff report from HPRB and on the
11 evaluation and recommendation chapter almost at the
12 end, it probably says why you're questioning it and I
13 read, it says "In terms of the rooftop addition, the
14 staff finds no significant preservation concerns. The
15 setback of the third floor is an appropriate and
16 convincing response.

17 While the existing rooftop addition to
18 2210 Q Street was determined compatible, it was a one
19 story structure with a second story addition, as
20 opposed to a two story structure with a third story
21 addition. Alleys are typically characterized by one
22 and two story dwellings. Thus, the setback helps to
23 relieve the height and mass of the third floor as seen
24 from the alley resulting in an overall lighter and
25 less bulky appearance.

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1 In addition, the staff agreed that due to
2 its location on an alley, a certain amount of latitude
3 in terms of the Board's standards for an addition is
4 warranted. The staff does not have a lingering
5 concern regarding the overall height and scale of the
6 elevator shaft by the knowledge that its visibility is
7 primarily limited to a private space and can really
8 only be seen from the parking lot of the church."

9 CHAIRPERSON GRIFFIS: Excellent. Thank
10 you.

11 MR. JEFFERIES: I would like to say Maxine
12 and I met a couple of times in her office.

13 CHAIRPERSON GRIFFIS: Good.

14 MR. JEFFERIES: Along with Steve Cochran.

15 CHAIRPERSON GRIFFIS: Unless you have
16 cross questions of her --

17 MR. JEFFERIES: No.

18 CHAIRPERSON GRIFFIS: -- you can save it
19 for your closing.

20 MR. JEFFERIES: Got it.

21 CHAIRPERSON GRIFFIS: Which would be an
22 appropriate time to address everything that we're
23 going to get through, because I think we're going to
24 get through this fairly quickly now as we go on. Ms.
25 Maxine Brown-Roberts has presented the report of the

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1 Office of Planning to this Agency, and I want to
2 commend her on her report.

3 One, it's a lengthy analysis based on the
4 length and the detail in this case and I think that
5 her report and analysis shows an in-depth
6 understanding of the elements, one, the regulations
7 themselves and, two, this specific project and I
8 appreciate all that has been put forward.

9 I think where she is going, as I
10 understand it, in terms of the alley dwelling and how
11 it then attends to the rear yard and the side yard is
12 appropriate analysis and is something that the Board
13 will have to take under great consideration and
14 whether that practical difficulty has been met. I
15 don't think it's contested that there are unique
16 aspects to this.

17 When we talk about the character, I am
18 hearing, obviously, there is testimony from the
19 applicant. There is our impression, there is OP's
20 impression, there is HPRB's. Ms. Miller has said it
21 I think most succinctly that we all look at the same
22 nomenclature, the same words with different criteria.
23 And it is, I think, interesting to look at the
24 character of this alley as we have an apartment
25 building on one side in an R-3 Zone. We have large

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1 single-family dwellings and we have these alley
2 dwellings, and we have the church structure that wraps
3 around the whole corner.

4 None of that is lost on any of the Board
5 Members, I don't believe, and obviously it's the
6 importance of all the information that we have in this
7 record. That being said, if there is no other
8 questions for the Office of Planning, I think it's
9 best that we move on and move to the other Government
10 Agency reports of which I don't have any attendant to
11 this application. We could go just to the ANC report.

12 Has an ANC member joined us, 2D? Not
13 noting any ANC member joining, we do have Exhibit 31.
14 It is a requirement of a waiver of our seven day
15 ruling, I do believe.

16 Is there any objection from the Board of
17 accepting it into the record? If there is no
18 objection, we take it as the consensus of the Board to
19 accept the ANC's report. I note that they voted in
20 support of the application and I don't know that I
21 need to address anything else on that unless the
22 applicant has anything else to bring to our attention
23 in the ANC report, which I don't know if you do.
24 Excellent. Very well.

25 That being said, let's move ahead to

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1 additional persons present that would like to provide
2 testimony in Application 17495. Is there anyone else
3 here present in support of the application, in
4 opposition to the application, you can come forward at
5 this time. Not noting anyone coming forward to
6 address the Board, we will turn it over to the
7 applicant for -- unless there are Board questions at
8 this time. Yes, Ms. Miller?

9 VICE CHAIR MILLER: I just want to say to
10 the applicant that based on what I hear at this
11 hearing, that it doesn't sound like there is much of
12 an issue with the uniqueness prong and no adverse
13 impact prong and we have to meet all, we have to find
14 for all three.

15 And, in particular, so when you do your
16 closing I hope you'll address the practical
17 difficulties prong and, in particular, for the height
18 which is I think where we left with Office of
19 Planning, that they found that you just hadn't met the
20 practical difficulties test, not that it was out of
21 character.

22 CHAIRPERSON GRIFFIS: Good point.
23 Questions. You have given us some alternatives
24 showing, I think, for our understanding not that
25 you're actually proposing to pick one or the other of

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1 them, but just show that this -- the difficulty that
2 you're addressing.

3 Let me ask you directly. Were any of
4 these reviewed by HPRB? None of these alternatives
5 were. Would this change the fenestration line? For
6 instance, if I'm looking at the 29 foot height scheme,
7 does that change the fenestration where the floor hits
8 the window where it currently hits?

9 MR. PALMERA: The windows, existing
10 windows of the house, you may see on the lower board.

11 CHAIRPERSON GRIFFIS: Uh-huh.

12 MR. PALMERA: Are reduced right now to
13 become doors. If we reframe everything at a lower
14 height, we may need to, yes.

15 CHAIRPERSON GRIFFIS: So it starts to
16 impact that fenestration?

17 MR. PALMERA: Yes.

18 CHAIRPERSON GRIFFIS: That cutting and
19 that would obviously take some review by HPRB. Okay.
20 Right. Okay. I mean, well, there it is. Okay.
21 Anything else? Very well. We'll turn it over to you
22 for closings.

23 MR. JEFFERIES: Closing. Can I have one
24 moment?

25 CHAIRPERSON GRIFFIS: Sure.

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1 MR. JEFFERIES: Thank you very much for
2 seeing this case. I do realize that this is 9 or 10
3 variances. It's very unusual, but I think it's
4 equally unusual to have unanimous support. The
5 practical difficulty for this situation, if I were to
6 have to revisit the entire situation after two years
7 of trying to meet with everybody and make this work,
8 would be a very challenging experience for us.

9 There is certainly no way to expand broad.
10 We have to build up and that is the practical
11 difficulty that I can honestly see, is that it would
12 take many more reviews and redesign and I would
13 probably end up just splitting it back off for a
14 couple of years because it's just not something that
15 I can do for another two years.

16 I hope that you take into -- consider
17 everything we have done to try to make this work.
18 It's a very unique situation. We're towered by
19 buildings all the way around. There is no negative
20 impact and you have heard it all. So I think I will
21 just leave the closing argument. You have a long day
22 ahead of you. Thank you for seeing it.

23 CHAIRPERSON GRIFFIS: Excellent. Thank
24 you very much. If I understand just your last remarks
25 is that really this additional floor or partial floor

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1 drives this whole project, and so without this none of
2 the rest happens. And as I understand, you just said
3 you can't build out, because you have acquired all
4 those adjacent properties. As an existing structure,
5 you can only build up and that makes it feasible.

6 MR. JEFFERIES: That's correct.

7 CHAIRPERSON GRIFFIS: I see. Okay.

8 MR. PALMERA: I would like to add that if
9 the concern is that alley structures cast a shadow or
10 block views to other structures, in this case that is
11 the opposite. We have a six story building casting a
12 shadow on this property and it's a cry for light.
13 It's a cry for help here to reach up and get light
14 into these two properties.

15 And I will point out it's not visible. It
16 doesn't cause any negative on any surrounding
17 structure. It's actually -- as we have heard already,
18 it's improving the conditions of the alley and the
19 structure and it's just reaching for light and air.

20 CHAIRPERSON GRIFFIS: Excellent. Anything
21 else?

22 MR. JEFFERIES: That's it.

23 CHAIRPERSON GRIFFIS: Thank you all very
24 much. We do appreciate it. A lot of information.
25 Yes?

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1 VICE CHAIR MILLER: 2507.3, is anything
2 going to be happening with that?

3 CHAIRPERSON GRIFFIS: Absolutely. We're
4 going to set this for a decision. We're going to set
5 it for the 11th of July. We're going to have just the
6 address of that element in the record and that will
7 amend this application or not, depending. I think
8 it's pretty clear that this should be amended to
9 2507.3.

10 If you want to address that, that's fine.
11 I would rather you spend the time addressing whether
12 it's required to be relieved of 2507.3 or not. I
13 don't see this. Unless anyone else takes disagreement
14 with me, this is not the erection or construction of
15 a single-family dwelling, but rather it's dealing with
16 the existing.

17 So that being said, we'll leave the record
18 open for that. We'll give you the week before the
19 11th to provide that information. That would be the
20 Wednesday by 3:00 and that is the 5th of July, if I
21 recall correctly from our last. It can obviously come
22 in much earlier than that, as needed.

23 Is there any other information we would
24 need in the record? I don't think we would -- we
25 would also keep the record open if you wanted to re-

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1 articulate your closing remarks in terms of the
2 practical difficulty. You can put that in narrative
3 form, brief, succinct, direct. That makes for the
4 best reading and we will take that in and also as you
5 address if this needs to be amended.

6 MS. BAILEY: Mr. Chairman?

7 CHAIRPERSON GRIFFIS: Yes?

8 MS. BAILEY: I'm not sure if the Board
9 still wants it, but there was some discussion about
10 the appraisal of the properties.

11 CHAIRPERSON GRIFFIS: Right.

12 MS. BAILEY: I'm not sure if you still
13 want that.

14 CHAIRPERSON GRIFFIS: Excellent, and I
15 appreciate you bringing that up. That will be part of
16 the information that will address the 2507.3 which
17 will obviously have to value the property and then
18 value the addition and be it above or below 50
19 percent. Okay.

20 Anything else? Anything else we need in
21 the record? Very well. If there is nothing further
22 then, do you have any procedural questions?

23 MR. JEFFERIES: What is next?

24 CHAIRPERSON GRIFFIS: Okay. Next is your
25 submissions are due into the Office of Zoning. You're

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1 going to need to make sure that they get into the
2 record and that is what I have just laid out, and that
3 has to be in by the 5th of July which is that
4 Wednesday by 3:00. Let me say it in reverse. If they
5 are not in by the 5th at 3:00, they won't be part of
6 what we look at to deliberate on this.

7 MR. JEFFERIES: Okay.

8 CHAIRPERSON GRIFFIS: And that which is
9 going to be submitted in by the 5th is going to be
10 whether -- how you address 2507.3, so read that
11 section, see if you need relief from it, and -- oh,
12 and then we're allowing the record open for you to
13 submit a narrative re-articulation of your case,
14 basically your uniqueness, your practical difficulty,
15 impair the intent and integrity of the Zone Plan and
16 public good, so closing remarks in writing.

17 MR. JEFFERIES: Okay.

18 CHAIRPERSON GRIFFIS: Anything else?

19 UNIDENTIFIED SPEAKER: Can you repeat that
20 number again, 20?

21 MR. JEFFERIES: 2507.3. So there won't be
22 a vote today then?

23 CHAIRPERSON GRIFFIS: That's correct.
24 We're going to set this down for decision-making on
25 the 11th.

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1 MR. JEFFERIES: I'm not in town on the
2 5th, but that doesn't matter as long as it is
3 submitted by 3:00 on the 5th?

4 CHAIRPERSON GRIFFIS: The 5th is --
5 exactly. It can come into the office any time up to
6 the 5th at 3:00. On the 11th we will make our
7 decision. The 11th is a Tuesday. We'll call this for
8 -- you're not required to be here on the 11th. You're
9 certainly welcome to be here on the 11th. The record
10 is closed on the 5th. We will just call this case for
11 a decision, so you will hear the Board go through all
12 the facts in the case, deliberate on it and vote it.

13 MR. JEFFERIES: Okay. On the 11th?

14 CHAIRPERSON GRIFFIS: On the 11th. Good.

15 MR. JEFFERIES: Thank you very much.

16 CHAIRPERSON GRIFFIS: Any other questions?

17 MR. JEFFERIES: No.

18 CHAIRPERSON GRIFFIS: Very well. Thank
19 you all.

20 MR. JEFFERIES: Thank you very much.

21 CHAIRPERSON GRIFFIS: Thank you very much.
22 We appreciate it and we appreciate all those witnesses
23 that came down today. At this point, we're going to
24 just take a brief break. Let this applicant move out
25 and then we are going to take up the next case which

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1 will begin with a preliminary matter in this case,
2 which is a motion to dismiss.

3 (Whereupon, at 3:15 p.m. a recess until
4 3:37 p.m.)

5 CHAIRPERSON GRIFFIS: Let's continue. Mr.
6 Nettler, last we saw you, you were amidst of a motion
7 to dismiss, if I'm not mistaken.

8 MR. NETTLER: Yes, I was. Do you want to
9 call the case?

10 CHAIRPERSON GRIFFIS: Right. We're going
11 to call the case and then we can have you rearticulate
12 that briefly.

13 MS. BAILEY: Mr. Chairman, I will be
14 calling the case as it is published.

15 CHAIRPERSON GRIFFIS: Good.

16 MS. BAILEY: But with the understanding
17 that the applicant has made significant modification
18 to what was originally asked for, the relief that was
19 originally asked for.

20 CHAIRPERSON GRIFFIS: Excellent.

21 MS. BAILEY: Application No. 17337 of N
22 Street Follies, Ltd., pursuant to 11 DCMR 3104 and
23 3103.2, for a special exceptions to allow a hotel
24 under section 512, for a partial waiver of the rear
25 yard requirements under subsection 534.6, and to allow

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1 multiple roof structures and roof structures not
2 meeting the normal setback requirements of subsection
3 530.4, under section 411, and for variances from the
4 height requirements under section 530, the floor area
5 requirements under section 531, and the court
6 requirements under section 536, to allow the
7 construction of an addition to an existing building to
8 be used as a hotel. The property is located in the
9 Dupont Circle SP-1 District and the premises are 1743
10 through 1755 N Street, N.W. It's also known as Square
11 158, Lots 69, 835 and 836.

12 CHAIRPERSON GRIFFIS: Very well. Thank
13 you. Yes?

14 MR. NETTLER: Thank you. My name is
15 Richard Nettler. I'm here on behalf of the Tabard Inn
16 and for the benefit of Mr. Glasgow and those members
17 of the Board who were not here when I did begin
18 before, I am renewing my motion to dismiss the
19 application. And let me go back over some of the
20 issues.

21 If the Board might recall, when this case
22 first came before the Board last year requesting the
23 relief that Ms. Bailey had identified, there was a
24 concern at that point by Members of the Board as to
25 whether the applicant was wasting this Board's time

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1 with an application that, I guess for want of better
2 words, was dead on arrival and the applicant was
3 directed to revise that application to -- in seeking
4 this Board's review.

5 The matter was continued until a hearing
6 in January, at which point the applicant did come back
7 with a revised plan. That hearing ended without the--
8 those in opposition to the project being given an
9 opportunity to testify. However, in the interim,
10 between the time when that was presented to the Board
11 and the time that it came back before the Board in
12 February, the applicant went before the Historic
13 Preservation Review Board.

14 The Historic Preservation Review Board
15 denied the application that was presented. In fact,
16 the Office of Planning's support was contingent upon
17 the action taken by the Historic Preservation Review
18 Board. At the hearing date of February 28, 2006, the
19 applicant's attorney asked for a continuance of the
20 hearing.

21 This Board agreed to give him a fair
22 amount of time, because he made representations to you
23 and to us as well that he was going to go back before
24 the Historic Preservation Review Board and respond to
25 the concerns that were raised about the project with

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1 revisions and seek review by the review board and the
2 staff and presumably give the ANC as well an
3 opportunity to review those revisions in time for a
4 hearing that would be set way in the future, June
5 27th, today.

6 That was, I guess, about a four or five
7 month period of time in which to do so. Nothing has
8 happened in the interim. There has been no new
9 application filed with the review board, no new
10 presentation to the staff, nothing to the Advisory
11 Neighborhood Commission, nothing to us and nothing to
12 you that responds to the issues that resulted in the
13 rejection of the application by the Historic
14 Preservation Review Board.

15 As the Office of Planning stated at the
16 February hearing, it was important that we give the
17 applicant that opportunity, because otherwise the
18 Board would be, essentially, asked to review something
19 that it couldnot have any practical consequences in
20 terms of a project being able to be realized from the
21 plans that had been reviewed by this Board.

22 The applicant chose to present this to the
23 Historic Preservation Review Board. This is not
24 before -- in the interim. This is not a situation
25 where the applicant has come before the Board of

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1 Zoning Adjustment and obtained zoning relief, gone to
2 the Historic Preservation Review Board, the Historic
3 Preservation Review Board requires changes and the
4 applicant might have to come back here for
5 modifications.

6 This is a situation where the review
7 board, which by statute actually, its own statute, is
8 required to take into account the Zoning Regulations
9 whenever it reviews a project, although it is not the
10 zoning body, but nevertheless for historic
11 preservation reasons, which are, in essence, the
12 backbone of the Dupont Circle Overlay, if you read the
13 preamble and all the provisions, the whole purpose of
14 the Dupont Circle Overlay was to amplify the historic
15 preservation protections that were already contained
16 in the historic preservation law.

17 The Historic Preservation Review Board
18 said that this project is not going to go forward. It
19 would have required -- it would have resulted in
20 significant demolition of substantial fabric in the
21 neighborhood. It would require the Mayor's agent
22 hearing, special merit, all of the things that go
23 along with that, as well as the design being something
24 that the review could not approve. And it did not
25 approve. It rejected it.

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1 There was no review sought of that
2 decision by the review board, by the Mayor's agent,
3 nothing has happened. What has happened is we have --
4 we are now in a situation where this project is -- the
5 project that has been rejected now being opposed by
6 the Office of Planning, the Historic Preservation
7 Review Board, the Advisory Neighborhood Commission,
8 every neighbor of this project, my clients, the Tabard
9 Inn, and anyone else who has been given an opportunity
10 to participate in these proceedings is being asked
11 here to give you its comments about a project that
12 will never be constructed.

13 There is no ripe project before you. It
14 is a moot issue. The applicant and this project
15 should be dismissed as moot and the applicant should
16 be directed in accordance with the rules of the Board
17 of Zoning Adjustment to come back to here in the time
18 permitted by those rules with something new if it
19 wants to pursue something, but this isn't the project
20 that is properly before this Board, because it cannot
21 be built. And for us to sit here today, every one of
22 us, to say if this project that has been rejected
23 hadn't been rejected, this is what our comments have
24 been, makes a farce out of these entire proceedings
25 and we ask you to deny it, to dismiss it.

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1 CHAIRPERSON GRIFFIS: Very well. If I
2 understand you correctly, based on the HPRB denial of
3 the plans that are before us and the fact that there
4 was no revision of the plans, you are asserting that
5 this project is moot and therefore should be
6 dismissed. Comments?

7 COMMISSIONER MITTEN: Could I ask a
8 question?

9 CHAIRPERSON GRIFFIS: Sure.

10 COMMISSIONER MITTEN: Before we move on?
11 Could you direct us specifically to which of our Rules
12 of Procedure would allow us to dismiss the case?

13 MR. NETTLER: Well, actually, the courts
14 have consistently said and this court in this
15 jurisdiction, particularly with regard to the zoning
16 authorities, that you have the same jurisdictional
17 rights that a court does in terms of reviewing matters
18 that are either ripe or moot and in terms of applying
19 other administrative due process criteria, whether it
20 is res judicata or other types of jurisdictional
21 issues to matters that are before you.

22 Mootness is certainly one of those issues.
23 You do not act on matters that can have no legal
24 impact. And so it's actually decisions that are made
25 under the D.C. Administrative Procedures Act as

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1 opposed to any particular regulation under the zoning,
2 under the Board of Zoning Adjustment or the Zoning
3 Commission's regulations.

4 COMMISSIONER MITTEN: Thank you.

5 MR. GLASGOW: I think that the Chair of
6 the Zoning Commission has put her finger on something.
7 There is nothing in the rules that would lead to a
8 decision that you dismiss a case upon mootness. We
9 have an application. We filed the application. We've
10 brought it to the Board. We have presented a case to
11 the Board. We believe that we have met our burden of
12 proof. We're entitled to have our case adjudicated
13 and have the Board decide the application.

14 The fact that there is opposition to an
15 application, including that of the Office of Planning,
16 that does not mean that the case doesn't go forward
17 and doesn't get decided by the Board. There is a
18 reason why Mr. Nettler wasn't able to cite a case for
19 his proposition, because there -- I'm not aware of a
20 case for that proposition that's been decided in the
21 context of an applicant before the Board of Zoning
22 Adjustment or the Zoning Commission.

23 With respect to the application that the
24 applicant had and what we said we would do, we said we
25 would, and this is at page 317 of the transcript, we

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1 said we have to sit down with the review board staff
2 and see what they will and will not support. We sat
3 down with the review board staff and staff of the
4 Office of Planning on March 6th, which was after the
5 February hearing.

6 Then we went back to see whether or not we
7 could address those concerns. We determined that we
8 could not, in our view, reasonably address the
9 concerns and we want to proceed forward and have the
10 case adjudicated on the basis of what is before the
11 Board at this point in time.

12 With respect to HPRB, we have a right that
13 we can proceed before the Mayor's agent and the
14 Mayor's agent can determine whether or not, from an
15 HPRB standpoint, this project can go forward and be
16 built. There is nothing in either the Board of Zoning
17 Adjustment's Regulations or in the HPRB Regulations
18 that says which agency you go to first. And many
19 times we're going to the agencies at the same times.
20 Sometimes we don't.

21 We have had several Board of Zoning
22 Adjustment orders and Zoning Commission orders which
23 contain findings that talk about the applicant having
24 the flexibility in the design of PUDs. Now, those are
25 with the Zoning Commission. We have two of those.

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1 One is the Columbia Hospital for Women site, which we
2 weren't anywhere near getting through the HPRB process
3 when we got our approval from the Zoning Commission on
4 that case. We were still arguing about how many
5 floors we were going to have on the building and did
6 for months before that finally got resolved.

7 With the Woodward and Lothrop case, which
8 was also a PUD, we had the same type of situation and
9 we were given flexibility with respect to -- it says
10 "The applicant may make exterior alterations subject
11 to design approval by the HPRB and if required the
12 Mayor's agent, pursuant to D.C. Law 2-144." That was
13 decided in the Zoning Commission order issued prior to
14 us potentially having to go to the Mayor's agent.

15 We have the case of Application No. 16757
16 of Jemal's Lofts. "The applicant may modify the
17 design of the building, subject to approval under D.C.
18 Law 2-144, provided that those changes do not diminish
19 the amount of residential recreation space and
20 provided the roof structure setback on the west side
21 didn't change."

22 CHAIRPERSON GRIFFIS: Right. I don't
23 think we are arguing the chronology of where one goes,
24 whether it be Historic Preservation or Zoning
25 Commission or the Board.

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1 MR. GLASGOW: Right.

2 CHAIRPERSON GRIFFIS: But rather, does one
3 proceed with a denial of another agency is at
4 question. Your position is you have other stages to
5 go for the historic review.

6 MR. GLASGOW: That's correct. We can
7 bring another plan. One is with respect to this case.
8 We would be stating that we would like to have
9 approval of this application, subject to us completing
10 the Historic Preservation Review Board process,
11 provided that any design changes that we have from
12 HPRB don't change any area of the relief that we have
13 with respect to the Board of Zoning Adjustment. And
14 I can cite several other BZA cases where we've done
15 that, where we have not completed HPRB and we haven't
16 completed even the conceptual design review process,
17 which is what we have here.

18 And if we are unsatisfied with respect to
19 where we are, then we have the option of going to the
20 Mayor's agent to approve the building.

21 CHAIRPERSON GRIFFIS: So you don't see
22 this in any way not being, what might we say,
23 administratively inefficient in processing this now,
24 because you have full faith as representing your
25 client in this application that this is moving ahead.

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1 MR. GLASGOW: We are moving ahead as, in
2 our view, best we can under the circumstances.

3 CHAIRPERSON GRIFFIS: Right.

4 MR. NETTLER: If I might respond, I know
5 the ANC has a position in this. None of the matters
6 that Mr. Glasgow has raised because -- and there are
7 none, have -- relate to a situation in which the
8 review board has actually denied the application.
9 Those are -- all the ones that he has raised with you
10 are ones in which he has -- he still is within the
11 process.

12 The time for seeking Mayor's agent review
13 over the denial that was given to them in February has
14 already expired. By regulation it is expired. So if
15 he wants to go back before the Historic Preservation
16 Review Board, he has to come back before and have
17 ultimately a project review by the Mayor's agent. He
18 has to come back and start the process all over again.
19 It's not what this project -- because this project has
20 been denied and there hasn't been any review of it.

21 So we're not in the same situation and
22 we're certainly not in the same situation, as I said,
23 of those cases, because those are not situations where
24 there has been a denial of the project. It had -- he
25 chose to go before the review board before getting any

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1 final relief here. It is a waste of this -- of your
2 time administrative, the time of the individuals who
3 are here to be commenting on a project that has no
4 future and that's what's all about the mootness
5 doctrine.

6 If you have something that doesn't have
7 any future in this context, it doesn't -- it deprives
8 you of jurisdiction in the same way that it deprives
9 any other agency of jurisdiction in the same
10 administrative -- under the administrative due --
11 Procedures Act.

12 CHAIRPERSON GRIFFIS: Understood. Let's
13 hear from the ANC.

14 MR. BJORGE: Hello. Good afternoon. Mark
15 Bjorge, Single Member Commissioner, 2B05. I would
16 tend to agree. It does not appear to us that what we
17 are considering today is anything like what may
18 speculatively eventually be built. I would note that
19 we have been moving forward with this or a similar
20 version of this project for close to 16 years now. I
21 have no idea what forward motion looks like, but it
22 doesn't appear like that to me.

23 I would also note that the cases cited, I
24 don't know every case, but a number of them were PUDs
25 where flexibility is inherently more available than it

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1 would be in this forum. So I don't see how they are
2 germane.

3 CHAIRPERSON GRIFFIS: Ms. Miller?

4 VICE CHAIR MILLER: Mr. Glasgow, would you
5 agree with Mr. Nettler that the time for appealing the
6 HPRB decision to the Mayoral agent has passed?

7 MR. GLASGOW: We have -- with respect to
8 that particular submission, but we have been looking
9 at whether there is a similar submission that we want
10 to have which is different and whether or not we would
11 proceed with that and whether that goes to the Mayor's
12 agent. The filings in HPRB it is common many times to
13 go back a couple of months, two or three months, in a
14 row with the same project and tweaking this and
15 tweaking that with it.

16 It's not the same type of process that we
17 have with the Board of Zoning Adjustment. In fact,
18 when I cited the case, and I want to make sure to get
19 into the record two other BZA cases, because I don't
20 want to be in a position where people say well,
21 there's not BZA precedent on this.

22 VICE CHAIR MILLER: Well, basically,
23 before you go there though, just so I understand the
24 facts in this particular case --

25 MR. GLASGOW: Yes.

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1 VICE CHAIR MILLER: -- that the plans that
2 are before the Board right now, were those disapproved
3 by HPRB?

4 MR. GLASGOW: Yes, those were disapproved.

5 VICE CHAIR MILLER: So there's no -- so
6 how could they not be moot? Why would we waste our
7 time approving relief for plans that have been
8 disapproved?

9 MR. GLASGOW: Because we can resubmit
10 those plans with very minor changes and then go to the
11 HP -- then go to the Mayor's agent with them without
12 changing our -- without changing the BZA relief at
13 all. That is within the process.

14 COMMISSIONER MITTEN: Mr. Chairman, to
15 this whole point, I think part of the efficiency is
16 just the notion that there is some degree of urgency
17 that we want to move this along and given that the
18 meeting that you cited that you had with HPRB and I
19 don't remember if you said OP staff, but it was in
20 March.

21 MR. GLASGOW: Yes, yes, it was in March.

22 COMMISSIONER MITTEN: And we gave you
23 ample time to come back and do whatever revisions you
24 were going to do. And if you were going to do
25 revisions and you were going to go back to HPRB and

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1 perhaps they would deny it or they wouldn't deny it
2 and perhaps you would go to the Mayor's agent, what
3 are you waiting for? So why should we continue on
4 this way if whatever is going to change -- you know,
5 we're all happy to look at and happy to make a
6 decision on, but when is that going to happen? And
7 why should we keep talking about something that's
8 clearly off the table, when we don't know when
9 something new is going to come to us?

10 MR. GLASGOW: Well, we think that with
11 respect to the zoning part of the case, and if this
12 Board were to grant relief similar to what was done in
13 Applications 16387 in Square 456 and Jemal's Lofts at
14 16892, where if the Board were to grant the
15 application and say that as long as you get through
16 the Historic Preservation Review Board process and you
17 do not change the areas of relief, you don't create
18 any new ones, you don't exacerbate any ones that you
19 have, we believe that we have made substantial
20 progress with this project.

21 And that we are then in a position to sit
22 down and figure out what it is that we can and cannot
23 do, because we are not -- there is nothing in any
24 regulation that anybody has cited to us, at this point
25 in time, that requires that we have completed the HPRB

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1 process before we come to the Board.

2 COMMISSIONER MITTEN: I understand that
3 part, but I'm going to ask you a question and then I
4 want Mr. Nettler to comment on this, which is I know
5 that there is different ways that HPRB approaches
6 projects and outright denial is, I think, one
7 approach. Another is they give you conceptual
8 approval or something and they say you need some more
9 work here or they might send you away and not deny it.
10 But denial strikes me as something like this ain't
11 going anywhere.

12 MR. GLASGOW: Well, we don't --

13 COMMISSIONER MITTEN: Just let me finish.

14 MR. GLASGOW: Yes.

15 COMMISSIONER MITTEN: Just let me finish
16 my question. So it strikes me, and I may be wrong,
17 but it strikes me that that's a message that says
18 we're not talking about some minor changes that, you
19 know, the zoning issues will not be impacted by those
20 minor changes. I think the message from HPRB by a
21 denial is you've got some serious work to do. So how
22 can we take, if I'm interpreting the message of the
23 HPRB correctly, your representation that well, it's
24 going to be minor changes and we could work around the
25 zoning relief?

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1 I just don't understand how those two
2 things go together.

3 MR. GLASGOW: All right. I will explain
4 that, because they did not tell us other than some --
5 with respect to the roof structure setback and on the
6 top floor some setback issues. They didn't get into
7 a lot of issue with respect to the height and mass of
8 the overall building. What they said is you have a
9 situation where you are demolishing more of the
10 existing buildings than what we would like. Whether
11 they are within this -- whether you build around this
12 envelope with them or not.

13 They wanted us to keep more the interiors
14 of the building of the landmark building, so that when
15 you say just a denial, that's not quite how that
16 process operates. They give you feedback as to -- and
17 they say we're not going to approve your concept.

18 COMMISSIONER MITTEN: Yes.

19 MR. GLASGOW: I normally don't get -- they
20 say we're not going to approve your concept, why don't
21 you work on the following five things? Now, with
22 respect to our's --

23 COMMISSIONER MITTEN: But isn't that, just
24 for my clarity, saying we're not going to approve your
25 concept, why don't you work on these five things,

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1 strikes me as different than we're denying you or is
2 that a denial?

3 MR. GLASGOW: Yes, that's a denial.

4 COMMISSIONER MITTEN: Because --

5 MR. GLASGOW: The concept didn't get
6 approved.

7 COMMISSIONER MITTEN: Well, not getting
8 approved and getting a denial, to me, are two
9 different things. I mean, it's something that is of
10 significance to the Zoning Commission, for instance.

11 MR. GLASGOW: Right.

12 COMMISSIONER MITTEN: If we send someone
13 away, that says this is redeemable, please, you know,
14 we'll give you some direction and come back. If it
15 doesn't look redeemable, that's when you get a denial.

16 MR. GLASGOW: Well, the big area of
17 dispute right now, the way that I understand it with
18 HPRB, is that they want us to keep more of the
19 interior of the buildings than we are willing to keep,
20 at this point in time. That's where the issue is.

21 COMMISSIONER MITTEN: Okay.

22 MR. GLASGOW: And that's something that,
23 you know, can be negotiated or whatever. But our view
24 is that, at this point in time, we want to finish up
25 the BZA process and then determine how we're going to

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1 proceed with HPRB. And we think that under the
2 regulations that's within our right. And looking at
3 the time we've spent, I think the opposition had 45
4 minutes to put on their case. They probably could
5 have put on their case in the time we -- I know spent
6 with this motion.

7 COMMISSIONER MITTEN: Mr. Chairman? If
8 the Chairman will allow?

9 CHAIRPERSON GRIFFIS: A quick response.

10 MR. NETTLER: Thank you. You're right.
11 The Board does act in a variety of different ways.
12 And one of which is when it receives a conceptual
13 design and it has some things that it wants to be
14 tweaked. It asks you to tweak them and it will ask
15 you to move forward. That's not what happened here.

16 There was an outright denial of the
17 proposal because "It would result in substantial
18 demolition of contributing historic buildings." The
19 Board went to great pains during that hearing. I
20 don't know if we were at the same hearing, Ms. Eig and
21 I were at, through great pains as well to criticize
22 the depth of the development being done here, which is
23 one of the hallmarks of our opposition to this thing.

24 It would have substantiated -- a project
25 that was consistent with what the objections were and

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1 the basis for the denial would substantially change
2 the -- our position on this project. That's not why
3 the applicant is coming back before you. It's coming
4 back with a project that for all the reasons we
5 opposed it at Historic Preservation Review Board, all
6 of which were accepted by the Historic Preservation
7 Review Board, it now wants you just to continue to go
8 on with.

9 And that's not the same thing as having a
10 conceptual design that you tweak because of this issue
11 or that issue or that issue that needs to be tweaked.
12 And that's precisely -- the applicant on the
13 application sought not just conceptual review, it
14 sought alteration, new construction, demolition and
15 subdivision. All of those go way beyond mere
16 conceptual review. And all of those are things that
17 if you do not appeal the Historic Preservation Review
18 Board's decision on those, at that time, within the
19 time frame that is provided, they themselves become
20 res judicata.

21 You cannot come back and appeal -- and
22 challenge them at a later time before the Mayor's
23 agent. That's final. And that's what happened here.

24 MR. GLASGOW: This is a concept approval.
25 I mean, unless we're going to get all into the HPRB

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1 rules and regulations --

2 CHAIRPERSON GRIFFIS: Right.

3 MR. GLASGOW: -- which I think is beyond
4 this, I think that the comment with respect to that is
5 incorrect.

6 MR. NETTLER: Well, I mean, that's up to
7 the --

8 MR. GLASGOW: You have --

9 MR. NETTLER: -- review board.

10 MR. GLASGOW: It doesn't have anything to
11 do with that review board. I think it has to do with
12 whether or not you have a preliminary approval or
13 whether it's a concept approval and those type of
14 things and how they are treated under HPRB Regs.

15 CHAIRPERSON GRIFFIS: Okay.

16 MR. NETTLER: Well, my last point is if
17 you look at the regulations, you will see that concept
18 approval, preliminary approval on new construction are
19 treated differently than alteration, subdivision and
20 demolition. Those are separate components, but they
21 are treated differently and that's what the applicant
22 sought and that's what was denied.

23 CHAIRPERSON GRIFFIS: Excellent. Does the
24 ANC have any last comments on that?

25 MR. BJORGE: I would state that if memory

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1 serves, HPRB said that the space was being over-
2 programmed and that's a much deeper and broader
3 comment than any specific interior demolition.

4 CHAIRPERSON GRIFFIS: Sure.

5 MR. BJORGE: Roof demolition setback
6 issue. I would also say that we have been nibbling
7 around the edges of essentially the same proposal for
8 pretty much since I've been in high school, okay. I'm
9 in my mid 30s now, late 30s. If nibbling around the
10 edges was going to work, it would have worked by now.

11 CHAIRPERSON GRIFFIS: Yes, indeed. Okay.
12 Let me ask clarification. Does the Office of Planning
13 have a supplemental report for today?

14 MR. PARKER: No.

15 CHAIRPERSON GRIFFIS: Although there is
16 one in the record.

17 MR. PARKER: No. We have not submitted
18 any written report, although we do support any motion
19 to dismiss or deny, at this time, for the reasons that
20 have been stated.

21 CHAIRPERSON GRIFFIS: Interesting. Okay.
22 And I note that the last time we left off, I think it
23 was stated that Office of Planning was withholding
24 analysis of a majority of this pending the outcome of
25 HPRB. Comments, questions from the Board? Additional

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1 clarifications? Good. It's a perplexing piece and I
2 think we have two directions to go. Obviously, we
3 could continue this and have all those, the ANC is
4 where we left off, presentations, the presentations of
5 the opposition and the testimony.

6 Oh, let me just state is Science Services,
7 Inc., Mr. Green, present?

8 MR. NETTLER: He had to leave.

9 CHAIRPERSON GRIFFIS: Okay. All right.
10 That being said, we, obviously, could finish this case
11 or we could find -- here's my struggle on this. Is
12 that I don't find that we have in the regulations the
13 authority to grant the dismissal motion and that's
14 before us, so that we need to take that up, based on
15 the assertion that there is no further processing from
16 historic.

17 However, I'm open for discussion on that
18 and I think it's appropriate to take that up. Ms.
19 Miller?

20 VICE CHAIR MILLER: I would just disagree
21 with you. If I understand the facts, if the case is
22 moot, which it sounds like it is to me, unless I'm not
23 understanding it correctly, that these plans have been
24 disapproved by HPRB and therefore will not be able to
25 come into effect. And we, as the Zoning Board, issue

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1 decisions based on specific plans that are presented
2 to us. And so therefore, I think, it is moot.

3 It doesn't sound like we're just talking
4 about HPRB tweaking certain areas that don't affect
5 zoning, such as window fenestration or something like
6 that. Therefore, I don't think we have a real case or
7 controversy before us. I think they are not real
8 plans, at this point, that could take effect. So I
9 think we have the authority as Mr. Nettler says under
10 the Administrative Procedure Act and the courts have
11 held that even if we don't have a specific regulation
12 that addresses it.

13 CHAIRPERSON GRIFFIS: Excellent. Ms.
14 Mitten?

15 COMMISSIONER MITTEN: Even though I'm not
16 aware and Mrs. Miller is, I do note just from my
17 experience that we do have the prerogatives under
18 other administrative procedures if they are not
19 specifically articulated in our regulations, we do
20 have these other. We don't live and die only within
21 the Title 11. So I think we do have the prerogative
22 that Mr. Nettler described and I agree with Mrs.
23 Miller that this is not ready to go forward.

24 Even though we have spent a lot of time on
25 this, I think this is very important time that we are

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1 taking, because I think as we often struggle with, you
2 know, trying to be accommodating to applicants who are
3 clearly struggling to comply with all of the many
4 different rules that they have to sort out, I don't
5 get the sense that this applicant is working valiantly
6 to try and come to some resolution of these issues.

7 I see this as being, you know, as the ANC
8 described, this has been drawn out over a long period
9 of time with a variety of approaches trying to get to
10 some redevelopment and reuse of this property. There
11 is no sense of urgency on the part of the applicant.
12 We clearly have plans before us that have no chance of
13 ever coming to fruition and I think it's appropriate
14 for this Board to say come back when you are ready,
15 you're not ready now and to call an end to this.

16 So I would be in favor of the dismissal
17 motion.

18 CHAIRPERSON GRIFFIS: Okay. Just laying
19 it out there. It's my understanding that the
20 applicant has indicated that there are avenues of
21 which the plans could change that would not impact
22 that relief which is being sought here. But what I'm
23 understanding is that other Board Members don't agree
24 with that, that it would have to substantially change.
25 When one says that they are moot plans, that would

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1 mean that they would have to -- that there would be no
2 approval and historic processing for that relief
3 that's being sought before us.

4 VICE CHAIR MILLER: I guess we don't have
5 a feel for how the plans would change. I'm not sure
6 the applicant has determined that. I mean, our
7 choice, as I see it, would be to dismiss or to
8 continue. And I think the case has been continued
9 many times. I'm not sure if that's fair to the
10 community and everybody else to do that.

11 CHAIRPERSON GRIFFIS: Okay. Indeed.
12 Others?

13 COMMISSIONER MITTEN: I guess just to
14 maybe reinforce the point I was trying to make earlier
15 which is I do believe that a denial is more
16 substantial than a recommendation that additional work
17 be done and the case is basically left alive before
18 the HPRB. And I also think that it's a more difficult
19 representation to find reasonable that given the
20 number of variances that are involved in this case,
21 and I'm just reviewing the number of them, and given
22 the complexity of what's being proposed, that they
23 would not be affected in some redesign.

24 So I think that's a little harder to find
25 credible, unlike if it were one or two that you could

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1 clearly see how there would be a way to work around
2 it. There is, you know, a higher degree of complexity
3 here that I just don't see how this can be dealt with
4 simply, especially with something that I think is a
5 direction from the HPRB that suggests that substantial
6 change is required.

7 CHAIRPERSON GRIFFIS: Okay. Mr. Etherly?

8 BOARD MEMBER ETHERLY: Just to weigh in
9 briefly, Mr. Chair, my concern with the dismissal
10 action, at this point, kind of still struggles around
11 what is the appropriate authority in our regulations
12 for that step. I mean, essentially, it sounds as
13 though the ground that's being laid out is mootness.
14 I guess, I kind of understand that, but I'm just
15 trying to ground that in an appropriate statutory or
16 regulatory provision within our rules or regulations
17 that would enable us to do that.

18 VICE CHAIR MILLER: Well, our decisions
19 are based on plans that are presented to us in
20 evidence and that's what all the parties address and
21 we don't have viable plans any more, because HPRB has
22 denied them and they did not -- and the applicant did
23 not file an appeal with the Mayor's agent. So those
24 plans, we know those plans will not be going into
25 effect.

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1 CHAIRPERSON GRIFFIS: Okay. I don't think
2 anyone wants to waste time. I mean, I think that
3 would be a clear consensus. I note Mr. Etherly's
4 questioning of how one might substantiate the fact
5 that this would not be proper for us to proceed. I
6 mean, here's what I'm trying to deal with in terms of
7 the big picture here is that our orders have a time
8 limit. They expire in two years. If financing isn't
9 brought forth, then they expire and there's no mandate
10 that things be built as they are approved by us, but
11 rather they are built as they progress as approved, if
12 you follow.

13 And so I guess the point is that how do we
14 make decisions based on the fact that, I guess that
15 falls in the place of, is it as persuasive as you are
16 stating that you cannot use these plans for anything.

17 VICE CHAIR MILLER: I understand that. If
18 HPRB has denied it and they are required HPRB
19 approval, they can't use those plans. And no one is
20 depriving this applicant of the opportunity to come
21 get BZA approval at a later date. We just wouldn't be
22 holding this case open based on plans that are no long
23 viable.

24 COMMISSIONER MITTEN: And I think that's
25 a very important point. I mean, we're not saying

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1 never come back, you know, don't darken our door again
2 with this thing. I mean, we're saying -- I mean, what
3 do we want? We want something that's going to happen.
4 We're not getting it. Instead, they ask us to spend
5 our time, you know, having everybody testify and then
6 us deliberate on something that won't happen.

7 Well, why don't you bring us something
8 that at least has a chance of happening, which is
9 something that the HPRB hasn't denied? And they have
10 had, you know -- I mean, these are what's playing it
11 for me is they chose this path. They chose to go down
12 two tracks simultaneously. They didn't have to,
13 because many people don't. But they did, so they got
14 a denial from HPRB. They had a course of action open
15 to them.

16 Appeal it to the Mayor's agent. They
17 didn't do that. Then they had the course of action
18 available to them make some changes. They haven't
19 done that. So, you know, here we are. We're just
20 kind of spinning our wheels with the same thing and
21 they have had a chance to at least gesture at
22 correcting whatever it is that the HPRB found to be
23 shortcomings.

24 We could have in front of us plans that
25 the HPRB hasn't rendered an opinion on that just

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1 merely address those issues, but that's not what we
2 have either. So, I mean, I'm fully in support of the
3 idea to say okay, you're done. You want to file
4 again, file again.

5 CHAIRPERSON GRIFFIS: Within the time
6 after it has run from the denial?

7 COMMISSIONER MITTEN: Well, if they bring
8 new plans, isn't it --

9 CHAIRPERSON GRIFFIS: A new application.

10 COMMISSIONER MITTEN: Well, first of all,
11 it's not a denial. It's a dismissal.

12 CHAIRPERSON GRIFFIS: Okay.

13 COMMISSIONER MITTEN: And if there is some
14 nuance that needs to be addressed that ensures that
15 they have the opportunity to come back without some
16 waiting period, I would be in favor of that. But, you
17 know, I just don't understand why we're keeping this
18 case open unless -- I mean, the only thing, the only
19 reason that I can see that we keep this case open, at
20 this point, is so they don't have to pay an
21 application fee again.

22 CHAIRPERSON GRIFFIS: Okay.

23 COMMISSIONER MITTEN: That's the only
24 reason. And I mean I really can't see any other
25 reason.

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1 CHAIRPERSON GRIFFIS: Indeed. And I
2 understand that. I'm going to do this. I'm going to
3 allow last comments on all three of the panels that
4 are here now and then I would expect a motion from the
5 Board. We'll start. Mr. Nettler, we'll give you the
6 end, if you want, or the beginning.

7 MR. NETTLER: I can take the end.

8 CHAIRPERSON GRIFFIS: Indeed.

9 MR. NETTLER: That's fine.

10 CHAIRPERSON GRIFFIS: Mr. Glasgow?

11 MR. GLASGOW: I would just say that this
12 case we thought that we had significantly simplified
13 the case in reducing the number of variances. The
14 Board had indicated the height variance, the FAR
15 variance were problematic. We significantly changed
16 the building to be within the height and within the
17 FAR and we have one minor variance left. So we think
18 that we have significantly simplified this case for
19 action by the Board.

20 We believe that the project in an overall
21 fashion is still very viable and we believe that there
22 is nothing in the Board's Regs that permit this type
23 of dismissal of an application where the applicant is
24 ready to go forward and we have presented our case and
25 we believe that we have met our burden of proof for

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1 the relief that has been required under the Zoning
2 Regulations as opposed to what's going on with the
3 Historic Preservation Review Board.

4 Because otherwise what happens is we
5 believe that this case then has then been -- the
6 jurisdiction has been put over to the Historic
7 Preservation Review Board, that if we never get
8 through their process, we can never proceed with the
9 BZA process. And we don't think that's the way the
10 rules and regs are set up between the agencies. Thank
11 you.

12 CHAIRPERSON GRIFFIS: Excellent. Thank
13 you.

14 MR. BJORGE: I would say that the way this
15 proposal has been advanced, it was advanced on a dual
16 track schedule. To be successful, both tracks must
17 have been successful and that's not so. What we have
18 here is we have one track continuing, but the other
19 track is dead. As you have noted, even if we heard
20 this today, it would go nowhere. This is nothing.
21 This amounts to nothing. It is truly moot. I don't
22 know how to put it any more simply than that.

23 CHAIRPERSON GRIFFIS: Good. Thank you.
24 Last word.

25 MR. NETTLER: Thank you. I think actually

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1 that Ms. Mitten has really hit the nail on the head in
2 terms of what you are being asked to do here. You
3 have, if you recall back to the first time we came
4 before you, bent over backwards to give the applicant
5 an opportunity to provide you with a project that even
6 if we objected to, at least you could support, because
7 you had concerns about it when it first came to you.

8 And it's predicate for seeking the relief
9 that it wanted was because it was in a Historic
10 District. It had these constraints on it from the
11 historic preservation law and it was driving the
12 project in the direction that it drove it before you
13 back in January. Well, the irony here is the
14 applicant chose a course. They chose a course that is
15 fully familiar to you and it was rejected.

16 The basis upon which it believes that it
17 has a reason for being here has been rejected with
18 full knowledge that the Office of Planning's own
19 support is predicated on that as well. And you still
20 gave the applicant the opportunity after that February
21 hearing when it asked for this to be continued to
22 today, a substantial amount of time to come back with
23 a new project, either go before the HPRB or come back
24 before you with something that was different, because
25 that's what the applicant said it was going to do.

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1 Well, it didn't do that. It is turning
2 this proceeding into a farce, because the applicant
3 has been the moving party for all of these actions
4 taken and the reason for taking them has been
5 predicated upon something that has now been denied.
6 And we believe that that having happened and the
7 applicant having chosen not to do anything about it,
8 positively or otherwise, he should be hoisted upon his
9 own petard.

10 He has created this situation and it
11 provides -- there's an adequate basis under the DCAPA
12 to do the action that you are -- that we have asked
13 you to take.

14 CHAIRPERSON GRIFFIS: Good. Thank you.
15 very well. Is there a action by the Board?

16 VICE CHAIR MILLER: Mr. Chairman, I would
17 move dismissal of Application No. 17337 of N Street
18 Follies, Ltd. on grounds of mootness.

19 COMMISSIONER MITTEN: Second.

20 VICE CHAIR MILLER: And speaking to the
21 motion, I just basically have probably addressed the
22 points, but I want to reiterate that the applicant is
23 asking us to grant relief with respect to plans that
24 have no possibility of going into effect and that our
25 decisions are always based on plans that go into

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1 effect. And with respect to HPRB, we allow for
2 certain variations from the plans to the extent that
3 they don't affect the zoning relief granted, but those
4 usually deal with smaller issues with an HPRB specific
5 authority, such as window, fenestrations and things
6 like that.

7 In this case, we don't even know what kind
8 of building plans HPRB would approve. I think that
9 Ms. Mitten made an excellent point that these plans
10 were disapproved a while ago and the applicant did not
11 file an appeal to the Mayoral agent, but not only
12 that, they did not then make an attempt to revise the
13 plans in any way. I think I would feel very
14 differently if they came before us and said, you know
15 what, the plans were disapproved by HPRB and we have
16 revised them in a way that we think may address their
17 concerns.

18 And even if HPRB hadn't dealt with those
19 plans yet, at least that would have been a good faith
20 effort and it would be plans that had a chance of
21 coming to fruition. These plans have absolutely no
22 chance of coming to fruition and therefore it is not
23 only moot, but a waste of everybody's time and effort,
24 the community addressing plans that can never go into
25 action, us deliberating on something. I don't know

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1 that the Board has ever done that. I don't think that
2 the Board ever would do that or should do that.

3 And I think it falls very clearly within
4 the law that this is a case of mootness and the
5 application should be dismissed.

6 CHAIRPERSON GRIFFIS: Thank you. Others?

7 BOARD MEMBER ETHERLY: I'll speak against
8 the motion, Mr. Chair, but for a fairly nuanced
9 reason, and that is I understand the grounds that have
10 been argued very articulately on both sides of me, so
11 I feel somewhat surrounded here. But the point that
12 still concerns me is the absence of clear regulatory
13 grounds within our rules and regs for this. I
14 understand the argument of mootness.

15 I understand that we may, indeed, be
16 standing over a laboring carcass that may be about to
17 utter its last dying breath, if you will, and I'm just
18 trying to compete with the horse thing of the petard,
19 that was a very good piece there. But perhaps it's
20 still important to me how the beast dies, if you will.
21 And I don't mean to be overly theoretical about it,
22 but I do believe it is an important point.

23 What concerns me, despite those wonderful
24 arguments, is still having the applicant exercise what
25 should be or what is the right to be in front of this

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1 body and argue the case. From a zoning standpoint, my
2 concern is allowing the HPRB decision to, in fact,
3 prevent that from happening within the venue that
4 deals with zoning-related questions.

5 So that's my rationale for speaking
6 against the motion, Mr. Chair.

7 CHAIRPERSON GRIFFIS: Thank you.
8 Excellent. Thank you very much, Mr. Etherly. Others?

9 BOARD MEMBER MANN: Yes.

10 CHAIRPERSON GRIFFIS: Yes, Mr. Mann?

11 BOARD MEMBER MANN: I want to explain why
12 this is, I think, such a difficult decision. I hear
13 a very persuasive and strong argument on one side and
14 I hear a very persuasive and strong argument on the
15 other side. I don't have the legal training to make
16 a decision based on those facts. I don't have the
17 breadth of experience necessarily to claim that I have
18 heard cases like this before.

19 So it falls to which argument I think is
20 strongest with perhaps a little dose of common sense
21 thrown in and maybe some logic. One of the things
22 that I see as an outcome regardless of whether or not
23 this case is dismissed is no speedy resolution to this
24 case. I see this moving at a snail's pace whether or
25 not we proceed. I see it moving at a snail's pace

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1 whether or not we dismiss. There has been little
2 action and I'm not quite certain that whatsoever is
3 going to change necessarily the ultimate outcome or
4 the ultimate or speedy resolution of this case based
5 on any of the information I have heard.

6 That being said, I think that the argument
7 that I find more persuasive and that I find easier to
8 accept is to dismiss the case.

9 CHAIRPERSON GRIFFIS: Well done. Others?
10 All very well said. My position on this motion is,
11 first, generally speaking, I always want to move
12 things forward, so that we can have progression. And
13 I do believe that I would err in moving forward rather
14 than discontinuing or dismissing in general respect.
15 I also have great concern that this be viewed as an
16 abdication of our jurisdiction to the historic review
17 process, which is different and distinct.

18 However, those are the general parameters.
19 I think that it has been persuasively put forward, not
20 to the level that Ms. Mitten or rather Ms. Miller
21 holds that these are mooted plans, but to the point of
22 which these will have to so substantially change that
23 what we are actually embarked to review does tend to,
24 if not, I think, persuasively argues that our
25 administrative efficiency is lost in looking at these

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1 plans at this time.

2 It is analogous to me more of -- I guess
3 I use this for illustration purpose and not direct
4 comparison, but to an applicant that is not prepared
5 and doesn't really know the relief that they need and
6 we try and cobble it together. Well, we're not sure
7 that as things progress in, because the plans aren't
8 shown well enough, that we're actually approving what
9 will totally be needed. And therefore, we, at those
10 instances, send them off to clarify, to articulate and
11 to come back.

12 It's why we don't have alternatives placed
13 before the Board. It's why we don't pick and choose
14 between things. We look at what's presented and we
15 move on. That's the stature I always want to take.
16 I have a hard time being in this position, but think
17 that these plans would have to substantially change to
18 the point that it does not prove well for our own
19 process to proceed today.

20 So with that, I'll let others that have
21 anything else. Mr. Etherly?

22 BOARD MEMBER ETHERLY: I'll just note on
23 a final word, Mr. Chair, that we had probably the
24 interesting fortune over the past couple of months of
25 encountering a couple of cases where we dealt with

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1 what can be a complex interplay between two agencies,
2 i.e., the Board of Zoning Adjustment and the Historic
3 Preservation Review Board.

4 And I think in each instance we have
5 grappled and really scratched at the surface of what
6 is today, I think, an illustration of the worst case
7 scenario where you have, understandably is not the
8 correct word, where you clearly have a decision by
9 HPRB which does render the plans, as they are
10 currently presented, unworkable. I understand that.

11 Again, I will just note for the record
12 what concerns me is -- and I think Mr. Mann touched
13 upon it to an extent, I'll just close and say what
14 concerns me is if the beast is, indeed, going to die,
15 I still want to pay attention to the process by which
16 we use to put it out of its misery. Notwithstanding
17 the question of mootness, notwithstanding the issue of
18 judicial economy and efficiency, I would as soon have
19 the carcass die in our venue as opposed to another
20 venue, which then in turn eliminates it from this
21 venue all together.

22 Again, that's probably a tortured way of
23 articulating it, but I think it's an important point
24 that I want to kind of stand by. Thank you, Mr.
25 Chair.

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1 CHAIRPERSON GRIFFIS: I appreciate that
2 and I would be with you on that, if we hadn't heard
3 this in November, January, February and also in June.
4 Others? Ms. Mitten?

5 COMMISSIONER MITTEN: I just wanted to
6 maybe add a little bit of emphasis to a point that
7 both you and Commissioner Miller made, which is to the
8 issue of the fact that we require applicants to build
9 to a set of plans that we have reviewed. And
10 sometimes we -- and it's not uncommon for the BZA,
11 it's not uncommon for the Zoning Commission to give
12 some leeway to another body, whether it's CFA or
13 whether it's HPRB. But that's relatively limited and
14 we also have a sense of the direction in which these
15 things may go.

16 But one of the reasons why I think the
17 Board does this where instead of just articulating,
18 you can build or we grant you a variance to build,
19 like in the case we had earlier, a 30 foot loading bay
20 instead of a 55 foot loading bay. Why do we look at
21 the plans? Because it's a holistic presentation. We
22 have to understand how these things fit into the hole.
23 So to try and parse out the zoning relief and then use
24 that as a framework to put the rest of it together, as
25 if the framework makes no difference to us, is, I

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1 think, not proper.

2 So I just wanted to emphasize that,
3 because I think that's a really important point about
4 why we need to see, you know, something that's more or
5 less a finished product in granting zoning relief.
6 Thanks.

7 CHAIRPERSON GRIFFIS: Thank you. Others?
8 Is there anything else? We have a motion of the Board
9 to dismiss the application and it has been seconded.
10 It has been deliberated. I would ask for all those in
11 favor of the motion to signify by saying aye.

12 ALL: Aye.

13 CHAIRPERSON GRIFFIS: And opposed?

14 BOARD MEMBER ETHERLY: Opposed.

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

17 MS. BAILEY: The vote is recorded as 4-1-0
18 to dismiss the application on the grounds of mootness.
19 Mrs. Miller made the motion, Mrs. Mitten second. Mr.
20 Griffis, Mr. Mann supports the motion. Board Member
21 Etherly is opposed.

22 CHAIRPERSON GRIFFIS: Excellent. Thank
23 you very much, Ms. Bailey. Thank you all very much.

24 MR. NETTLER: Thank you.

25 (Whereupon, at 4:30 p.m. a recess until

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1 4:32 p.m.)

2 MS. BAILEY: This is Application 17468A,
3 Appeal of Advisory Neighborhood Commission 6A,
4 pursuant to 11 DCMR section 3100 and 3101, from the
5 decision of the Zoning Administrator to issue
6 approvals for electrical, fire, mechanical and
7 plumbing disciplines, DCRA Tracking No. 236 D5, with
8 the intention of issuing building permits to allow the
9 expansion of a nonconforming apartment building from
10 three units to six units.

11 Appellant alleges the ZA erred by giving
12 said approvals without consideration of the underlying
13 R-4 zoning use and area requirements and the parking
14 requirements under section 2115 of the Zoning
15 Regulations. The property is located at 1124 E
16 Street, N.E. It's in Square 984 and on Lot 44.

17 CHAIRPERSON GRIFFIS: Excellent. Thank
18 you very much. Good. I think on efficiency and time,
19 let's move right into this, of course. We did have a
20 request to continue this case from DCRA based on the
21 fact that Mr. Crews was not available. I'm just going
22 to jump on this as you're here, and I think everybody
23 is here, and just for clarification of course from our
24 last proceedings, we had requested that the Zoning
25 Administrator be present and was not the specific

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1 person, but rather a representative that would be able
2 to provide testimony.

3 So with that, I don't think there is going
4 to be a great support of the Board, unless we're
5 persuaded otherwise, to continue this case, but I will
6 turn it over to you as you will state your name for
7 the record and address that.

8 MR. TAYLOR: Thank you, Chairman Griffis.
9 Good afternoon to you and to the Board. For the
10 record, my name is Dennis Taylor, Assistant Attorney
11 General representing DCRA at this proceeding. The
12 motion for continuance was based on the representation
13 to me of ANC-6A and my understanding of the wishes of
14 this Board that Mr. Crews be here. ANC-6A told me
15 that it was not acceptable to them to have anyone else
16 present, so I have made the motion.

17 I would allow ANC-6A to state its
18 opposition should it choose to, but I have brought
19 deputy -- is it deputy or assistant?

20 MR. LeGRANT: Deputy.

21 MR. TAYLOR: Deputy Zoning Administrator
22 Matthew LeGrant with me to answer any questions that
23 he might be able to answer.

24 CHAIRPERSON GRIFFIS: Excellent. And I
25 think for my purpose, and I will hear from the rest of

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1 the Board, but that certainly satisfies the ability to
2 provide testimony which is what we're looking at in
3 terms of the presentation of the case. You did
4 gesture appropriately to 6A, ANC, to an empty chair.

5 Is the ANC present? Were they here? Did
6 I miss them?

7 MR. TAYLOR: I have not seen them in my
8 time here.

9 CHAIRPERSON GRIFFIS: We had one heck of
10 a schedule. They probably think they show up around
11 7:00 tonight, although required to be here at 1:00.
12 That is a little concerning.

13 Mr. Moy, you don't have any communication
14 with them this afternoon, do you?

15 MR. MOY: No, sir, I don't have anything
16 additional to add.

17 MR. BROWN: Mr. Chairman, Patrick Brown.

18 CHAIRPERSON GRIFFIS: Yes.

19 MR. BROWN: My apologies for the last
20 minute arrival. I emailed Mr. Taylor and Mr. Fengler
21 from the ANC I guess yesterday afternoon passing on
22 guidance from Rick Nero of the Board staff that we
23 would take up the preliminary matter when the case was
24 heard. So I tried to inform Mr. Fengler about how I
25 thought the proceedings would go forth. I received no

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1 response, but I certainly provided that to him and Mr.
2 Taylor.

3 COMMISSIONER MITTEN: While the Board
4 puzzles this out, I just wanted to put on the record
5 that originally Commissioner Turnbull was on this case
6 and I have read a copy of the transcript of the prior
7 hearing and I have the record before me, so I just
8 wanted to let you know I'm prepared to take his place
9 on the case.

10 CHAIRPERSON GRIFFIS: Excellent, and I
11 appreciate that and welcome your participation in
12 this. I think what we need to do is try and make
13 contact so that we're all here, so why don't we take
14 five minutes. We're going to make contact. Mr.
15 Brown, this is your cross appeal so I have no
16 difficulty in, you know, juggling the order. If we're
17 a little bit delayed, however, it doesn't make a whole
18 lot of sense if the ANC isn't present in this
19 proceeding.

20 Yes, we have had extensive delays all
21 through the day, so perhaps they are on their way.
22 Why don't we -- do you have a good contact for them?

23 MR. BROWN: Not on me. I can check with
24 my office and try to follow-up that way.

25 CHAIRPERSON GRIFFIS: Okay.

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1 MR. BROWN: And I would be happy to do
2 that.

3 CHAIRPERSON GRIFFIS: Why don't we take 10
4 minutes. We'll do the same from this end if you
5 wouldn't mind doing it.

6 MR. BROWN: Okay.

7 CHAIRPERSON GRIFFIS: And just get a read
8 in where we are because we're more than prepared to
9 continue today, so I guess we'll get done what we can
10 depending on who is here. Okay. Thank you.

11 (Whereupon, at 4:37 p.m. a recess until
12 4:58 p.m.)

13 CHAIRPERSON GRIFFIS: Ms. Bailey, you have
14 called this case?

15 MS. BAILEY: Yes, Mr. Chairman.

16 CHAIRPERSON GRIFFIS: Excellent, in which
17 case we're all together. ANC is here. Welcome,
18 appreciate you being here. As you note, the full
19 capacity of our air conditioning isn't working so we
20 have all removed our jackets, so feel free to do that
21 to be comfortable because we need to get through this
22 and be comfortable.

23 With that then, we're going to start with
24 you, Mr. Brown, and presentation of your central cross
25 appeal. I'm sorry, go ahead.

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1 MR. TAYLOR: Mr. Chairman, were you not
2 going to allow the ANC to speak on the motion for a
3 continuance?

4 CHAIRPERSON GRIFFIS: Sure. Do you have
5 a word on that?

6 (Whereupon, at 5:00 p.m. the Public
7 Hearing continued into the evening session.)

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E-V-E-N-I-N-G S-E-S-S-I-O-N

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5:00 p.m.

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MR. FENGLER: I do, but given the
expedience of moving into the cross appeal, I can only
gather what the decision would be. But, yes, I do
have a comment on proceeding with this case today.

For the record, it is with no irony that
the ANC appeal that was dismissed was the vehicle for
Mr. Brown and their client to jump start the
application process and get on the docket. And at the

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1 time that we had those discussions, even though I had
2 two days to prepare with his cross appeal, there was
3 discussions about, well, you know, we really need to
4 have the Zoning Administrator here and I understand
5 that there is someone else in his capacity that is
6 here.

7 From our discussion to me and to the ANC,
8 it's pivotal to have Mr. Crews here. Mr. Crews is the
9 one that signed the letter. I understand that it's
10 convenient to take an appeal that the ANC filed, file
11 a cross appeal, have that appeal dismissed before it's
12 even heard and then hijack that appeal's order and get
13 expedited consideration to get on the calendar instead
14 of going through the normal process, which is what ANC
15 does when we have an appeal. We have to go through
16 the normal process. We have to file 20 copies. We
17 have to wait our turn in line.

18 The letter that Mr. Crews signed denying
19 the Certificate of Occupancy was March 22nd. Why Mr.
20 Brown waited so long after March 22nd to even get his
21 case in the queue is beyond me. He waited until our
22 appeal was heard, which was significantly later. So
23 in my mind our ANC was held to a very high standard as
24 far as timeliness and when to file, and it's not lost
25 on me that that is not being applied here in this

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1 case.

2 It's our ANC's position that if Mr. Crews
3 is not here -- and that was what we agreed to at least
4 from our perspective. And now, granted, we don't have
5 a vote in the process, but I was willing to be fair.
6 As long as Mr. Crews was here, we didn't have an
7 objection to giving them consideration. If Mr. Crews
8 wasn't here, we would have an objection and part of
9 the problem is this is the month that people take
10 vacations.

11 I mean, this is not unheard of and that
12 when you have an appeal, Mr. Crews knowing six months
13 out might be able to have his schedule done
14 accordingly, but only given less than one month's
15 notice, it's very difficult for him to cancel vacation
16 plans. So I think it's not unreasonable to have this
17 case be continued until Mr. Crews can arrive.

18 And for those reasons of, one, they used
19 our appeal which we never got to actually hear because
20 it was dismissed, but in that dismissal was given
21 preferential status. Two, in my mind that status was
22 granted upon the fact that Mr. Crews would be here and
23 only if he would be here and he could accommodate such
24 an expedited less than one month's notice. And,
25 three, if those two conditions weren't met, they would

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1 have to go get in the queue like every other citizen,
2 like any other ANC.

3 So I hope that you just don't plow
4 through, you know, we're going to delay the
5 continuance on expedited matters because there is a
6 process that has to be followed and I was subject to
7 that process and I accepted it willingly, and I think
8 the other opponent needs to accept the terms of not
9 filing a timely appeal when he could have had it in
10 March instead of using our appeal as a way to make up
11 that time.

12 CHAIRPERSON GRIFFIS: Excellent and well-
13 said. On those points, first, in regards to Mr. Crews
14 in person being present, I think that that would have
15 been good, but not required. The person is not the
16 office and it's the office that we look to and their
17 decision. Whether it be Mr. Crews that actually
18 personally did all this or not, it is his name and his
19 position that the appeal or any appeal would come to.

20 And so a representative is what is
21 critical for us because an attorney cannot provide
22 testimony. It can provide the legal analysis and
23 prepare the case, but we need testimony in order for
24 us to have, one, cross, but also for us to fill the
25 record. And it was strongly felt by this Board that

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1 we needed that and I think that is satisfied here.

2 In terms of some preferential treatment,
3 I take that with great note. I actually was of more
4 of the understanding and position that this was more
5 kind of administrative processing, administrative
6 efficiency for everything, that everyone wants to see
7 this resolved no matter what direction it goes and by
8 continuing this further would be -- frankly, wouldn't
9 be helpful to anyone. And I will let you know when
10 the request for a continuance came in, the Board did
11 look at it in Executive Session and our first
12 indication was to set this off.

13 And when we did set it off, we tried to
14 pick a date, obviously, and that date didn't start to
15 occur easily until October. And at that point we
16 started to say who is served by us reviewing this
17 again and getting refreshed by all of you preparing
18 again and getting refreshed when the facts are the
19 same or similar as we move ahead with this.

20 And so that was, I know, my position on
21 that. I will have others speak to those points if
22 need be.

23 COMMISSIONER MITTEN: I would.

24 CHAIRPERSON GRIFFIS: Yes?

25 COMMISSIONER MITTEN: I don't want to

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1 distract, but I don't want to lose a thought that Mr.
2 Fengler just put in my head, which is I don't think
3 it's specifically before us, but in talking about the
4 motion for a continuance one of the issues that you
5 raised is timeliness of the cross appeal.

6 And I didn't get a chance to prepare to
7 address that, but there is -- we do have rules about
8 when someone is put on notice of a decision that they
9 must file an appeal within a certain amount of time,
10 and I know that was an issue in the ANC's appeal.

11 So is the cross appeal timely?

12 MR. BROWN: If I could interject. Mr.
13 Crews' letter was dated denying the Certificate of
14 Occupancy. The application was dated March 22nd of
15 this year. It did not arrive to my client
16 immediately. But, again, assuming March 22nd, we
17 brought the cross appeal prior to the May 16th hearing
18 date so that you're looking at a 60 day rule. You
19 have April 22nd, May 22nd.

20 So I don't think there should be a
21 question on the 60 day rule as far as timeliness.
22 And, again, at the time that the cross appeal was
23 accepted on the 16th, it was accepted for purposes of,
24 you know, stopping the timing clock. So I think
25 timeliness has been satisfied.

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1 COMMISSIONER MITTEN: Okay. As I said, I
2 didn't -- I really hadn't prepared. I just wanted to
3 explore that, because I didn't know what all the
4 specific dates were.

5 CHAIRPERSON GRIFFIS: Okay. Yes?

6 VICE CHAIR MILLER: I just want to add
7 that my recollection of the hearing was that there is
8 no requirement that Mr. Crews be here, but that the
9 Board thought that that would be a good idea in the
10 event that we had questions for the Zoning
11 Administrator, and I think that the Government has
12 basically satisfied the Board by producing someone in
13 the office who has the knowledge and expertise who
14 might be able to respond to questions.

15 And I would also note before you start
16 that upon reading again the cross claim, it does
17 appear that it's primarily a legal issue that is being
18 presented to us and I think that is why the
19 Government's attorney didn't come with a witness at
20 all, because he was prepared to address the legal
21 arguments the last time.

22 MR. FENGLER: Well, my only concern on
23 that point is that I believe the gentleman, while
24 well-qualified, I have just met him. I don't think he
25 was actually working for DCRA at the time that Bill

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1 Crews was making these decisions. So as you can
2 imagine, while that may be satisfactory to you because
3 it checked the box and it may be satisfactory to my
4 opponent because they are not necessarily -- were even
5 working for DCRA when the decisions were made.

6 From my perspective, Bill Crews is the one
7 that made the decision and delegating that to someone
8 else who may or may not have been on the payroll at
9 the time certainly puts our position at a
10 disadvantage, and that's why I was so concerned about
11 not having Mr. Crews himself.

12 CHAIRPERSON GRIFFIS: Okay. But let me
13 clarify that, because it doesn't put you at a
14 disadvantage and, hopefully, I can be clear on that.

15 MR. FENGLER: Okay.

16 CHAIRPERSON GRIFFIS: Because Mr. Crews is
17 not just an individual that can decide --

18 MR. FENGLER: Sure.

19 CHAIRPERSON GRIFFIS: -- things any way he
20 wants. And what is now being charged of us is to step
21 in his shoes.

22 MR. FENGLER: Okay.

23 CHAIRPERSON GRIFFIS: We are Bill Crews.
24 So all we need now from the Government is to say what
25 happened, how was that based, and the Deputy Zoning

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1 Administrator is able and is here to do that. And
2 then we will try and decide whether there was an error
3 in that decision. So, again, it doesn't have anything
4 to do with the person that signed the letter. Okay.

5 Is there any concern with then continuing
6 forward from the Board's perspective?

7 BOARD MEMBER ETHERLY: And perhaps just to
8 kind of put a pin in that Mr. Chair, while it's not
9 unusual -- if I could have the Chair's leave, let me
10 just direct a question to Mr. Grant. Mr. Grant, thank
11 you for being here.

12 Just for clarity's sake, have you been in
13 a position or have you been in a position to have
14 knowledge and understanding about the factual basis
15 for the denial of the Certificate of Occupancy in this
16 particular instance?

17 MR. LeGRANT: Again, my name is Matthew
18 LeGrant. I am the Deputy Zoning Administrator. I
19 started with DCRA on April the 18th. Prior to the
20 hearing today I was briefed by Mr. Crews and my
21 attorney, Mr. Taylor, in regards to the facts of the
22 case and I have had an opportunity to look over the
23 various reports and communications and plans.

24 BOARD MEMBER ETHERLY: And so with that,
25 with that introductory remark, you are comfortable or

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1 feel that you are familiar enough with the relevant
2 facts of this case to answer questions pursuant to the
3 decision regarding the March 22nd letter and the
4 Certificate of Occupancy?

5 MR. LeGRANT: Yes, I am.

6 BOARD MEMBER ETHERLY: Okay. Thank you.
7 Thank you, Mr. Chair.

8 CHAIRPERSON GRIFFIS: Good. Anything
9 further?

10 MR. TAYLOR: Mr. Chairman, if that matter
11 has been disposed of, I do have one other preliminary
12 matter I would like to bring before you.

13 CHAIRPERSON GRIFFIS: Good.

14 MR. TAYLOR: At this time, the Government
15 moves for the exclusion of Toye Bello as a witness for
16 the cross-appellant and moves that his expert report
17 be stricken from the record.

18 CHAIRPERSON GRIFFIS: And the reasoning?

19 MR. TAYLOR: Under the rules of this
20 Board, number 3106.6 which I will give in an
21 underlined form, "No former employee of the Government
22 of the District of Columbia shall represent any person
23 other than himself in a particular matter for which
24 the employee had a substantial responsibility while an
25 employee of the District."

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1 I have a declaration from Ms. Cassandra
2 Hayden who is management program analyst in the Human
3 Resources Division of DCRA. Based on her declaration,
4 which I can pass around to you, Mr. Bello served as
5 the Zoning Program Manager for the District of
6 Columbia from the dates of October 18, 2004 through
7 May 26, 2005.

8 As the Zoning Program Manager, his duties
9 included, among others, the supervision and effective
10 utilization of employees of the Zoning Division,
11 including the assignment and review of their work and
12 the administration of the Zoning Regulations by
13 interpreting and making decisions on the application
14 of the provisions in individual situations.

15 This matter got started with the issuance
16 of a building permit in February of 2005 while Mr.
17 Bello was serving as the Zoning Program Manager.
18 Therefore, at the very least, he had the primary
19 supervisory role in the issuance of that permit and
20 his testimony would be inappropriate in this matter.

21 CHAIRPERSON GRIFFIS: Interesting.
22 Additional questions?

23 BOARD MEMBER ETHERLY: Do you -- without
24 having the particular provision directly in front of
25 me, would you read that provision, Mr. Taylor, to

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1 require or mandate direct hands-on experience with the
2 relevant facts that are at issue here or it's just
3 enough that Mr. Bello had a supervisory role that
4 broadly speaking he would have responsibility for
5 matters that take place under his jurisdiction?

6 MR. TAYLOR: I think that that is too
7 broad of a distinction to make and I would say as an
8 example, in theory, the Mayor has supervisory
9 responsibility for every District employee.

10 I think that that would be far too broad
11 of an interpretation. The regulation speaks of
12 substantial responsibility and being that Mr. Bello
13 was the Zoning Administrator, and I use that term in
14 a very loose form and I know that back then it was
15 Zoning Program Manager and now the position is Zoning
16 Administrator. Forgive me if I flip flop between
17 those two.

18 But Mr. Bello is someone who was in charge
19 of the issuance or, excuse me, in charge of the zoning
20 review for the issuance of this building permit.
21 While a zoning technician had the hands-on
22 responsibility, we don't know just what all else is
23 done and this was the direct superior. Therefore, I
24 think that that is substantial responsibility.

25 BOARD MEMBER ETHERLY: Just as a follow-

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1 up, Mr. Chair. Looking at the relevant site, 3106.6,
2 for this -- okay, I think I have it. I will save my
3 questions for opposing counsel. Thank you.

4 CHAIRPERSON GRIFFIS: Any other quick
5 questions?

6 MR. BROWN: And, Mr. Chairman, Members of
7 the Board, Patrick Brown. One, I am somewhat
8 disappointed that this wasn't raised sooner rather
9 than at the last minute. We could have become a
10 little more prepared both in writing, but I think the
11 regulations by referencing substantial responsibility
12 are clearly involved, hands-on, actual decision-
13 making, handling.

14 DCRA processes about 60,000 building
15 permits a year and there is no indication and Mr.
16 Bello can testify that he had no direct involvement in
17 this permit, that it's just one of the 60,000 permits
18 that come in the door and out the door that never
19 required or had his direct involvement.

20 One, I think you need to read the
21 regulations in the context of the other requirements
22 that may be applicable to Mr. Bello as a former
23 employee, the revolving door issues for which we have
24 been most careful about that would, at most, limit his
25 involvement for a limited period of time after his

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1 leaving the post. That time period has expired based
2 on the dates that Mr. Taylor has indicated, so I don't
3 think the Board should feel any reluctance to accept
4 his testimony, his expert testimony, and it's
5 important I think the Board hear his testimony.

6 And I don't think this regulation was ever
7 intended to -- I mean, taken the way Mr. Taylor reads
8 it, it's a lifetime exclusion for anything that
9 occurred in the District of Columbia Government. I
10 mean, you have to read it narrowly and generally, and
11 this goes beyond the Board's expertise, but
12 interpreting and applying exclusions or work
13 restrictions on people in employment contracts, they
14 are extremely narrowly interpreted for the fundamental
15 reason that to do so broadly would undermine a
16 person's ability to earn a living, to practice their
17 trade.

18 For lawyers they go the furthest and, as
19 a matter of public policy, you can't restrict a
20 lawyer's employment, the ability for that person to
21 practice their trade. A lawyer, and in this case Mr.
22 Bello, a zoning expert, should be very narrowly
23 protected and restricted. So I don't think you can
24 read the regulations to reach to anything that
25 occurred during the, what, 18 months that you were the

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1 Zoning Administrator or less?

2 MR. BELLO: Less.

3 MR. BROWN: Yes, for which he -- and,
4 please, confirm. You had no direct involvement or
5 knowledge of this permit?

6 MR. BELLO: Absolutely.

7 CHAIRPERSON GRIFFIS: Question, Ms.
8 Miller?

9 VICE CHAIR MILLER: Mr. Brown, I am
10 guessing, but are you going to be presenting Mr. Bello
11 as an expert witness in discussing the Zoning
12 Regulations at issue or what is Mr. Bello's role going
13 to be here because when I look at this regulation it
14 talks about no member representing any person other
15 than himself, and I am of the impression that you're
16 representing the client and that Mr. Bello will be
17 acting as a witness. Is that correct?

18 MR. BROWN: He is acting as an expert
19 witness. I will move to have him identified as an
20 expert witness. I have his CV. And the Board, more
21 so than a lot of other tribunals, blurs the
22 distinction between representation. I mean, you don't
23 have to be a lawyer to represent somebody, but I think
24 it's a distinction.

25 Mr. Bello is here as a witness and not as

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1 a representative. He could be -- in fact, I suspect
2 he has already served as a representative of an
3 applicant on their behalf not as a witness. He is
4 here as a witness.

5 COMMISSIONER MITTEN: I think there is a
6 distinction here that I think is important, which is
7 so that -- just to Mr. Brown's point that this is some
8 kind of lifetime exclusion, it speaks to two things.
9 It speaks to a particular matter, which here we have
10 a particular case, not broadly speaking matters that
11 were within the purview of the individual, and then
12 for which the individual has substantial
13 responsibility.

14 So the matter is the narrow part and what
15 I think should be interpreted more broadly is not did
16 you have direct involvement, which was Mr. Brown's
17 phrase, but if you had responsibility for decisions
18 that were being made by people under you in that
19 particular matter, whether you had direct involvement.
20 I think that is what this is intended to address.

21 CHAIRPERSON GRIFFIS: Can we get to our
22 particular matter, because I think you're exactly
23 right and the particular matter, we have talked a lot
24 about the permits, but are we here talking about the
25 Certificate of Occupancy and wouldn't that be the

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1 particular matter of which the involvement would have
2 to be substantial responsibility?

3 MR. TAYLOR: Mr. Chairman, if I may, what
4 we have here in trying to put together some form of
5 judicial economy, regardless of how things are
6 captioned, laid out, we have two interpretations of
7 statute, the same statute. One interpretation is that
8 if you have a grandfathered nonconforming use, you may
9 expand upon that however you see fit. The other is
10 that any alteration to the structure must meet the
11 Zoning Regulations that are current.

12 That is the debate that we were going to
13 have for the building permit. That is the same reason
14 for the denial of the Certificate of Occupancy.
15 Counsel has raised in pleading the fact that the
16 building permit was not revoked. It was not revoked
17 because, A, until about a month ago it was the issue
18 for you to decide how to interpret that point of law.

19 Since then it has not been revoked because
20 it's still the same point of law waiting for this
21 Board to interpret. And what it essentially is going
22 to boil down to is the legal interpretation that Mr.
23 Bello had his employees under him carry out while he
24 was the Zoning Program Manager versus the
25 interpretation that Mr. Crews has asked his employees

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1 to carry out during his tenure as Zoning
2 Administrator.

3 Ultimately, this Board will decide which
4 of those interpretations is the one that will move
5 forward. But for that reason, I think that Mr. Bello
6 is intrinsically involved in the facts of this case.

7 MR. FENGLER: And if --

8 CHAIRPERSON GRIFFIS: Sounded like an
9 equal situation there as you put it out. Yes?

10 MR. FENGLER: Well, you know, while my
11 case was -- our case was dismissed because of
12 timeliness, we should have appealed the January 2005
13 issuance. You know, we will have to re-litigate that,
14 but our ANC actually believes that those building
15 permits were issued in error.

16 We have a new Zoning Administrator who has
17 come along, who the only thing he could affect at the
18 time in agreeing with us, because those decisions had
19 been made, was the Certificate of Occupancy. So I
20 find it ironic that the person who is responsible for
21 the oversight of that department who issued those
22 building certificates are going to be integral under
23 their case, and I think it's almost -- of course he
24 would be an expert witness because he would be
25 defending, in essence, the division he worked at when

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1 he was there.

2 I mean, who would want to admit to an
3 error in public when they were the manager of an
4 agency? So he has no choice but to think that what
5 was done was correct, because he had direct oversight
6 of that. So I think it's inherent conflict of
7 interest.

8 MR. BROWN: Mr. Chairman? Ms. Miller,
9 you --

10 VICE CHAIR MILLER: I just wanted to say
11 a couple things real quick so we can move on to the
12 matter. Personally, I don't think 3106.6 applies here
13 because Mr. Bello is not going to be representing any
14 person in this case, that he is here as a witness and
15 that this regulation does not prohibit former
16 employees from being witnesses in a case.

17 And, second, I believe that Mr. Bello will
18 probably be addressing a legal issue and it will in no
19 way involve any facts, I don't think, that are
20 specific to this case as to what he did for this
21 Certificate of Occupancy which he, from what I
22 understand, had -- has no memory of this specific one.
23 He had oversight over thousands of permits.

24 So I just -- I don't think 3106.6 is
25 applicable. Other Board Members may disagree, but it

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1 doesn't talk about witnesses. It talks about
2 representing persons.

3 MR. RITTING: If I could interject to
4 bring some clarity to the definition of what
5 representation is.

6 I would like to bring your attention to
7 another Zoning Regulation, 3106.1, which reads "In a
8 proceeding before the Board, any person or party may
9 appear on that person's or party's behalf. Any person
10 or party may be represented by any other person duly
11 authorized in writing to do so. The authorization
12 shall state specifically that the authorization
13 includes the power of agent or representation to bind
14 the person in the case before the Board." So that
15 speaks to what it is to be a representative of a
16 person.

17 MR. TAYLOR: Certainly, the Government did
18 not call Mr. Bello.

19 CHAIRPERSON GRIFFIS: So let me
20 understand. Let me ask our attorney then is a witness
21 a representative?

22 MR. RITTING: Well, I'm not going to --
23 I'm not saying that that decided it one way or
24 another, but that since the rule that the DCRA
25 attorney cited refers only to representatives and

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1 doesn't speak to witnesses, that the other rule that
2 I cited suggests that representation is limited to
3 something that is not the same as being a witness. In
4 other words --

5 CHAIRPERSON GRIFFIS: I see, ability to
6 take authorization.

7 MR. BROWN: And the ability, I think the
8 distinction is between somebody who has the right and
9 the ability to bind the underlying person and that is
10 my job.

11 CHAIRPERSON GRIFFIS: Right.

12 MR. BROWN: As opposed to a witness. And
13 Mr. Bello is not a fact witness. He is an expert
14 witness.

15 CHAIRPERSON GRIFFIS: Right.

16 MR. BROWN: And largely what he is going
17 to be testifying to are things and interpretations and
18 the --

19 CHAIRPERSON GRIFFIS: Right.

20 MR. BROWN: -- evolution of the Zoning
21 Regulations that occurred long before he became the
22 Zoning Administrator and will remain long after --

23 CHAIRPERSON GRIFFIS: Right.

24 MR. BROWN: -- he has left the post and
25 this matter.

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1 CHAIRPERSON GRIFFIS: I think those are
2 two excellent distinctions, one for the OAG, taking on
3 Ms. Miller's point of a witness not being
4 representation and then the fact that Mr. Bello is
5 being proposed to be an expert witness not a fact
6 witness. And, of course, there is a differentiation
7 in our proceedings of that. A fact witness would go
8 to speaking directly to the elements germane to the
9 facts established in this case, what happened, when it
10 happened and who it happened to.

11 And what I understand you saying is that
12 Mr. Bello is going to be an expert witness of which,
13 if granted that status, would be able to draw analysis
14 or logical analysis of the overall Zoning Regulations
15 and history thereof.

16 MR. TAYLOR: Mr. Chairman?

17 CHAIRPERSON GRIFFIS: Yes?

18 MR. TAYLOR: I think it would be a
19 dangerous precedent for this Board to establish that
20 a lay person is considered an expert in legal
21 interpretation. If what Mr. Bello is going to do is
22 try to explain how to interpret --

23 CHAIRPERSON GRIFFIS: No one said anything
24 about legal interpretation.

25 MR. TAYLOR: -- the regulations of this

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1 Board, I think that in itself would be highly
2 inappropriate.

3 MR. BROWN: Well, then the same would go
4 true for the Zoning Administrator talking about the
5 same subject.

6 CHAIRPERSON GRIFFIS: Right.

7 MR. BROWN: I mean, and as jealous as
8 lawyers are practicing law or others practicing law,
9 the Zoning Administrator or a zoning expert is
10 required to interpret the regulations which are a body
11 of law, so that I don't think you can separate the
12 two.

13 MR. TAYLOR: How can he testify about what
14 the interpretation should be without testifying to how
15 he in his official capacity interpreted those
16 regulations?

17 CHAIRPERSON GRIFFIS: I think there could
18 be differentiation from that. I'm not sure that his
19 testimony -- if you're saying he would have to say
20 this is what I did in order to make some basis of
21 testimony.

22 COMMISSIONER MITTEN: Mr. Chairman?

23 MR. TAYLOR: The Zoning Administrator is
24 here to talk about factual questions.

25 CHAIRPERSON GRIFFIS: Right.

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1 MR. TAYLOR: You would ask him why did you
2 do this?

3 CHAIRPERSON GRIFFIS: Sure.

4 MR. TAYLOR: If Mr. Bello is not here to
5 be a factual witness of why did you do this, I fail to
6 see what his role would be here.

7 CHAIRPERSON GRIFFIS: Okay.

8 MR. BROWN: If you look at Mr. Bello's --
9 and I don't think the Board wants to belabor this, but
10 if you look at Mr. Bello's report, it's taken in --
11 vacuum isn't the right word, but it's an analysis of
12 the Zoning Regulations. It's not an analysis specific
13 to the facts of this case.

14 And if you look at our case on the
15 underlying issues, they are principles established by
16 the Zoning Commission long ago that we're talking
17 about that need to be recognized. So that I think
18 there is a distinction that needs to be accepted and
19 we move on.

20 CHAIRPERSON GRIFFIS: Understood. Ms.
21 Mitten?

22 COMMISSIONER MITTEN: This is not -- to me
23 this is not cut and dried, but given that it's not cut
24 and dried I want to just put a few thoughts on the
25 record.

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1 The first is that I believe that Mr. Bello
2 is representing the applicant, because he is not here
3 on his own behalf. He is being paid to be here, so
4 you're allowed to come and say, you know, like
5 something is happening with your neighbor's property.
6 You're allowed to come and say your piece about that.
7 That is what I think is intended to be authorized in
8 3106.6 not that you can come on someone else's behalf,
9 which I believe is notwithstanding one's ability to
10 look at 3106.1 and say, well, maybe strictly speaking
11 what was intended is that you bind someone.

12 I just think that that is the
13 interpretation that I would argue for. That's point
14 number one. Point number two, which I think the Chair
15 was trying to get at earlier, is, well, was he really
16 in his capacity when the decision that is on appeal
17 was made, which is the denial of the Certificate of
18 Occupancy as opposed to the things leading up to the
19 Certificate of Occupancy. That is one. You know, I
20 think you could go either way. I hope we're not going
21 to, you know, get down into chopping it that finely.

22 And, you know, this whole issue is
23 something I am sensitive to, because I'm a Government
24 employee and I am involved in -- you know, I have to
25 confront my conflicts on a regular basis particularly

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1 as it relates to zoning. And one of the things that
2 helps me make my decisions or the way that I make my
3 decisions, and I would hope would be made in this
4 case, is if there is a fear that an individual's
5 participation would prejudice a particular party in
6 the case, and that is at the core of it.

7 Even though I might not be able to
8 articulate it very well, I think Mr. Bello's
9 participation would prejudice a party in this case.
10 And so I would -- I mean, I would ask the applicant to
11 consider is that really what you want to do, is open
12 the door for an appeal because someone has
13 participated who may prejudice a particular party? So
14 those are my thoughts.

15 CHAIRPERSON GRIFFIS: Interesting.
16 Comments?

17 BOARD MEMBER ETHERLY: I'm more than happy
18 to weigh in. I mean, I'm just at the point of it's a
19 wonderful gambit. It's a nice try. I just don't buy
20 the argument, Mr. Taylor, in all due respect. On its
21 face it has some appeal to it, but I think the
22 aspects, the points that have been raised, one by my
23 colleague, Mrs. Miller, and two by opposing counsel in
24 terms of interpreting and then, three, the Office of
25 Attorney General providing some assistance in terms of

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1 looking at other portions of the statute, I think
2 there is a distinction that is drawn out within the
3 statute regarding appearance and representation and I
4 think that's part of where Mrs. Miller's comments were
5 going with the issue of representation.

6 I think the spirit of 3106.6, 3106.6, I
7 think the spirit there is just as Mrs. Mitten was
8 going to and that is is there some kind of prejudice.
9 But I think there is a threshold that has to be gotten
10 to before kind of getting to the prejudice argument
11 and I think the terms of 3106.6 itself kind of speak
12 to that.

13 I think Mr. Bello's presence here is an
14 appearance on behalf of a party not representation,
15 nor do I think the language of 3106.6, "particular
16 matter for which the member or employee had a
17 substantial responsibility," I don't think that
18 encompasses the work or role that Mr. Bello played in
19 his prior capacity. I think particular matter means
20 that there has to be some real hands-on kind of --
21 with regard to this particular situation, Mr. Bello
22 had some substantial role or authority to play.

23 So I think your earlier answer as it
24 related to if you read it too broadly, the Mayor could
25 be held to this exclusionary rule for any number of

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1 different things. So for those reasons I'm not
2 persuaded that that motion is a successful one. So
3 I'll just note that for the benefit of my colleagues.
4 I'll be prepared to make a motion to that effect once
5 we reach that appropriate point, Mr. Chair.

6 CHAIRPERSON GRIFFIS: Thank you.
7 Comments?

8 VICE CHAIR MILLER: I'll just say this
9 once more and then move on, but I do think the word
10 represent is a legal word that has a different meaning
11 when you're -- as the OAG attorney said, your party is
12 bound by your representations and that's different
13 than a witness.

14 So I think that the reg speaks to that,
15 but I also think beyond that that the regulation is to
16 protect so that the testimony is not tainted by the
17 person's involvement in activity that, you know, could
18 affect the credibility or the motive and I don't see
19 that here.

20 I have heard Mr. Bello testify before in
21 other cases and that's why I anticipate that his
22 testimony is really going to go to his understanding
23 of the Zoning Regulations and it's based on years of
24 experience, I'm sure, as ZA and in other capacities.
25 And so I don't -- I'm not afraid that it's tainted in

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1 some way by the fact that there might have been
2 overlap of when he was ZA and when the building
3 permits were issued.

4 CHAIRPERSON GRIFFIS: Excellent. Others,
5 comments? Mr. Brown, Ms. Mitten brought up an
6 interesting and fairly persuasive comment. Is there
7 a change to your witness list?

8 MR. BROWN: No, I don't think it would be
9 appropriate to change our list. I am comfortable. My
10 client who I represent is comfortable that the chance
11 of any prejudice is nonexistent and the value of Mr.
12 Bello's testimony not only to our case, but to the
13 process.

14 CHAIRPERSON GRIFFIS: Okay.

15 MR. BROWN: I don't think anybody is going
16 to argue that he is one of the most knowledgeable
17 people available on the issues that we're going to be
18 talking about.

19 CHAIRPERSON GRIFFIS: Very well.

20 MR. BROWN: And so I would like to go
21 forward.

22 CHAIRPERSON GRIFFIS: Very well. Is there
23 a motion?

24 BOARD MEMBER ETHERLY: Mr. Chair, it would
25 be my motion to deny the motion for the exclusion or

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1 removal of Mr. Bello as a witness on behalf of the
2 cross-appellant, I think would be the appropriate
3 term, in this instance.

4 I'm going to be fairly broad in my grounds
5 so as not to necessarily invite some particular firm,
6 bright line interpretation of representation versus
7 appearance, so I'm comfortable simply leaving it that
8 I do not read Mr. Bello's presence here to be -- I'm
9 trying to think strategically in terms of what I can
10 cobble together a majority for, but I don't view Mr.
11 Bello's presence here to be representative in the
12 sense of that particular term as it's used here nor do
13 I believe that Mr. Bello played a substantial -- had
14 a substantial responsibility in the particular matter
15 here. I would invite a second to that.

16 CHAIRPERSON GRIFFIS: Is there a second?

17 VICE CHAIR MILLER: Second.

18 CHAIRPERSON GRIFFIS: Excellent.

19 BOARD MEMBER ETHERLY: Thank you very
20 much, Mrs. Miller. I think it has been adequately
21 discussed. Again, I understand the spirit in which
22 the motion of DCRA is moving and I think it's a very
23 important one, and that is the overall issue of
24 prejudice or disadvantage to the department in this
25 instance by virtue of Mr. Bello's participation.

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1 But I think by the terms of 3106.6 and as
2 has been discussed by some of my colleagues with
3 regard to the issue of prejudice, I don't see it. I
4 think we can move forward and I think both parties
5 will be able to articulate and advocate effectively.
6 At bottom, ultimately, it's about helping this Board
7 get to the relevant facts around the decision that was
8 made as we look at this appeal, and I think the
9 participation, the appearance of that particular
10 witness, will enable us to do it. Thank you, Mr.
11 Chair.

12 CHAIRPERSON GRIFFIS: Excellent. Thank
13 you very much. Ms. Miller?

14 COMMISSIONER MITTEN: Mr. Chairman?

15 CHAIRPERSON GRIFFIS: Yes?

16 COMMISSIONER MITTEN: I just wanted to
17 speak against the motion. I'm not going to repeat
18 myself, but I just wanted to clarify what my basic
19 position is on these matters and, you know, Mr.
20 Etherly is right, you know, we don't want to talk
21 about the bright lines because there aren't bright
22 lines in our attempt to interpret this.

23 But my view on matters like this is if
24 it's murky, then make it clean by stepping out, you
25 know, by removing yourself so that there is no

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1 possibility of prejudice. And that is why I'm voting
2 against the motion. Mr. Bello is very knowledgeable
3 and he is a great -- he is often a great resource for
4 the Board. I think under these particular
5 circumstances, everyone would be better served if he
6 were not participating, but I respect my colleagues'
7 view that he should.

8 CHAIRPERSON GRIFFIS: Ms. Miller?

9 MR. TAYLOR: Mr. Chair, not to put forward
10 any efficacy but --

11 CHAIRPERSON GRIFFIS: Actually, I can't
12 have you address the Board. We're in a motion right
13 now.

14 MR. TAYLOR: Okay.

15 CHAIRPERSON GRIFFIS: Ms. Miller?

16 VICE CHAIR MILLER: I just want to say
17 that I don't think Mr. Bello is going to be helpful in
18 us getting to the facts and that is the reason that I
19 think there is no reason to exclude his testimony.

20 I think that he is going to be helpful in
21 helping the Board understand the regulations from his
22 breadth of history of working in this field. And I
23 don't find it murky. I don't think that that overlap
24 has any consequence to his being able to explain his
25 interpretation of the regulations.

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1 CHAIRPERSON GRIFFIS: Excellent. Others?
2 Any other comments? Very well. I think it has been
3 well-deliberated. We do have a motion before us. It
4 has been seconded. I would ask for all those in favor
5 to signify by saying aye.

6 ALL: Aye.

7 CHAIRPERSON GRIFFIS: And opposed?

8 COMMISSIONER MITTEN: I'm opposed, but not
9 as vigorously as Mr. Etherly is enthusiastic.

10 BOARD MEMBER ETHERLY: My enthusiasm is a
11 signal that I agree with Mrs. Miller's comments
12 unequivocally that there is no murkiness here. Thank
13 you, Mr. Chair.

14 CHAIRPERSON GRIFFIS: Indeed. And
15 abstaining? Very well.

16 BOARD MEMBER ETHERLY: Okay.

17 CHAIRPERSON GRIFFIS: Why don't we record
18 the vote and move ahead? We don't need to state it.
19 I think it's in the record. Thanks.

20 MR. TAYLOR: Mr. Chair, now that this
21 matter has been decided, I would move for admission of
22 Ms. Hayden's declaration just to complete the record
23 for this discussion.

24 And second of all, I would request that
25 since this is a precedent-setting matter for this

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1 Board that while you may not draw a bright line, that
2 at least that this be addressed in the eventual
3 opinion so that counsel for both the Government and
4 the -- anyone else coming before this Board has
5 guidance on how you will be interpreting this
6 regulation.

7 CHAIRPERSON GRIFFIS: Well-said. It is an
8 official motion by the Board. It would have to be
9 addressed in any official order that is released. I
10 missed the first part though, you --

11 BOARD MEMBER ETHERLY: The declaration.

12 CHAIRPERSON GRIFFIS: The declaration.

13 MR. TAYLOR: I would like to move into the
14 record or move into evidence the declaration of Ms.
15 Hayden.

16 CHAIRPERSON GRIFFIS: Okay.

17 COMMISSIONER MITTEN: It might help Mr.
18 Taylor to know that we don't have the formal rules of
19 evidence. You can just submit it. You don't have to
20 move it into evidence.

21 MR. TAYLOR: I'm new to this process.
22 When in doubt --

23 COMMISSIONER MITTEN: Right, and I'm
24 trying to help you understand.

25 MR. TAYLOR: Yes.

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1 COMMISSIONER MITTEN: We're a little less
2 formal than that.

3 CHAIRPERSON GRIFFIS: Right. You can just
4 provide that to Ms. Bailey and she will give it an
5 exhibit number and distribute it into the record if
6 you want that now.

7 MR. TAYLOR: Thank you.

8 CHAIRPERSON GRIFFIS: Okay. Are we ready
9 then? Any other preliminary matters? If there are
10 none, let's proceed.

11 MR. BROWN: Again, Patrick Brown from
12 Greenstein, DeLorme and Luchs on behalf of the
13 appellant, Mr. Tesfaye, the cross-appellant, Mr.
14 Tesfaye who is sitting to my right. Also with me,
15 obviously, is Mr. Bello who will be testifying in the
16 capacity as an expert witness on the Zoning
17 Regulations.

18 Why don't we, if we could, if you don't
19 mind just to keep things moving, resolve Mr. Bello's
20 status as an expert witness. I have copies of his CV
21 which I will submit to the Board.

22 CHAIRPERSON GRIFFIS: No, why don't we
23 leave it for -- excellent. Thank you. Mr. Bello is
24 being proffered as an expert witness in D.C. Zoning
25 Regulations?

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1 MR. BROWN: Zoning Regulations, yes.

2 CHAIRPERSON GRIFFIS: Does the ANC have a
3 comment?

4 MR. BROWN: Just to clarify, Mr. Chairman.

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. BROWN: As an expert in interpretation
7 of the D.C. Zoning Regs, interpretation and
8 application of the regulations, as well as the duties
9 of the Zoning Administrator in interpreting and
10 applying those regulations.

11 CHAIRPERSON GRIFFIS: Okay. Mr. Fengler,
12 do you have a comment on that?

13 MR. FENGLER: I guess my comment is if he
14 is going to testify as to what the Zoning
15 Administrator should do in their capacity versus what
16 we talked about earlier, which qualified him, which is
17 on this particular case, I mean, I would argue that
18 the reason we're here is that when he was in charge,
19 he didn't put the proper procedures in place to
20 educate zoning inspectors on how not to expand a
21 nonconforming use.

22 So I find it ironic that he would be
23 qualified to then offer testimony about how that
24 agency should run. You all made very clear comments
25 that you would be limited to the facts of the case.

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1 Now, we're going to let him testify as to the
2 operations of DCRA.

3 CHAIRPERSON GRIFFIS: Okay.

4 MR. BROWN: I didn't mean to broaden it to
5 that extent.

6 CHAIRPERSON GRIFFIS: Okay.

7 MR. BROWN: And certainly, the --

8 CHAIRPERSON GRIFFIS: I understand. I
9 don't find it ironic. I find it actually substantive
10 in terms of what is being offered on this, and the
11 issue is not his past involvement specifically in
12 this, but let me ask you directly. Is there anything?
13 What we're trying to establish here, because actually
14 that goes into the substance -- what you're posing to
15 us as ironic is exactly the substance of which we need
16 to decide.

17 So I think we're all attuned to that.
18 What I'm asking you right now is just on the base CV
19 that you have been shown, is there a comment that you
20 could help me as I will decide whether I bring Mr.
21 Bello in as an expert witness? Is there a comment in
22 here that you need to highlight or find concern with?

23 You know, for instance, he actually only
24 lived in the city for two months. How could he be an
25 expert in, you know, zoning, something of that nature.

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1 I'm simplistic in trying to give my example.

2 MR. FENGLER: I apologize. In my own
3 understanding, too, I -- again, I would just be
4 cautious if he is going to offer testimony about the
5 process inside of DCRA when it has administered all
6 facets, responsible for interpretation. That is no
7 problem.

8 He is obviously an expert, but the
9 supervising and review of building permits, I mean,
10 clearly our case is the certificates, the building
11 permits, were issued in error. So if he was working
12 at DCRA at the time those were issued, I would like
13 him to just be an expert on the facts of the case and
14 not the operations inside of DCRA.

15 CHAIRPERSON GRIFFIS: Okay.

16 VICE CHAIR MILLER: To me that sounds like
17 exactly what we would be wanting to avoid.

18 CHAIRPERSON GRIFFIS: Right.

19 VICE CHAIR MILLER: That there could be a
20 conflict of interest if Mr. Bello was going to be
21 talking about what he did that might have affected the
22 building permits.

23 MR. FENGLER: No, I apologize if I'm not
24 clear. I don't want him -- I guess I apologize for my
25 lack of clarity specifically on the intrinsic nature

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1 of the regulations and how they would apply in cases
2 of parking or height density and all of those things,
3 not 1124 E Street. I think he is going to give
4 testimony on a much broader extent, but when counsel
5 was talking about other things he indicated he would
6 offer testimony as to the inside of DCRA and how
7 things should be done and how things should be
8 followed.

9 And that is the second component that
10 raised my antenna up. The first component, which we
11 talked about initially, was just historic, you know,
12 his interpretation of the Zoning Regulations not the
13 interpretations of how DCRA operates, and that is what
14 I got from Mr. Brown when he introduced the second
15 part of what he would be testifying on. And if you
16 would like to clarify that, I would be more than
17 welcome to understand better.

18 MR. BROWN: Well, I certainly don't want
19 to have this turn into a referendum or trial on DCRA
20 or the Zoning Administrator's Office, but the
21 regulations and the interpretations of those
22 regulations and how the Zoning Administrator does that
23 are important parts of the inquiry we need to have.

24 VICE CHAIR MILLER: Why do we need to know
25 how he does it? I mean, isn't the issue here whether

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1 or not the Zoning Administrator erred on a legal issue
2 in interpreting a regulation?

3 MR. BROWN: Well, and the question is how
4 does the Zoning Administrator partly -- what is the
5 basis by which the Zoning Administrator interprets the
6 regulations and what are the sources and restrictions
7 that he has to live within. I mean, for instance, the
8 Zoning Commission case where the Zoning Commission has
9 issued an order giving guidance on the Zoning
10 Regulations.

11 The Zoning Administrator is bound by that
12 interpretation and that is an important fact and that
13 is an important part of his function. The Zoning
14 Administrator is not the author of the Zoning
15 Regulations. That is left to the Zoning Commission
16 and Mrs. Mitten and that is an important distinction,
17 and it's an important distinction in how you approach
18 reviewing this decision.

19 VICE CHAIR MILLER: But, I mean, basically
20 it sounds like he could discuss how to interpret a
21 regulation, what you look to. Is that correct? I
22 mean, the Zoning Administrator does a lot of different
23 things and it seems to me that Mr. Bello though is not
24 going to be talking about what the Zoning
25 Administrator does when he gets a complaint. I don't

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1 know if that's what you're saying.

2 MR. BROWN: No, no, no, no.

3 VICE CHAIR MILLER: Okay. So he is really
4 going to talk about how you interpret a regulation,
5 right?

6 MR. BROWN: And how -- and in this case,
7 we're going to focus in on how he interprets this
8 regulation.

9 VICE CHAIR MILLER: Okay.

10 MR. BROWN: I mean, I don't want -- we
11 want to keep -- number one, this is a case where it
12 behooves us to remain focused --

13 VICE CHAIR MILLER: Right.

14 MR. BROWN: -- on the very, I think,
15 fairly narrow issue at hand and it really revolves
16 around one section of the Zoning Regulations and the
17 definitions and how the Zoning Commission has
18 interpreted that and guided those who have to on a
19 day-to-day basis, including this Board, interpret the
20 zoning and apply the Zoning Regulations.

21 CHAIRPERSON GRIFFIS: Excellent. Let's
22 move ahead and move back to that, specifics that
23 behooves us. DCRA's comment on Mr. Bello's
24 qualifications?

25 MR. TAYLOR: Thank you, Mr. Chairman. I

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1 won't belabor the point in view of the discussion that
2 we have put into this already, but for purposes of
3 preserving my appellate rights I do specifically point
4 out the parts of his resume where he speaks of being
5 the primary responsible person for the decisions made
6 while he was Zoning Administrator and that it was his
7 duty to supervise the review of the building permits
8 as grounds for my objecting to his being admitted as
9 an expert witness in this matter.

10 CHAIRPERSON GRIFFIS: How about being an
11 expert?

12 MR. TAYLOR: I don't think that his
13 qualifications as -- I'm trying -- getting so much
14 feedback here, but I'm not sure that his
15 qualifications as an expert in a matter with which he
16 does not have direct responsibility is something -- is
17 an area that I would like to get into at this point.

18 CHAIRPERSON GRIFFIS: Okay.

19 MR. TAYLOR: But for specifics of this
20 case, I object and I will try to be very brief in just
21 noting the objections.

22 CHAIRPERSON GRIFFIS: Sure.

23 MR. TAYLOR: As needed down the road.

24 CHAIRPERSON GRIFFIS: Okay.

25 MR. TAYLOR: In that regard.

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1 CHAIRPERSON GRIFFIS: Excellent. Well, we
2 appreciate that and, of course, we are establishing
3 the expert status of Mr. Bello. It is the authority
4 of the Chairperson to establish, qualify and call
5 witnesses. However, I always open it up for comments
6 in order to get full understanding of different
7 interpretations and opinions and directions.

8 I will open it up to the Board if they
9 have any additional comments on that.

10 VICE CHAIR MILLER: I would like to
11 suggest that Mr. Bello be accepted as an expert
12 witness in interpreting Zoning Regulations, so that we
13 can avoid crossing any lines with respect to what he
14 might have done, with respect to oversight of building
15 permits or anything like that.

16 CHAIRPERSON GRIFFIS: Excellent. I
17 appreciate that and I absolutely agree. I think we
18 can establish Mr. Bello as an expert witness in the
19 D.C. Zoning Regulations. I think his history or
20 practice both at DCRA and also as a compliance officer
21 indicate a great knowledge, a breadth of understanding
22 of the regulations and also its past procedures and
23 implementations. That being said, let's move ahead.

24 COMMISSIONER MITTEN: Could I just make
25 one comment?

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1 CHAIRPERSON GRIFFIS: Go ahead.

2 COMMISSIONER MITTEN: I'm fine with moving
3 forward as you both have suggested, but I would just--
4 because I do understand the concern that the ANC and
5 DCRA have articulated. So I think if there are points
6 in Mr. Bello's testimony where they feel like he has
7 gone outside of the boundaries of what he has been
8 determined to be an expert in, I think that should be
9 noted and then we can put that -- we can weigh his
10 testimony accordingly.

11 CHAIRPERSON GRIFFIS: Excellent. And I
12 took that as my understanding, that you would make
13 your objections very succinct, but direct, and I think
14 that's perfectly appropriate and I'm pleased that Ms.
15 Mitten mentioned that, that we should absolutely do
16 that and we will resolve those as we can as they come
17 up. With that, Mr. Brown?

18 MR. BROWN: And if I could, before we
19 launch into testimony, I would like to try to frame
20 this case and hopefully that will serve as a guidepost
21 to moving through quickly.

22 I think there are two important parts to
23 this case. The first is the legal question of
24 estoppel that the argument being made on behalf of my
25 client is that under the facts and circumstances that

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1 exist here, DCRA, the District Government, is estopped
2 from denying the Certificate of Occupancy application
3 under the facts, wholly apart from the substantive
4 issue about our view that the permit was issued
5 properly and there is no basis for denying the C of O.

6 But, again, estoppel is an important legal
7 argument and I think with the testimony of Mr. Tesfaye
8 you will see, and it's in the chronology, if you read
9 the chronology in our filings, that Mr. Tesfaye acted
10 in good faith. He applied for and obtained a building
11 permit without any knowledge.

12 And I challenge anybody to provide
13 testimony that he had any knowledge that what he was
14 obtaining, the building permit, was in violation and
15 that based on those acts of D.C., not once, twice for
16 building permits and a host of other related
17 electrical and plumbing permits, that he acted on
18 those and moved forward and relied on those permits.

19 The thought and in framing the Board's
20 view of this, the thought that somehow Mr. Tesfaye
21 proceeded at his own peril, that he went through the
22 permitting process and he got the permit and he was --
23 somehow, having gone through that process, he was, you
24 know, at your own risk, that you can't rely on that
25 permit, that is -- quite frankly, that undermines the

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1 whole process, the permitting process of the Zoning
2 Regulations which are based on a certainty that the
3 regulations are applied. You get your permit and
4 you're allowed to rely on them.

5 The concept that DCRA has raised, which
6 quite frankly, undermines their whole position in the
7 permitting process that you really -- Mr. Tesfaye
8 couldn't have, shouldn't have, couldn't have,
9 shouldn't have relied on the permit that was issued
10 is, I think, self-defeating. It makes no sense.

11 If you go through the process, and we'll
12 go through in detail how he went through the process
13 and gets the permit, he has every right and, in fact,
14 the whole process is predicated on him being able to
15 rely on that permit to spend a great deal of money.
16 It's clear he spent a great deal of money, \$1 million
17 in making these improvements.

18 Almost all of it was spent before he had
19 any notice that somebody thought the permit was issued
20 in error and then fairness, to come back a substantial
21 period of time later after Mr. Tesfaye spent \$1
22 million and say, well, we have changed our mind and
23 you can't have your C of O is fundamentally unfair,
24 particularly in the context of the delay that the
25 Department of Consumer and Regulatory Affairs and

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1 directly Mr. Crews, who knew about this in the latter
2 part of 2005, according to testimony from the ANC, and
3 certainly was being quoted in the Voice of the Hill in
4 the first week of February of 2006, yet made no
5 contact with my client and took no action until March
6 of '06.

7 That delay, compounding the other
8 equities, adds insult to injury and only further
9 support the estoppel argument that if the regulator is
10 going to regulate, he better do it and not sit around
11 for four or five months and allow Mr. Tesfaye to
12 continue on his way and spending money.

13 The second issue is the substances. This
14 permit was issued correctly, that if you interpret the
15 Zoning Regulations as they have been interpreted, as
16 the Zoning Commission has clearly indicated they
17 should be interpreted, the permit was issued correctly
18 and that there was no conversion for purposes of the
19 900 square foot rule.

20 And particularly, it's important because
21 that vindicates not only the longstanding
22 interpretation, but the rule of the Zoning Commission
23 as the author and interpreter of the regulations in
24 the first instance, that the Zoning Commission in this
25 case, Order 211, went to great lengths, when a

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1 question was raised by the BZA in an appeal, to
2 clarify exactly what they meant and didn't mean and,
3 in this case, they clarified that a conversion in this
4 type of multiple dwelling to an apartment, in this
5 case, an apartment which is a multiple dwelling into
6 another apartment is not a conversion for which the
7 900 square foot rule should be applied.

8 And it's important because they have
9 obviously said that, but it's important because of the
10 Zoning Commission who is the author and interpreter of
11 the regs. And then also Mr. Bello in greater detail
12 and expertise than I will ever be able to will walk
13 you through the zoning analysis, not only the Zoning
14 Commission order, but the logic and the analysis going
15 through and why the permit was issued.

16 So with that, Mr. Tesfaye, I would like to
17 -- and not only is he new to the development business,
18 but he is certainly very new to the BZA process and
19 rather than allowing him to testify, it would be more
20 comfortable and efficient for all of us, I think, if
21 I were given the liberty just to ask him a series of
22 questions to elicit his testimony, if that is
23 acceptable to the Board.

24 CHAIRPERSON GRIFFIS: Absolutely.

25 MR. BROWN: Mr. Tesfaye, if you could

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1 provide your name and address.

2 MR. TESHAYE: Good afternoon, Board
3 Members. My name is Endalkachew Tesfaye. I live in
4 7050 Solomon Seal Court, Springfield, Virginia 22152.

5 MR. BROWN: And, Mr. Tesfaye, you bought
6 this property in September 2004?

7 MR. TESHAYE: Correct.

8 MR. BROWN: And how much did you pay for
9 the property?

10 MR. TESHAYE: \$850,000.

11 MR. BROWN: And prior to this project,
12 have you ever been involved in development in the
13 District of Columbia?

14 MR. TESHAYE: No, this is the first time.

15 MR. BROWN: And when you bought this
16 property, how would you describe it?

17 MR. TESHAYE: It was three units apartment
18 and one tenant was living on the other side and the
19 former were living in the two units.

20 MR. BROWN: And according to all the
21 information you have, the building was built in 1900
22 to 1901?

23 MR. TESHAYE: Correct.

24 MR. BROWN: And also according to the
25 records you have that you obtained from the District,

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1 it has operated as a three unit apartment house since
2 prior to May 1958?

3 MR. TESHAYE: That's correct.

4 MR. BROWN: And when you purchased the
5 property, it was actually operating as --

6 MR. TESHAYE: Three units.

7 MR. BROWN: Three units occupied?

8 MR. TESHAYE: Yes.

9 MR. BROWN: When you purchased the
10 property, did you hire an architect with District of
11 Columbia experience?

12 MR. TESHAYE: Yes, I do.

13 MR. BROWN: And that architect initially
14 came up with a plan for three townhouses on the
15 property.

16 MR. TESHAYE: Yes, but the city was reject
17 it.

18 MR. BROWN: For zoning purposes it was
19 rejected?

20 MR. TESHAYE: Yes, yes.

21 MR. BROWN: And as a result of that, you
22 and your architect met with Ms. Faye --

23 MR. BELLO: Ogunneye.

24 MR. BROWN: -- Ogunneye, the Chief of the
25 Zoning Review Branch?

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1 MR. TESHAYE: Yes, I do.

2 MR. BROWN: And as a result of that
3 meeting, you were advised on issues that were the
4 basis for the plan you submitted for six units?

5 MR. TESHAYE: Yes, we do, we had that.

6 MR. BROWN: And you operated based on the
7 advice and guidance for zoning compliance from the
8 Zoning Administrator's Office through Ms. Ogunneye?

9 MR. TESHAYE: Yes, that is correct.

10 MR. BROWN: And you then -- your architect
11 prepared revised plans based on six apartments?

12 MR. TESHAYE: Yes, that is correct.

13 MR. BROWN: And then you submitted those
14 plans and you obtained a building permit in February
15 2005?

16 MR. TESHAYE: That's correct.

17 MR. BROWN: And at the time that that
18 permit was issued, did the permit and by the Zoning
19 Branch specifically approve the parking provided?

20 MR. TESHAYE: Yes, yes.

21 MR. BROWN: And based on that permit, when
22 did you start work at the property?

23 MR. TESHAYE: It was end of February,
24 around 25 in 2005.

25 MR. BROWN: And subsequently in April, you

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1 revised the original permit?

2 MR. TESHAYE: That's correct.

3 MR. BROWN: And the Zoning Administrator's
4 Office approved the enclosure of the existing covered
5 porch?

6 MR. TESHAYE: That's correct.

7 MR. BROWN: And based on that you
8 completed the project in accordance with those two
9 permits?

10 MR. TESHAYE: Yes, that's correct.

11 MR. BROWN: And you reached substantial
12 completion of the project in November 2005?

13 MR. TESHAYE: That's correct.

14 MR. BROWN: And you sold the first two
15 units of the six units in November 2005?

16 MR. TESHAYE: Yes, that's correct.

17 MR. BROWN: And at the time you sold those
18 units, did you have any knowledge of, concerns about
19 a zoning violation?

20 MR. TESHAYE: No, I don't have anything.

21 MR. BROWN: When did the -- the BZA appeal
22 was filed by ANC-6A on December 13, 2005. Did you
23 receive a copy of that?

24 MR. TESHAYE: No, I did not receive that
25 one.

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1 MR. BROWN: Okay. When did you first
2 receive a copy or knowledge of the ANC-6A appeal?

3 MR. TESFAYE: After they rejected my
4 Certificate of Occupancy application and I had a
5 meeting with Mr. Crews.

6 MR. BROWN: And that was?

7 MR. TESFAYE: That was -- he told me that
8 the city got sued by ANC and he gave me the copy of
9 the appeal at that time. I think that's end of
10 February or the first week of March 2006.

11 MR. BROWN: You submitted your Certificate
12 of Occupancy application after you had completed all
13 your final inspections?

14 MR. TESFAYE: Yes, that's correct.

15 MR. TAYLOR: Chairman Griffis, excuse me.
16 I was having great trouble with that previous answer.
17 Could we either ask the witness to repeat himself a
18 little bit more slowly or ask the reporter to review
19 what he stated?

20 CHAIRPERSON GRIFFIS: Right. You couldn't
21 understand what the answer was? Is that the question?

22 MR. TAYLOR: Correct.

23 CHAIRPERSON GRIFFIS: Yes. Can we just
24 restate the answer?

25 MR. TESFAYE: Sure.

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1 MR. TAYLOR: The part about the -- when he
2 did not -- about him not getting notice of the ANC
3 appeal.

4 MR. TESFAYE: I did not receive any notice
5 from ANC, but when I had a meeting with Mr. Crews he
6 told me about the city got sued by ANC. So I didn't
7 know. I just ask him, you know, what is that. Even
8 I don't know what that means, ANC, and he gave me a
9 copy of the appeal from D.C. office and that time, I
10 knew that my building was in appeal by ANC. But
11 before that I didn't know anything about that.

12 MR. BROWN: And that was late February of
13 2006 after you had filed your Certificate of Occupancy
14 application?

15 MR. TESFAYE: Yes, that is correct.

16 MR. BROWN: And you filed your Certificate
17 of Occupancy application after you had received final
18 approvals for all six units?

19 MR. TESFAYE: Yes, that's correct.

20 MR. BROWN: So at that time, all the work
21 had been completed and to the satisfaction of the
22 District of Columbia?

23 MR. TESFAYE: Yes, that was correct.

24 MR. BROWN: Although Mr. Crews was quoted
25 in the February 9th Voice of the Hill article saying

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1 that your permit had been issued in error, you weren't
2 aware of that article until much later, until after
3 you had met with Mr. Crews in late February/early
4 March?

5 MR. TESFAYE: I didn't know that, but
6 after -- I think that's where I got it, from a friend
7 of mine agent told us the city, they is talking about
8 our building permit is issued in error. And after
9 that I just Google it and I found that article was
10 stated in February 9th.

11 MR. BROWN: Okay.

12 MR. TAYLOR: Objection. That article
13 hasn't been brought into evidence or, excuse me,
14 authenticated.

15 MR. BROWN: It's in my --

16 CHAIRPERSON GRIFFIS: Actually, it's
17 Exhibit C for the cross-appellant's filing.

18 MR. BROWN: And it's referencing --

19 CHAIRPERSON GRIFFIS: Exhibit 21, our
20 Exhibit 21, Attachment C.

21 MR. BROWN: It's C to my prehearing
22 statement, Exhibit C. It's also referenced in the
23 chronology that is in the text of my document.

24 MR. TAYLOR: Thank you.

25 MR. BROWN: At the time you met with Mr.

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1 Crews in late February, he told you about the appeal
2 and gave you a copy.

3 MR. TESFAYE: Yes.

4 MR. BROWN: And what did he tell you about
5 your Certificate of Occupancy application?

6 MR. TESFAYE: Because he got sued, the
7 city got sued and he don't want a decision right
8 there, so he wanted -- he would like to talk to his
9 attorney and then he will give me the answer. He
10 didn't give me the answer on end of February. And
11 after like going there and after maybe two weeks or
12 three weeks, I got his letter from them that says they
13 denied my Certificate of Occupancy application, but he
14 didn't tell me when I had a meeting with him.

15 MR. BROWN: In connection with the denial
16 of your Certificate of Occupancy, has Mr. Crews issued
17 a Stop Work Order to you?

18 MR. TESFAYE: No, he didn't.

19 MR. BROWN: Has Mr. Crews in connection
20 again with the denial of the Certificate of Occupancy
21 or for any basis revoked any of your building permits?

22 MR. TESFAYE: No, he didn't.

23 MR. FENGLER: Excuse me, Mr. Chair? I
24 apologize and I apologize, Mr. Brown, but this is kind
25 of like concatenations, I knew we would be talking

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1 about Bill Crews, the state of his mind, what he
2 didn't say, what he did say and, you know, again my
3 general frustration is without Mr. Bill Crews here to
4 defend himself, no one can testify to the other side
5 of that conversation, you know, to what has been said
6 as they build their case as far as estoppel goes or
7 they build their case for timeliness. So again --

8 CHAIRPERSON GRIFFIS: I appreciate that
9 and I think we will keep our minds open to that, but
10 I haven't heard anything in his testimony about what
11 Bill Crews was thinking.

12 MR. FENGLER: Well, the --

13 CHAIRPERSON GRIFFIS: There is factual
14 basis of there was no Stop Work Order issued and then
15 when the letters and communication was going.

16 MR. FENGLER: Well, I know there were
17 three Stop Work Orders issued on that property between
18 December, January and February.

19 CHAIRPERSON GRIFFIS: Will Bill Crews only
20 know that?

21 MR. FENGLER: Well, again, I don't know.
22 He should know that, because we talked about that.

23 CHAIRPERSON GRIFFIS: Um-hum.

24 MR. FENGLER: You know, I know that for a
25 matter of fact.

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1 CHAIRPERSON GRIFFIS: But you are
2 criticizing the Government's ability to put on their
3 case. Is that -- that they wouldn't know that the
4 Stop Work Orders weren't there?

5 MR. FENGLER: Yes, I'm sorry. I'm just
6 trying -- my concern is if we're going to talk about
7 what Bill Crews did, when he did it and how he did it
8 without Bill Crews being here -- it's all right. I,
9 obviously --

10 CHAIRPERSON GRIFFIS: I understand your
11 point.

12 MR. FENGLER: Obviously, I'm not making my
13 point clear enough, but just I get concerned when
14 testimony is yes, I was in a meeting with Bill Crews
15 and this is what he told me.

16 COMMISSIONER MITTEN: I think --

17 CHAIRPERSON GRIFFIS: The office --

18 COMMISSIONER MITTEN: I think what -- if
19 I could just offer something?

20 CHAIRPERSON GRIFFIS: Yes.

21 COMMISSIONER MITTEN: What you will find
22 as the hearing goes on is that you are anticipating
23 like that there won't be any push back on that. If
24 you find that the push back is not sufficient, like
25 boy, if Bill Crews were just here, he could answer

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1 that, then you have to convince the Board that, you
2 know, we really do need to hear something specifically
3 on a point. So, you know, just have a little faith
4 that if he really needs to be here, then we'll make
5 sure that we hear from him personally.

6 CHAIRPERSON GRIFFIS: Well said. Okay.

7 MR. FENGLER: I apologize, Mr. Brown.

8 MR. BROWN: That's all right. Mr. Fengler
9 makes a good point and I forget the exact date he
10 reference, but he provided some helpful information
11 even though he may not have intended to that
12 conversations were going on long in advance of my
13 client having any discussions or knowledge.
14 Discussions were going on, which I'm not saying are
15 improper, but there was a level of activity that was
16 going on behind the scenes with Mr. Crews and the
17 Zoning Administrator's office and the ANC that
18 unfortunately my client was not privy to.

19 CHAIRPERSON GRIFFIS: Right. And it is an
20 unfortunate piece, but let's stay on topic.

21 MR. BROWN: Well, it goes very much to the
22 estoppel issue.

23 CHAIRPERSON GRIFFIS: Indeed.

24 MR. BROWN: So I just wanted to highlight
25 that.

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1 VICE CHAIR MILLER: Mr. Brown, could I
2 just ask a question without reading again all the
3 pleadings? Are you introducing any new evidence or is
4 your client just testifying to information that is
5 already in the record?

6 MR. BROWN: well, he is testifying on the
7 record, subjecting himself to cross examination. I'm
8 willing to stand on the record. I don't think -- with
9 one exception that there -- with two minor points I'm
10 almost done, but I'm doing it for the impact to have
11 Mr. Tesfaye in his own words testify --

12 VICE CHAIR MILLER: Okay.

13 MR. BROWN: -- and subject himself to
14 cross examination, rather than this just being black
15 and white, because it's important. I mean, it's
16 important to him financially. It's important to him,
17 obviously, from a fairness standpoint. And this is a
18 devastating turn of events for Mr. Tesfaye. And how
19 it occurred and his involvement and how, in fact, he
20 was the last person to know, you know.

21 MR. FENGLER: Object. Is that a question?
22 I would like to clarify something and I know Ms.
23 Bailey can pull the record. When I had to file my
24 appeal, I put the address that was on the building
25 permit for Mr. Tesfaye and I mailed them that and I

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1 signed out a personal certification that on January,
2 I think it was like, the 6th or whatever the date was,
3 I sent that to him.

4 So Bill Crews got the same letter mailed
5 on the same day by my -- sent to the address that that
6 I know. If he did not get that letter that was on the
7 permit that I sent the letter to, which is in -- you
8 can pull that from that -- I mean, I don't want it to
9 be said that we just filed this in the dark of the
10 night without trying to reach out. I simply sent the
11 letter and I called the numbers that were on the
12 permit. No one answered the phone that I called. No
13 one responded to the letter that I sent. And I
14 submitted that under perjury of oath when I filed my
15 appeal.

16 So I do want it said for the record that
17 we did try to reach out and file the appeal with Mr.
18 Tesfaye, as according to the regulations for me to
19 bring the appeal to the Board.

20 MR. BROWN: And I'm not casting aspersions
21 on Mr. Fengler. He followed the rules, but quite
22 frankly, through no fault of his own, he mailed the
23 appeal to the property address. Well, Mr. Tesfaye and
24 for that matter, at that point, I don't believe
25 anybody lived there and so it's not surprising that it

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1 never reached him. And again, it's -- any point after
2 Mr. Tesfaye reached substantial completion, the
3 estoppel argument becomes iron clad as far as his
4 reliance and his detrimental reliance on the permit.

5 I mean, he was allowed -- and there were
6 discussions going on much earlier and he was allowed
7 to just proceed along his merry way and spend money
8 and then only to be told later that somehow he had
9 done something wrong or the permit shouldn't have been
10 issued. And that one undermines the permit process
11 and it's fundamentally and legally unfair and
12 unacceptable to Mr. Tesfaye.

13 I want to conclude and move on. And I'm
14 only raising this because it is raised in DCRA's
15 brief. There was a roof deck built at the property
16 after substantial completion, correct?

17 MR. TEFAYE: That's correct.

18 MR. BROWN: Did you build that deck?

19 MR. TEFAYE: No, I didn't.

20 MR. BROWN: Who built that deck?

21 MR. TEFAYE: The individual that sold the
22 house on the Unit A. The Unit A owner did build the
23 roof deck after I finished with the house.

24 MR. BROWN: So for clarity, you had no
25 involvement in any remedies that should be sought

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1 against the property owner?

2 MR. TESHAYE: No.

3 MR. BROWN: Okay. Also, tell me as a
4 result of the publicity that's now out about your
5 property, tell me what has happened.

6 MR. TESHAYE: My building is under market,
7 but nobody has come to our building, because it's
8 under appeal. It says even something illegal
9 construction is going on on our building, but it's not
10 illegal building. I have a permit and approved letter
11 from the inspection. And sometimes they said it on
12 the Voice of the Hill. It says that the illegal D.C.
13 condo is shut down. DCRA is going to shut down this
14 building. Because of that, nobody even come to our
15 building to see it. So that will affect our even to
16 sell the condo, the building.

17 MR. BROWN: And while you can't sell your
18 condo now, you are incurring additional costs every
19 month?

20 MR. TESHAYE: Yes.

21 MR. BROWN: To pay the mortgage and the
22 other bills related to it?

23 MR. TESHAYE: Yes, yes, sir.

24 MR. BROWN: And is that causing you
25 financial hardship?

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1 MR. TESHAYE: Yes.

2 MR. BROWN: Okay. I would like to allow
3 the Board, turn it over to the Board and cross
4 examination.

5 CHAIRPERSON GRIFFIS: Good. Let's have
6 our Board questions. Questions?

7 VICE CHAIR MILLER: I just didn't follow
8 totally. How is it advertised that there is something
9 illegal about your building that people see, so they
10 don't purchase?

11 MR. TESHAYE: Because it's Voice of the
12 Hill in local newspaper that said that our building
13 is illegally constructed, but it doesn't legally
14 construct. And second thing, DCRA is going to shut
15 down the building. But they didn't shut down. I
16 don't know why they --

17 MR. BROWN: An ongoing series or articles
18 not only in the Voice of the Hill, but the Hill Rag as
19 well as, and we provided some of those as well, the
20 Capitol Hill Restoration Society newsletter. This
21 property quite to Mr. Tesfaye's detriment has become
22 infamous, particularly given the level of comment by
23 Mr. Crews and DCRA spokesmen to repeatedly hammer at
24 the fact, and you'll see it in the articles, all the
25 legality, the violations.

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1 MR. TAYLOR: Objection. Wasn't the
2 question directed to Mr. Tesfaye?

3 CHAIRPERSON GRIFFIS: Agreed. Other
4 questions from the Board? Any other questions?
5 Cross?

6 MR. TAYLOR: Yes, sir. I'll go first and,
7 Joe, is that fine with you? Okay. Okay. Mr.
8 Tesfaye, first of all, I think that everyone at DCRA
9 is aware of the financial stake that you have in the
10 building and truly regrets any prejudice that you are
11 finding from this action, however, unavoidable we may
12 believe it to be.

13 You or your attorney has testified about
14 all the approvals that you received, such as
15 electrical approval, plumbing approval. What others,
16 do you recall?

17 MR. TESFAYE: I don't know. What do you
18 mean?

19 MR. TAYLOR: Electrical approvals, you
20 have received plumbing approvals. Are there others
21 that I am -- that I haven't gotten written down?

22 MR. TESFAYE: No, I don't think so.

23 MR. BROWN: Can I interject? He has
24 received, you know, electrical, plumbing, mechanical.
25 He has received every permit required to complete this

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1 project from the building -- underlying building
2 permits to all what I refer to as the trade permits.
3 And not only has he received those permits, but all
4 those permits have been inspected and final approval.
5 It's in the record.

6 MR. TAYLOR: Mr. Tesfaye, excuse me, if I
7 may ask you, to the best of your knowledge, what was
8 the role of the Zoning Administrator's office in the
9 issuance of approval of the electrical system?

10 CHAIRPERSON GRIFFIS: I don't understand
11 the --

12 MR. TESFAYE: I don't understand the
13 question.

14 CHAIRPERSON GRIFFIS: -- relevance of the
15 question.

16 MR. TAYLOR: The relevance to the question
17 is that one of the items being put before this Board
18 is that the electrical people approved this. The
19 plumbing people went and gave their approval and it's
20 just -- and, you know, the zoning people should have.
21 Well, the -- and my point exactly is there is nothing
22 zoning-related about the electrical system. There is
23 nothing zoning-related about the plumbing.

24 CHAIRPERSON GRIFFIS: Right.

25 MR. TAYLOR: That's a total red herring

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1 for this case.

2 MR. TESHAYE: But it is admitted with
3 the --

4 CHAIRPERSON GRIFFIS: Okay. That's fine.
5 Next question.

6 MR. TAYLOR: Okay. You said that you met
7 with Mr. Crews in February?

8 MR. TESHAYE: End of February. I'm not
9 sure the exact date, but end of February or first week
10 of March.

11 MR. TAYLOR: End of February or beginning
12 of March?

13 MR. TESHAYE: Yes.

14 MR. TAYLOR: How many times did you meet
15 with him?

16 MR. TESHAYE: Just one time.

17 MR. TAYLOR: Just one time?

18 MR. TESHAYE: Yes.

19 MR. TAYLOR: Who was present at that
20 meeting?

21 MR. TESHAYE: Just me and him.

22 MR. TAYLOR: So in your opinion, Mr.
23 LeGrant has no knowledge of that meeting?

24 MR. TESHAYE: Who?

25 MR. TAYLOR: The gentleman sitting right

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1 here.

2 MR. TESFAYE: Oh, I don't know. I don't
3 know.

4 MR. TAYLOR: Was he at the meeting?

5 MR. TESFAYE: No, he wasn't.

6 MR. TAYLOR: Okay.

7 MR. BROWN: I'm not so sure that's
8 relevant.

9 MR. TAYLOR: Okay.

10 MR. BROWN: At least not to the point that
11 we're offering the meeting date for.

12 CHAIRPERSON GRIFFIS: Understood.

13 MR. TAYLOR: I'm sure that Mr. Fengler
14 will make the point more sharply.

15 CHAIRPERSON GRIFFIS: That's fine.
16 Continue.

17 MR. TAYLOR: What -- when you met with --
18 and I'm going to be able -- I'm going to be unable to
19 say her name just like everyone else, Ogunneye.

20 CHAIRPERSON GRIFFIS: Ogunneye?

21 MR. TAYLOR: Ogunneye. Thank you. When
22 you met with Ms. Ogunneye the first time, what plans
23 had you put forward? Well, let me simplify. Was it
24 for a six unit condominium?

25 MR. TESFAYE: Not that time.

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1 MR. TAYLOR: What had you submitted at
2 that time?

3 MR. TESFAYE: Actually, I didn't submit
4 them. My architect, the one I hired, he submitted,
5 but they denied it. And then the second time we had
6 a meeting with her and what we should do. And she
7 said just you can do the six unit condos or this way,
8 actually, apartment and then according to that, we go.
9 We went back to his office and he agreed to our
10 redesign the building and we submitted after two or
11 three weeks.

12 MR. TAYLOR: Okay. Now, the first plans
13 that went in, were those for either apartments or
14 condominiums?

15 MR. TESFAYE: It was three townhouses.

16 MR. TAYLOR: For three?

17 MR. TESFAYE: Yes.

18 MR. TAYLOR: Okay. And that was denied?

19 MR. TESFAYE: Yes, because of the -- it's
20 vertical is not horizontal divided, so because of the
21 vertical, vertically divided, they didn't accept it,
22 because of the Zoning Regulations. I don't know what
23 that mean, but she told us, so we submitted another
24 plan, a new print. So she approved it after two or
25 three or four months.

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1 MR. TAYLOR: Is it your testimony --

2 MR. TESHAYE: I mean, three or four weeks.

3 MR. TAYLOR: -- that she advised you to
4 build six units?

5 MR. TESHAYE: Yes, she did.

6 MR. TAYLOR: That was her idea?

7 MR. TESHAYE: It wasn't her idea. She
8 just --

9 MR. TAYLOR: Whose idea was it?

10 MR. TESHAYE: I just -- I mean, she was
11 counseled with us. We had a meeting with her. So she
12 did not say do this way, but this the way, but when
13 you are at a meeting with her, okay. If you divided
14 horizontally this way, that way, especially my
15 architect talked to her, because I don't know exactly
16 what it mean this way, that way, because I'm not
17 architect or I'm not expert on these things.

18 MR. TAYLOR: Whose idea was it to turn
19 this into a six unit building?

20 MR. TESHAYE: My architect. Actually,
21 it's not really idea, but that's the plan.

22 MR. TAYLOR: Whose plan was it?

23 MR. TESHAYE: The architect's plan.

24 MR. TAYLOR: Okay.

25 MR. TESHAYE: They being -- you can see it

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1 on the --

2 MR. TAYLOR: Okay. Thank you.

3 MR. TESHAYE: -- on the permit.

4 MR. TAYLOR: Now, how far back in history
5 do you have familiarity with the use of the building?

6 MR. TESHAYE: This is my first time. I
7 don't have before this time.

8 MR. TAYLOR: No, no, with this specific
9 building, do you know if say three months before you
10 purchased the building, if anyone was living there?

11 CHAIRPERSON GRIFFIS: I'm not so sure. I
12 thought he testified to the fact that when he bought
13 it one person was living in the building. Is that
14 correct?

15 MR. TESHAYE: Yes.

16 CHAIRPERSON GRIFFIS: I think three people
17 were.

18 MR. TESHAYE: Three people were living in
19 the building.

20 CHAIRPERSON GRIFFIS: I see.

21 MR. BROWN: All three units that existed
22 at that time were being occupied.

23 CHAIRPERSON GRIFFIS: Okay.

24 MR. TESHAYE: Yes. Actually, the tenant,
25 she got evicted. She doesn't want to move out.

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1 CHAIRPERSON GRIFFIS: That's okay.

2 MR. TAYLOR: Was the parking garage being
3 used as well?

4 MR. TESFAYE: Actually, was closed.

5 MR. TAYLOR: It was closed?

6 MR. TESFAYE: So legally closed. Legally
7 closed, but we --

8 MR. TAYLOR: How -- do you know how long
9 it had been closed?

10 MR. TESFAYE: I don't know.

11 MR. TAYLOR: Okay. Thank you. Let's see.
12 You said that you sold units in 2005. How many units
13 did you sell in 2005?

14 MR. TESFAYE: Three of them.

15 MR. TAYLOR: Three of them?

16 MR. TESFAYE: Yes. But one of the
17 building --

18 CHAIRPERSON GRIFFIS: Okay. Let's go to
19 the next question.

20 MR. TAYLOR: Have they -- and have you
21 received payment on those three sales?

22 MR. BROWN: I'm not so sure that's
23 relevant.

24 CHAIRPERSON GRIFFIS: What's the relevancy
25 of this?

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1 MR. TAYLOR: The -- actually, this would
2 probably be a good point for me to bring up that we're
3 getting close to a Fifth Amendment area, if he is
4 under oath. He is not supposed to be selling these
5 units right now. And I will defer from that, but --

6 MR. BROWN: Mr. Chairman, I don't see the
7 basis for that. He has the right to, the legal right
8 to sell them, and I certainly don't think that -- DCRA
9 has gotten themselves in enough trouble on the Zoning
10 Regulations, they ought not to be lecturing my client
11 on his rights to sell the property.

12 CHAIRPERSON GRIFFIS: Right. But be that
13 as it may, it's well outside of our jurisdiction.

14 MR. TAYLOR: Okay.

15 CHAIRPERSON GRIFFIS: So --

16 MR. TAYLOR: Okay. Do you have a valid
17 Certificate of Occupancy for that building?

18 CHAIRPERSON GRIFFIS: Isn't that why we're
19 here?

20 MR. BROWN: I mean, there's going to be
21 testimony later by our zoning expert to indicate why,
22 in fact, for the interim period he, in fact, has a
23 provisional C of O. But I will leave that to the
24 expert to testify to.

25 CHAIRPERSON GRIFFIS: Okay.

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1 MR. TAYLOR: That concludes my questions.

2 Thank you.

3 CHAIRPERSON GRIFFIS: Okay. Thank you.

4 MR. BROWN: Mr. Chairman, could I follow-
5 up just to --

6 CHAIRPERSON GRIFFIS: Sure.

7 MR. BROWN: -- clarify. Mr. Tesfaye, when
8 your architect and you met with Faye Ogunneye --

9 MR. TESFAYE: Yes.

10 MR. BROWN: -- you collectively discussed
11 and developed a plan for the six units.

12 MR. TESFAYE: Yes.

13 MR. BROWN: Is that correct?

14 MR. TESFAYE: Yes, that's correct.

15 MR. BROWN: And then you went back and it
16 was working together with guidance from the Zoning
17 Administrator's --

18 MR. TESFAYE: Right, yes.

19 MR. BROWN: -- office to help you in
20 developing a plan that you then went back and
21 finalized with your architect?

22 MR. TESFAYE: Yes.

23 MR. BROWN: And then based on that you
24 submitted it for the permits?

25 MR. TESFAYE: Right, yes.

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1 MR. BROWN: Okay.

2 MR. TESFAYE: That's correct.

3 MR. TAYLOR: Okay. Redirect, please.

4 Recross, excuse me. With whom besides Mrs. Ogunneye,
5 outside of Faye, whom else at DCRA gave you guidance
6 in this project?

7 MR. TESFAYE: Nobody, just her.

8 MR. TAYLOR: Okay.

9 MR. FENGLER: Thank you. Just a couple of
10 questions.

11 MR. TESFAYE: Sure.

12 MR. FENGLER: Sir, how many Stop Work
13 Orders did you have on the building during your
14 construction phase?

15 MR. TESFAYE: Nothing.

16 MR. FENGLER: No Stop Work Order?

17 MR. TESFAYE: Nothing, just you, I don't
18 know, write it on the newspaper there was two Stop
19 Work Orders, even the city didn't find them.

20 CHAIRPERSON GRIFFIS: That's okay. So the
21 answer is zero.

22 MR. FENGLER: That's fine.

23 CHAIRPERSON GRIFFIS: Okay.

24 MR. FENGLER: That's all.

25 CHAIRPERSON GRIFFIS: That's it? All

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1 right. Thank you. Follow-up questions from the
2 Board? Very well. Let's continue. Mr. Bello?

3 COMMISSIONER MITTEN: Well, actually, I do
4 want to ask something. I'm sorry, it will be just a
5 minute to kind of put it all together, because Mr.
6 Brown mentioned that there is this provisional
7 Certificate of Occupancy, so I would like to know more
8 about that.

9 So do you have a provisional Certificate
10 of Occupancy?

11 MR. TESHAYE: Yes, I do.

12 COMMISSIONER MITTEN: And can you tell me
13 what that entitles you to? Is that for occupancy of
14 all six units?

15 MR. TESHAYE: No, it was -- says three
16 units.

17 COMMISSIONER MITTEN: I'm sorry?

18 MR. TESHAYE: Three apartment units.

19 COMMISSIONER MITTEN: Okay. And are any
20 of the apartments occupied?

21 MR. TESHAYE: Which one?

22 COMMISSIONER MITTEN: Are any of the
23 apartments occupied?

24 MR. TESHAYE: Yes, it is by three
25 individuals.

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1 COMMISSIONER MITTEN: Three of the
2 apartments are occupied?

3 MR. TESFAYE: Yes.

4 COMMISSIONER MITTEN: And have each of
5 those apartments been sold? Did you sell each of
6 those?

7 MR. TESFAYE: Yes, three of them actually
8 are sold, but three of the units is still under the
9 market.

10 COMMISSIONER MITTEN: Okay. So just in
11 terms of we didn't get into the magnitude of the
12 financial hardship, but just for the Board's
13 information, the financial hardship that you are under
14 at the moment really relates to three units not six.
15 Is that fair to say?

16 MR. TESFAYE: Actually, the building was
17 three units apartment before I bought it. So after I
18 bought it, I resubmitted building plan and they
19 approved it for six units and I have a plot and a plan
20 from the Condo Conversion Office, so because of that,
21 I can sell three of the units. So I already sold
22 three of the units, but three of the units is still
23 under the market.

24 COMMISSIONER MITTEN: Okay. Let me take
25 another run at it. So the financial hardship that you

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1 are suffering right now relates to the three unsold
2 units?

3 MR. TESHAYE: Yes, that's correct.

4 COMMISSIONER MITTEN: Okay.

5 MR. BROWN: Can I try to clarify? The
6 financial hardship is that the amount you paid for the
7 land, plus the million dollars you spent improving it,
8 less what you received from the sale of three units?

9 MR. TESHAYE: Yes, of course, that's
10 right.

11 MR. BROWN: And you have not come close to
12 recouping your investment?

13 MR. TESHAYE: Oh, no. No, not yet. Not
14 yet.

15 MR. BROWN: So you are still carrying that
16 cost?

17 MR. TESHAYE: Yes, yes, that's right.

18 COMMISSIONER MITTEN: Okay. I just wanted
19 to clarify that it wasn't the whole cost, that some of
20 it has been recovered, because you have sold some
21 units.

22 MR. TESHAYE: Right.

23 CHAIRPERSON GRIFFIS: The last piece I
24 know we are all very well aware, but we're not
25 establishing necessarily financial hardship, but going

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1 to the estoppel issue that is that the expense of
2 permanent improvements were made based on the reliance
3 of an official action. So I think Ms. Mitten puts it
4 in good context, but we're going to go straight to the
5 estoppel, if we get there, that's what it would have
6 to be.

7 MR. TAYLOR: Okay. Mr. Chair, if I may
8 follow-up on one of Ms. Mitten's questions? I have
9 not, to the best of my knowledge, seen that
10 provisional Certificate of Occupancy. Is that in the
11 record somewhere?

12 CHAIRPERSON GRIFFIS: Not that I'm aware
13 of. Is it in the record?

14 MR. BROWN: I'm going to allow Mr. Bello
15 to take that up.

16 CHAIRPERSON GRIFFIS: And let me just
17 address the Board then. The direct answer is no.
18 That's correct or it's not a direct answer?

19 MR. BROWN: Well, correct me if I'm --

20 CHAIRPERSON GRIFFIS: All right. Before
21 we get into that --

22 MR. BROWN: There are two things. There
23 is a three unit C of O prior to the construction.

24 CHAIRPERSON GRIFFIS: Right.

25 MR. BROWN: That's in the record. Also,

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1 inherent, based on the regulations, in the building
2 permits that were issued is a provisional C of O for
3 that use. Am I correct, Mr. Bello?

4 MR. BELLO: Good evening. For the record,
5 Toye Bello. I think you would find the answer in
6 section 3203.11(c). And I will read it on the record.
7 "At the time of the issuance of the building permit
8 that is required by this subsection, the proposed use
9 shall be designated in the provisional Certificate of
10 Occupancy." So the time that a building permit is
11 issued to establish a use, in fact, issue a
12 provisional Certificate of Occupancy for that use.

13 COMMISSIONER MITTEN: Is there an actual
14 document that one can shake in the air?

15 MR. BELLO: It is --

16 COMMISSIONER MITTEN: Just let me finish
17 the question. That is a piece of paper that's called
18 "Provisional Certificate of Occupancy?"

19 MR. BELLO: It is called today a Pre-
20 Occupancy Data Sheet, that's correct.

21 COMMISSIONER MITTEN: Okay. Can we get a
22 copy of that in the record?

23 MR. BELLO: Can we get a copy of that in
24 the record?

25 COMMISSIONER MITTEN: May we up here get

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1 a copy of that in the record?

2 MR. BELLO: Well, in terms of process and
3 procedure, the responsibility for that record is the
4 District Government's, not the applicant's.

5 COMMISSIONER MITTEN: But if the applicant
6 is relying on a provisional Certificate of Occupancy,
7 I would think they would want it in their hand.

8 MR. BELLO: Sure. The Government is
9 required to provide them a copy of that.

10 COMMISSIONER MITTEN: Okay. Let's get to
11 the point. Do you have one? Do you have a physical
12 copy?

13 MR. TESFAYE: I do not.

14 COMMISSIONER MITTEN: You don't have it?

15 MR. TESFAYE: No.

16 COMMISSIONER MITTEN: You don't have it?

17 MR. TESFAYE: Yes, I don't.

18 COMMISSIONER MITTEN: You're relying on a
19 piece of paper that you don't have a copy of?

20 MR. TESFAYE: Well, you mean for PD? Is
21 that what?

22 MR. BELLO: If I can just --

23 MR. TESFAYE: I don't understand.

24 MR. BELLO: If I could just shed a little
25 light on that? In the process of DCRA, the Zoning

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1 Administrator at the time that he approves a use
2 issues a provisional Certificate of Occupancy.

3 COMMISSIONER MITTEN: An actual piece of
4 paper?

5 MR. BELLO: An actual piece of paper.

6 COMMISSIONER MITTEN: Yes.

7 MR. BELLO: That's called a Pre-Occupancy
8 Data Sheet.

9 COMMISSIONER MITTEN: Okay.

10 MR. BELLO: That's in the permanent
11 records awaiting the issuance of the last step for
12 issuing a final Certificate of Occupancy. So while
13 the applicant may be provided a copy of it, in fact,
14 as a matter of recordkeeping procedure, even though
15 the District Government does not keep a copy of that,
16 it is, in fact, issued at the time of the issuance of
17 the final building permit, because there isn't any
18 space for keeping those records.

19 So it would come as no surprise if, in
20 fact, you asked the Government to provide a copy of
21 that, for them not to be able to provide it. But as
22 a matter of routine, at the time of the application
23 for Certificate of Occupancy, when a valid building
24 permit exists, that Pre-Occupancy Data Sheet is issued
25 on the spot.

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1 COMMISSIONER MITTEN: Well, you know, I
2 don't know what relevance it really has for our
3 interpretation, but I think that, I mean just as a
4 general matter, if I were someone who was relying on
5 such a document (A) I would want a copy of it, so I
6 would know exactly what it said, whether it said it
7 was a document on which I could rely and, you know,
8 just to understand the validity of it.

9 CHAIRPERSON GRIFFIS: Can I interject?

10 COMMISSIONER MITTEN: Yes.

11 CHAIRPERSON GRIFFIS: Because I need to be
12 helped in understanding why we need to know this.

13 COMMISSIONER MITTEN: I just said I'm not
14 sure.

15 CHAIRPERSON GRIFFIS: Okay.

16 COMMISSIONER MITTEN: But I'm saying if I
17 were Mr. Tesfaye, for instance --

18 CHAIRPERSON GRIFFIS: Oh, sure.

19 COMMISSIONER MITTEN: -- I would want to
20 have a copy of it.

21 CHAIRPERSON GRIFFIS: Sure, sure.

22 COMMISSIONER MITTEN: To see if it had a
23 big asterisk saying not to be relied on for actual
24 occupancy purposes.

25 CHAIRPERSON GRIFFIS: Right.

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1 COMMISSIONER MITTEN: Or something like
2 that.

3 CHAIRPERSON GRIFFIS: Yes. No, I noted,
4 yes, absolutely your concern and direction. I just
5 wasn't sure how far we --

6 COMMISSIONER MITTEN: Right. I'm sorry if
7 I asked too many questions about it, but it took me
8 that long to figure out I didn't really need to know
9 about it.

10 MR. TAYLOR: But there is no actual
11 Certificate of Occupancy that has ever been issued to
12 you for that building?

13 MR. TESFAYE: For the six unit or what are
14 you --

15 MR. TAYLOR: For that building that has
16 been issued to you. There may have been some they
17 issued to other people in the past, none issued to
18 you.

19 MR. TESFAYE: No, I don't get any.

20 MR. BROWN: Which is the subject of this
21 appeal.

22 CHAIRPERSON GRIFFIS: There we are. Okay.

23 VICE CHAIR MILLER: I just want to ask a
24 follow-up question and maybe Mr. Bello would be
25 getting to this eventually, but just while we're on

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1 the subject, I'm kind of confused here with respect to
2 Mr. Crews' letter denying a Certificate of Occupancy
3 at the end of the project for process for use as a six
4 unit apartment building. How does that affect the
5 provisional Certificate of Occupancy for the three
6 units? In your opinion, would they still have a
7 Certificate of Occupancy for three units?

8 MR. BELLO: No, in fact, the provisional
9 Certificate of Occupancy is for the six units that the
10 building permit allowed. And contextually, it's
11 really to -- it's inherently the permanency to a
12 certain degree of the decision of the Zoning
13 Administrator in issuing a final Certificate of
14 Occupancy, once inspection is completed.

15 The notion here is not that provisional
16 Certificate of Occupancy allows you to occupy a
17 building, construction is still ongoing and there will
18 be inspections predicated on the issuance of the
19 building permit -- of the Certificate of Occupancy.

20 MR. TAYLOR: So I know we have leapfrogged
21 apparently into Mr. Bello's direct testimony. And if
22 you wish me to withhold my questions to a later time,
23 I will do that.

24 CHAIRPERSON GRIFFIS: Let's get into it.

25 MR. BELLO: Good afternoon, Mr. Chairman

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1 and Board Members, again. I'm sure that you have read
2 my submission to the record.

3 CHAIRPERSON GRIFFIS: Absolutely.

4 MR. BELLO: And basically, I have
5 summarized the issue before the Board into two issues,
6 two essential questions really. And as I outlined,
7 Issue No. 1, based on the Zoning Administrator's
8 denial of the Certificate of Occupancy, is one
9 whether, in fact, this use is a nonconforming use by
10 definition.

11 MR. TAYLOR: Objection for the record.

12 CHAIRPERSON GRIFFIS: What's the
13 objection?

14 MR. TAYLOR: That he is giving a legal
15 argument.

16 CHAIRPERSON GRIFFIS: What's the legal
17 argument?

18 MR. TAYLOR: He is interpreting what's at
19 issue in this case.

20 CHAIRPERSON GRIFFIS: Why does that make
21 it legal?

22 MR. TAYLOR: What I sense him having -- he
23 is trying to interpret what the issues are in this
24 case. He is trying to apply the law as he reads it to
25 those legal issues, which sounds an awful lot like he

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1 is acting as an attorney and if he is here as an
2 expert, maybe I'm unsure about just what his expert
3 status is. If he is -- say, it would be easy if he
4 was an expert in how to make two pipes fit together
5 and this was a plumbing case. But this feels very
6 much like a legal argument to me. I promised I wasn't
7 going to belabor it.

8 CHAIRPERSON GRIFFIS: Right.

9 MR. TAYLOR: But I have to --

10 CHAIRPERSON GRIFFIS: I just need to know
11 the substance of it.

12 MR. TAYLOR: -- make -- preserve
13 objections.

14 CHAIRPERSON GRIFFIS: Right. We're going
15 to need to dispense with them as they come up, as
16 there wouldn't be additional time, except in the case
17 presentation, to really address that. I don't find
18 this is stepping outside of the bounds of an expert
19 witness' testimony. He is here on the regulations,
20 the Zoning Regulations, that does allow him. In fact,
21 he has been offered to bring this analysis. It
22 doesn't step into the legal analysis of it.

23 MR. TAYLOR: Okay.

24 CHAIRPERSON GRIFFIS: But rather the
25 regulatory interpretation of it. Let's move ahead.

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1 MR. TAYLOR: Yes.

2 MR. BELLO: Well, thank you. And in
3 determining whether this use qualifies as a
4 nonconforming use, I would also delve into the issue
5 of whether the use has, in fact, been expanded. The
6 second point is whether the requirements of section
7 330.5(c) applies to pre-existing pre-'58 apartment
8 buildings in a nutshell.

9 I'm not -- as the Board is aware of what
10 the definition of a nonconforming use is, I'm not
11 going to read it into the record.

12 CHAIRPERSON GRIFFIS: Good.

13 MR. BELLO: I'm just going to make one
14 single point. And that point is that nowhere in the
15 Zoning Regulations can you still establish a use that
16 is deemed nonconforming in the underlying zone which
17 still permits that use to be established today. The
18 Zoning Regulations under 330.5(c) allows an apartment
19 house use to be established as a matter-of-right on
20 condition. But if we set that condition aside for a
21 minute, and I'll give an analogous argument, a single-
22 family dwelling is allowed in an R-1 Zone.

23 In that R-1 Zone, a single-family dwelling
24 is required to be constructed on a minimum lot size of
25 7,500 square feet or 5,000 square feet, depending on

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1 what zone you are in. In certain instances, you, of
2 course, can construct a single-family dwelling on a
3 substandard lot, either by coming before the Board of
4 Zoning Adjustment for a variance or not.

5 But in those instances, the argument that
6 minimum lot size requirements for an apartment house
7 use would render a use nonconforming is, in fact,
8 analogous and saying a single-family dwelling is
9 nonconforming, because it's constructed on a
10 substandard lot.

11 I think I have submitted on the record
12 that we only know of one definition for an apartment
13 house using the Zoning Regulations. And if we are to
14 follow the position of DCRA, the regulations would
15 actually provide two definitions for that use. One
16 for a pre-'58 apartment house, another for a post-'58
17 apartment house. We know that not to be the case.
18 There is only one single definition in the Zoning
19 Regulation for an apartment house use.

20 The second point is that the specific
21 language contained in 335.(c), which speaks to the
22 conversion of the building from ostensibly one use to
23 another. By definition, an apartment house use is any
24 building containing three units or more. So whether
25 you be three units or six units, you are an apartment

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1 house use by definition. There is no separate
2 definition for a 100 unit apartment building or a
3 three unit apartment building.

4 So, in fact, when you focus on the word or
5 the term "convert," no conversion occurs when an
6 apartment building, a pre-'58 apartment building is
7 going from three to six units. It remains the same
8 use under the zoning definition.

9 CHAIRPERSON GRIFFIS: So if I follow you,
10 just to make that point, it's a conversion of an
11 apartment building in differential from -- as opposed
12 to a flat or a single-family home. Is that correct?

13 MR. BELLO: That is correct. In fact,
14 when you are converting from a flat, a single-family
15 dwelling or commercial use even, if you are changing
16 use by definition under the zoning scheme, then you
17 are converting.

18 CHAIRPERSON GRIFFIS: Okay.

19 MR. BELLO: I believe the definition that
20 I provided in my submission for the word convert
21 really speaks to the point. To change something from
22 one use function or purpose as in to convert a forest
23 into a farm land, no conversion is occurring here.

24 I also submitted on the record that
25 sometimes the intent of the regulations can be

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1 garnered for the general provisions in the underlying
2 zone. And if one reads those general provisions under
3 3301, 330.1 through 330.4, I think that it should be
4 readily operated the concern of the Zoning Commission
5 at the time of the writing of this regulations was the
6 proliferation of conversions of existing stock of
7 buildings in the R-4 Zone into multiple unit buildings
8 or apartments, not an attempt to foreclose the right
9 of an apartment, pre-existing apartment house use to
10 be able to increase an intensity of use or for that
11 matter, to be able to construct an addition which
12 would comply with all of the requirements and
13 provisions of the Zoning Regulations.

14 I just wanted to take the time to read a
15 bit of those general provisions in the record.

16 CHAIRPERSON GRIFFIS: You're looking at
17 330. Is that correct?

18 MR. BELLO: 330, sir, yes. 330.1, these
19 are from the general provisions. "The R-4 District is
20 designed to include those areas now developed
21 primarily with row dwellings, but within which there
22 have been a substantial number of conversions of the
23 dwellings into dwellings for two or more families."
24 So, in fact, when the Zoning Commission was writing or
25 the writers of these regulations were writing, they

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1 were aware that, in fact, in mapping the R-4 Zone
2 there had been conversions into multiple dwelling
3 units.

4 And if we go to 330.2, it says "Very
5 little vacant land shall be included within the R-4
6 District." It says "It's primary purpose shall be the
7 stabilization of one-family dwellings." The way that
8 I believe that was envisioned was to control the
9 proliferation of conversions of buildings that had
10 already not been converted. Not to stifle the
11 existence of those that already had been converted.

12 And in 330.3, which, you know, people like
13 to famously hang their hat on about the R-4 Zone not
14 being primarily designed as a multiple unit building,
15 when it says "The R-4 District shall not be an
16 apartment house district as contemplated under the
17 general residents R-5 Districts," it really speaks to
18 new construction of apartment buildings, which is
19 permitted in R-5 Districts by special exception in R-
20 5-A Zone, and as a matter-of-right in other R-5
21 Districts.

22 So in order to construct a new apartment
23 building here in the R-4 Zone, you will have to come
24 before the Board. You couldn't construct or establish
25 a multiple unit or apartment house use in the R-4 Zone

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1 as a matter-of-right under a new construction scheme.

2 Now, I want to speak a little bit on the
3 issue of whether the minimum lot area requirements
4 would then apply to pre-'58 apartment buildings
5 seeking to increase the intensity of use by increasing
6 the number of units. I think we will agree that if we
7 cannot reach the threshold of deeming an apartment
8 house use a nonconforming use in the zone, then the
9 expansion argument is out the window. It's clearly
10 out the window.

11 So the only remaining argument would be
12 that the Regulations of the Zoning Commission intent
13 for the minimum lot size requirements to be applicable
14 to pre-'58 apartment buildings, that will be the only
15 single question that remains to be answered.

16 I think we submitted on the record that,
17 in fact, Zoning Commission Order No. 211 speaks
18 specifically to that issue. And the Zoning Commission
19 found, as I have stated in my submission, that, in
20 fact, the history of interpretation of the Zoning
21 Administrator's office going back to May 12, 1958. I
22 think I was 1 year-old at that time. So that was
23 that.

24 Section 40 -- the minimum lot size
25 requirements of 401.3 do not apply to pre-existing

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1 apartment house use. That interpretation was affirmed
2 in a BZA case. The affirmation of that history of
3 interpretation is what led to the Zoning Commission
4 review of that section. And in fact, there are
5 certain facts that the Zoning Commission established
6 in that hearing.

7 One is that the Zoning Administrator's
8 office has historically interpreted this section
9 properly. Two, the Zoning Commission found that the
10 intention of the regulations was not to allow other
11 type of multiple unit dwellings, other than apartment
12 houses, to convert without being subject to that
13 minimum lot size requirement.

14 So what does Order No. 211 do? It amended
15 the text of 330.5(c) by substituting the word multiple
16 -- by substituting the word apartment house for
17 multiple dwelling. Prior to that order, the language
18 of 330.5(c) was that all pre-'58 buildings could
19 convert to multiple dwellings.

20 Now, by definition, what are multiple
21 dwellings? Multiple dwellings include rooming houses,
22 tenement houses, bachelor apartments, all these other
23 types of multiple uses, they do not qualify as an
24 apartment house. So even though the Zoning
25 Administrator's office have expansively applied this

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1 and rightfully upon that time, allow all types of
2 multiple dwelling units to be able to convert to
3 apartment houses if they met the requisite lot size
4 requirement.

5 The Zoning Commission found that it was
6 not the intent of the regulations to allow those other
7 type of multiple dwelling units to convert other than
8 pre-'58 apartment buildings. And so it amended the
9 regulations accordingly.

10 I will spend just a second to read
11 verbatim the text out of the Zoning Commission order.
12 It says "The Commission finds that the intent of the
13 Zoning Regulations was not only to apply the 900
14 square foot criteria to conversions of buildings,
15 which are single-family dwellings or plats, but also
16 to apply such criteria to conversions of buildings
17 which are multiple dwellings, (for example, rooming
18 houses.), to apartments.

19 The Commission further finds that the
20 present regulations as written, that was prior to this
21 amendment, are being properly interpreted and that the
22 regulations should be amended to specifically apply to
23 900 square feet to such conversions. Such conversions
24 speak to the conversions up until that time that
25 involve other type of multiple dwellings, other than

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1 apartment house."

2 CHAIRPERSON GRIFFIS: And what were you
3 reading from there?

4 MR. BELLO: This is an excerpt from the
5 Zoning Commission Order 211.

6 CHAIRPERSON GRIFFIS: 211.

7 MR. BELLO: Yes.

8 CHAIRPERSON GRIFFIS: Okay.

9 MR. BELLO: As contained in my submission.
10 There's the part.

11 CHAIRPERSON GRIFFIS: Can I see that?

12 COMMISSIONER MITTEN: Is it time for
13 questions?

14 MR. BROWN: No, he is almost finished.

15 COMMISSIONER MITTEN: Oh, okay.

16 MR. BELLO: Although the parking issue is
17 not a part of the base for the denial of the
18 Certificate of Occupancy by the Zoning Administrator,
19 since it was raised as an issue in the ANC appeal, I
20 thought it prudent to just perhaps shed light on that
21 a little bit.

22 CHAIRPERSON GRIFFIS: I don't tend to
23 agree unless we can be persuaded otherwise. As now,
24 you are bringing the substance of the issue to fall
25 back on something that actually was found not to go

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1 forward, I don't find germane. Unless others have --

2 COMMISSIONER MITTEN: Well, I think --

3 CHAIRPERSON GRIFFIS: Ms. Mitten?

4 COMMISSIONER MITTEN: Well, I don't think
5 it's germane right now, but, I mean, if the Zoning
6 Administrator were to find, which he did not, as a
7 basis for his denial of the Certificate of Occupancy
8 that there was some parking issue, then that would
9 have to be taken up at a later time, I think.

10 MR. BROWN: And, Mrs. Mitten, that's my
11 concern and unfortunately it has become kind of a
12 slippery slope practice where an issue will be
13 resolved as we're resolving the four corners of this
14 issue today. And then the Zoning Administrator's
15 office will turn around and then raise this related
16 issue like parking, so that the --

17 CHAIRPERSON GRIFFIS: I understand that,
18 but I don't think we can take almost insurance appeals
19 or insurance elements under all appeals to make sure
20 that we go through. Frankly, I don't think I would
21 put the requirement or the weight of the DCRA and the
22 Zoning Administrator present today to address that
23 issue, if it wasn't actually a decision that was, an
24 official decision, made that is appealable.

25 MR. BROWN: I understand. Still

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1 recognizing my ongoing concern looking for a global
2 resolution and not a nickel and dime approach.

3 CHAIRPERSON GRIFFIS: Absolutely. Okay.

4 COMMISSIONER MITTEN: I think it's not
5 unlike sometimes when we get self-certified
6 applications, we only grant the relief that has been
7 requested. If there is other stuff, it's not a
8 blanket, you know, like, okay, you've been blessed.
9 So we talk about parking, there could be something
10 else, and I wouldn't want to give the impression that
11 there is something that we all -- you know, that there
12 was some understanding that we have adjudicated every
13 possible issue. So I would like to just deal with the
14 ones that are in front of us, if we could.

15 CHAIRPERSON GRIFFIS: Right. Agreed.
16 Very well. Okay. Anything else?

17 MR. BELLO: Just one more I'll talk about.
18 Okay. As to the denial of the Certificate of
19 Occupancy, if I may, I'm just going to go ahead and
20 read the text of section 3203.11. It says that "This
21 subsection shall govern the issuance of a Certificate
22 of Occupancy for the use of a structure or part
23 thereof if the establishment of the use is dependent
24 upon the erection, construction, conversion or
25 alteration of the structure or part thereof."

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1 Clearly, the need -- I should refrain from
2 the word, the use of the word, convert. The need to
3 reconfigure the existing apartment building to a six
4 unit building requires a building permit. That is
5 without argument. So this section is really written
6 to almost guarantee that once the Zoning Administrator
7 issues a building permit and approves the use under
8 the zoning scheme, that a Certificate of Occupancy
9 shall be issued, unless the building permit is either
10 -- vacated by the Building Codes' official, even if
11 it's for zoning reasons.

12 So it says -- it has conditions provided.
13 (A) "The use authorized shall be designated as a
14 proposed use of the time of the application for the
15 building permit on which the use depends." There is
16 no argument here that the building permit that Mr.
17 Tesfaye applied for clearly indicated the use to be
18 established as a six unit apartment building.

19 "The building permit shall be issued in
20 compliance with section 3202." 3202 only speaks of
21 the necessary documentation that would allow the
22 Zoning Administrator to be able to make a
23 determination and that determination was made.

24 "At the time of the issuance of a building
25 permit that is required by this subsection, the

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1 proposed use shall be designated in the provisional
2 Certificate of Occupancy." As testified a little
3 earlier, that provisional Certificate of Occupancy is
4 in the form of a Pre-Occupancy Data Sheet.

5 "Indeed, the use designated in provisional
6 Certificate of Occupancy shall comply with all
7 provisions of this title in effect on the date on
8 which the building permit required by this subsection
9 is issued." So all the elements for issuing a
10 Certificate of Occupancy have been complied with by
11 the applicant. The fact that the Zoning Administrator
12 would deny a Certificate of Occupancy that is the
13 natural culmination of a building permit process
14 without vacating a building permit process in itself
15 is a judgment in error.

16 And that will be my testimony, sir.

17 CHAIRPERSON GRIFFIS: Excellent. Thank
18 you. Questions?

19 COMMISSIONER MITTEN: I had a few
20 questions. I just want you to help me with my reading
21 of Zoning Commission Order 211. As I understand 211--
22 they start in to the order and these orders are so
23 short, I wish they were longer, because often there
24 seems to be things left unsaid. But it says that, in
25 the second paragraph, I think what they are saying is

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1 as you, I think, articulated, Mr. Bello, which is
2 there was this notion or it was permitted in the
3 ordinance that these conversions could take place. It
4 wasn't narrow to apartment house. It was broader to
5 multiple dwellings.

6 And that the Commission wanted to clarify
7 the intent so that the 900 square foot criteria
8 applied to apartment houses and not these other
9 things. Is that right?

10 MR. BELLO: Not at all.

11 COMMISSIONER MITTEN: Okay.

12 CHAIRPERSON GRIFFIS: Go ahead.

13 COMMISSIONER MITTEN: Help me.

14 MR. BELLO: Let me just try to read what
15 the second paragraph is.

16 COMMISSIONER MITTEN: Okay. Well, tell me
17 what the second paragraph says. What does it mean to
18 you?

19 MR. BELLO: Well, here in pertinent part
20 is what it says. "This provision has been -- well,
21 let me just read it all. "The present Zoning
22 Regulations currently permit an existing building to
23 be converted to a multiple dwelling, provided that
24 there is 900 square feet of lot area for each dwelling
25 unit proposed to be created."

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1 COMMISSIONER MITTEN: Right. So broad
2 multiple dwelling, not narrow apartment house.

3 MR. BELLO: Exactly.

4 COMMISSIONER MITTEN: Okay.

5 MR. BELLO: "This provision has
6 consistently been interpreted such that it is not
7 applied to multiple dwellings already in existence in
8 1958, since changing such buildings to apartments
9 would not be a conversion to a multiple dwelling."

10 COMMISSIONER MITTEN: Okay. Let me just--

11 MR. BELLO: All right?

12 COMMISSIONER MITTEN: Let me just be with
13 that for a second. Okay. Okay. Okay. Okay. Help
14 me understand this part of it, which is, I think, your
15 historical view and the sections, the introductory
16 sections of R-4 that you quoted was that there seemed
17 to be some kind of proliferation of conversions and
18 they were trying to -- to apartment houses, and they
19 were trying to control that by imposing some kind of
20 requirement. And that's what having the minimum land
21 area per apartment was about.

22 MR. BELLO: No, I believe my statement was
23 that in mapping the R-4 Zone --

24 COMMISSIONER MITTEN: Yes.

25 MR. BELLO: -- that the Zoning Commission

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1 recognized that there had been, one, the existence of
2 multiple dwelling units in the R-4 Zone in the areas
3 in which they were mapping them.

4 COMMISSIONER MITTEN: Okay.

5 MR. BELLO: And then also conversions had
6 occurred. But in controlling, you know, the
7 proliferation of future conversions, it set this
8 minimum lot area requirement for other buildings that
9 were not already multiple unit dwellings as of that
10 date.

11 COMMISSIONER MITTEN: Okay. Maybe I was
12 just going for a broad notion when I said that, but,
13 okay. I accept what you said. But one of the things
14 that the Commission says further in this Order 211,
15 this is the last sentence in the third paragraph is
16 "The Commission finds that such a regulation would
17 prevent excessive density in the R-4 District and
18 would tend to help stabilize those areas of the
19 District where the R-4 Zone is concentrated.

20 MR. BELLO: Correct.

21 COMMISSIONER MITTEN: Okay. Rather than
22 me guess, what does that mean to you?

23 MR. BELLO: Well, to me, what it means is
24 that the broad interpretation which had been
25 historical in the Zoning Administrator's office which

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1 allowed all types of multiple dwelling units to be
2 able be convert if they were pre-existing, the pre-
3 '58, and not being subject to the minimum lot size
4 requirement, that it separated that issue for the
5 Zoning Administrator and said we believe that the
6 intent was always not to allow all types of multiple
7 dwellings to be able to convert without being subject
8 to that minimum lot size requirements, but only those
9 that were apartment buildings.

10 COMMISSIONER MITTEN: I'm going to have to
11 re-read this testimony, because there is a little
12 slippage. I'm not fully understanding your point.
13 But my point would be, and I would ask you to respond
14 to it, if there were an opportunity to interpret
15 conversion, which I want to talk to you about in a
16 minute, from -- if it did relate to intensity,
17 wouldn't that go to the issue of preventing excessive
18 density?

19 MR. BELLO: No, I don't think you can
20 reach that conclusion without first --

21 COMMISSIONER MITTEN: Okay.

22 MR. BELLO: -- establishing the premises
23 of the order.

24 COMMISSIONER MITTEN: Okay.

25 MR. BELLO: The premises of the order was

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1 that in allowing all types of multiple unit buildings
2 through the floodgate to be converted without being
3 subject to this requirement, just because they were
4 pre-existing, they predated the effective date of the
5 Zoning Regulations, that, one, they concluded that
6 they were rightfully and historically being
7 interpreted. But they made it more restrictive by
8 eliminating other types of multiple unit dwellings,
9 except an apartment house.

10 COMMISSIONER MITTEN: Okay. I'm just
11 going to leave that alone. I'm going to come back to
12 it. I'm going to read it and I'm going to read this
13 again. Let me ask you this. In the way that the
14 ordinance is written and the way that it is
15 interpreted, if you have a building that exists prior
16 to 1958 and you want to convert it to an apartment
17 house in R-4, in making the conversion is the control
18 the 900 square feet of land per apartment?

19 MR. BELLO: If you are not already a pre-
20 '58 apartment house. That's correct.

21 COMMISSIONER MITTEN: Okay. So in the
22 interpretation whether you -- I'm using the conversion
23 because there's a difference of opinion, I think with
24 at least the DCRA, about what constitutes a
25 conversion. But let's say you have a building that is

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1 of ample size that it could house many apartments, but
2 it only has enough land -- say it could house very
3 easily. It is tall and it's on a small lot. It could
4 house very easily 10 units. It's got -- you know,
5 it's large. But it's only got enough land for four.

6 So someone comes in and they say well,
7 I've got this -- maybe it's just a big house and they
8 want to convert it. So they come in and they ask for
9 four and they get four. And then they -- there is
10 nothing stopping them from then ramping that up to 10,
11 because they are now an apartment house. What is the
12 control from taking that with the 900 square feet and
13 that limitation, getting, you know, your ticket
14 punched for okay, now, I'm an apartment house. What
15 stops somebody from then basically what I think would
16 be exploiting the ordinance or exploiting the
17 interpretation to then getting more units than would
18 have been intended in the conversion?

19 MR. BELLO: One would hope that the Zoning
20 Administrator is doing his job diligently and
21 investigating the history of the establishment of that
22 use. The distinction is whether you existed prior to
23 the effective date of the Zoning Regulation or that
24 you converted after. If you convert a building after
25 May 12, 1958, based on the minimum lot size that you

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1 are able to convert to, you cannot come back for a
2 second bite at the apple and say oh, guess, what I'm
3 already an apartment building and I want to go up
4 more.

5 COMMISSIONER MITTEN: Um-hum.

6 MR. BELLO: If the Zoning Administrator
7 does his job, then he will be able trace the first
8 time of the establishment of that use to post-'58.

9 COMMISSIONER MITTEN: Okay.

10 MR. BELLO: And that will be enough for
11 him to deny that application.

12 COMMISSIONER MITTEN: Okay. And so now
13 just tie it all down for me. What specific use was
14 established for this property prior to 1958? Is it
15 apartment house specific number of units or just
16 apartment house? What does the Certificate of
17 Occupancy say that established the pre-'58 use?

18 MR. BELLO: I think even DCRA is in
19 agreement that the apartment house use of this
20 property --

21 COMMISSIONER MITTEN: I'm just asking you
22 a real specific question.

23 MR. BELLO: And I'm trying to answer it,
24 Ms. Mitten.

25 COMMISSIONER MITTEN: Okay.

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1 MR. BELLO: I believe it is a pre-'58
2 record of an apartment house use.

3 COMMISSIONER MITTEN: Do we have that in
4 the record? Can somebody point me to that?

5 MR. BROWN: In one of my submissions, and
6 I think it's my original cross-appeal.

7 MR. TAYLOR: It's Cross-Appeal No. 2.
8 It's probably --

9 MR. BROWN: Yes.

10 MR. TAYLOR: Exhibit 3.

11 MR. BROWN: That's right. There's a copy
12 of an April 14, 1967 C of O and beyond that a July 15,
13 1964 C of O for the property both referencing
14 apartment house.

15 COMMISSIONER MITTEN: Okay. Okay. I'm
16 sorry. I'm in No. 2 and I see Certificate of
17 Occupancy dated 1967 and then one in '64.

18 MR. BROWN: It should be right behind it.

19 COMMISSIONER MITTEN: I don't have that.

20 MR. BROWN: Okay.

21 COMMISSIONER MITTEN: I have an
22 application for a building permit. I have one dated
23 '64 and one dated '67, but nothing that predates that.
24 Is there one?

25 MR. BELLO: Not physically, but I can

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1 address that issue based on my experience, Ms. Mitten.
2 I believe probably about seven years ago DCRA started
3 to scan old records of Certificate of Occupancy into
4 computer reads. I think you would find the records
5 over there and I hate to say they are largely
6 inadequate. There are several ways that the Zoning
7 Administrator can establish the pre-existence of a use
8 dating back prior to May 12, 1958.

9 One is the Base Map and the Base Map
10 actually is indicative of every use by identification,
11 if it existed as of May 12, 1958. So while there may
12 be no physical record here, and I venture to say, in
13 fact, if we trace the -- if DCRA is able to provide or
14 they have on record the applications that are
15 attendant to the Certificate of Occupancy, tracing
16 that history back to May, prior to May 12, 1958, I
17 think can be established very easily.

18 COMMISSIONER MITTEN: Well, I think
19 somebody needs to do that, because if the assertion
20 is, and if I understood you correctly and there is at
21 least part of our conversation, I think, I understood
22 very clearly, which is in your view, if the apartment
23 house existed, validly existed prior to 1958, then
24 there is no control over the number of units in the
25 apartment house related to land area. Is that

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1 correct?

2 MR. BELLO: That's fair. That's correct.

3 COMMISSIONER MITTEN: Okay. So it's very
4 important then that we establish whether or not there
5 was a valid apartment house use prior to 1958.

6 MR. BROWN: Mrs. Mitten, if I could refer
7 you to Mr. Crews' letter of March 22, 2006 where he
8 denies the C of O, where in the second paragraph he
9 writes "Occupancy records indicate that a previous C
10 of O was issued authorizing a nonconforming use as a
11 three unit apartment building." This use predated the
12 current Zoning Regulations, which is May 12, 1958, and
13 goes on. So Mr. Crews has documented or, in fact,
14 affirmed that the three unit building is a --

15 COMMISSIONER MITTEN: So you want us to
16 rely on Mr. Crews for some things, but not for other
17 things?

18 MR. BROWN: He --

19 COMMISSIONER MITTEN: I'm just saying it,
20 because I think it's important and I don't think Mr.
21 Crews' letter establishes the facts of it. And, you
22 know, we're here and we're supposed to make an
23 interpretation and I think all the facts that bear on
24 that interpretation need to be in the record. And so
25 if anybody can provide us with something, even if --

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1 MR. BROWN: Okay.

2 COMMISSIONER MITTEN: If it's not the
3 Certificate of Occupancy, if it's the kind of evidence
4 that Mr. Bello says that the Zoning Administrator
5 would rely on in the absence of a valid Certificate of
6 Occupancy issued by the Government, then let's see it.

7 VICE CHAIR MILLER: I have to say this
8 would be one instance in which it would be very
9 helpful if Mr. Crews was here, but perhaps DCRA can
10 answer that, because it appears that Mr. Crews was
11 relying on records, occupancy records indicate.

12 MR. TAYLOR: Well, I guess, it would be
13 appropriate then to ask Mr. LeGrant if he is privy to
14 what documents Mr. Crews was relying upon.

15 MR. LeGRANT: Well, my review of the
16 record has found only what I think was provided to the
17 Board, the Certificates of Occupancy in 1964 and 1967
18 that state it is an apartment house.

19 MR. TAYLOR: So do you have specific
20 knowledge of what Mr. Crews meant?

21 MR. LeGRANT: No.

22 CHAIRPERSON GRIFFIS: Where else did you
23 investigate to find Certificate of Occupancies for
24 this?

25 MR. LeGRANT: I simply looked at the

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1 records that we have that have been submitted to the
2 Board in regards to the use shown in those two
3 Certificates of Occupancy.

4 CHAIRPERSON GRIFFIS: Okay. So did you at
5 all look into the records at DCRA to see if there was
6 any additional Certificate of Occupancy?

7 MR. LeGRANT: I did not.

8 CHAIRPERSON GRIFFIS: Okay.

9 MR. BROWN: And putting aside that, if I
10 could, the documentation question and we can certainly
11 attempt to and I think the Office of Zoning has a Base
12 Map where you keep the official records of the Zoning
13 Map, which we have one in our office that we can
14 certainly provide that. But putting aside that and
15 accepting Mr. Crews at his word that it existed pre-
16 1958 --

17 MR. TAYLOR: Excuse me. Mr. Brown, he
18 does not say pre-'58, does he?

19 CHAIRPERSON GRIFFIS: Yes, he does.

20 MR. BROWN: Yes, he does.

21 CHAIRPERSON GRIFFIS: The second
22 paragraph.

23 MR. BROWN: But leaving that aside for a
24 second, we're here and we need to focus in on the
25 rule, for instance, where -- the interpretation, the

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1 rule of the regulations and at least focus in on that
2 for purposes of our understanding today. And if we
3 need to document the record --

4 COMMISSIONER MITTEN: Well, I'm trying to
5 say, okay, if I think Mr. Bello is 100 percent correct
6 then there has to be something that establishes, there
7 has to be a document or there has to be sort of like
8 a trail of bread crumbs that establishes to the
9 Board's satisfaction that the apartment house use
10 existed pre-1958.

11 All I'm asking for is for someone -- and
12 I would think it would be good for your side, that
13 would be something that your side would want to put in
14 the record, something to convince us that that's true
15 because then the rest of your argument falls nicely
16 into place. But if you don't start there, then the
17 rest of it is -- you know, there's a question mark.

18 MR. BROWN: And the same difficulty that
19 apparently the city has had, we have had. The records
20 that we have found we have given you. Now, we can go
21 back and look at those alternative sources to provide
22 that, but based on Mr. Crews' letter is wasn't an
23 issue. And just in the same token that you didn't
24 want to go beyond the question of parking, I think to
25 limit ourselves to the issues that Mr. Crews has

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1 raised, if that's how we need to --

2 COMMISSIONER MITTEN: I think you're
3 trying to -- I think you're stretching a little bit to
4 go there because this is very germane to the issue
5 that was raised by Mr. Crews in denying the appeal.
6 Parking is, you know, over here. This is right on
7 point. This is definitely in the neighborhood of what
8 we're talking about.

9 CHAIRPERSON GRIFFIS: But --

10 COMMISSIONER MITTEN: So let's not --

11 CHAIRPERSON GRIFFIS: But it's not
12 contested. I think that's what is being said.

13 MR. BROWN: Yes. I mean, putting it in an
14 overly legalistic term, he has made an admission.

15 CHAIRPERSON GRIFFIS: Right.

16 MR. BROWN: And I don't challenge that
17 admission. Now, I provided information more so than,
18 quite frankly, he has provided, the best information
19 I have available, but I don't have the same access to
20 the records, but it's not an issue in Mr. Crews' eyes.
21 He certainly hasn't raised it.

22 CHAIRPERSON GRIFFIS: Good, and I think
23 we're clear on that. We're clear on the letter and
24 Ms. Mitten is bringing up a point though that needs to
25 be addressed. So obviously we're going to keep the

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1 record open for additional filings on that to see if
2 there's additional documentation for the pre-1958
3 Certificate of Occupancy and you have already
4 indicated that there is one more resource to look at
5 that isn't necessarily in the record.

6 MR. BROWN: And we will redouble our
7 efforts.

8 CHAIRPERSON GRIFFIS: Excellent. Okay.
9 Follow-up questions? Yes, Ms. Miller?

10 VICE CHAIR MILLER: Okay. I think I just
11 want to zero in. Basically, what is at issue is
12 whether the ZA made an error and the error alleged is
13 with respect to 401.3 requiring a minimum lot, a
14 minimum 900 square feet per unit application to this
15 building and that the argument is, as I understand it,
16 that 401.3 doesn't apply because, in fact, a
17 conversion didn't take place at all, because it was an
18 apartment building and continued to be an apartment
19 building. And, therefore, that provision in 401.3
20 regarding conversions to apartment houses does not
21 apply to this situation. Is that right?

22 CHAIRPERSON GRIFFIS: A pre-1958.

23 VICE CHAIR MILLER: Because it was pre-
24 1958.

25 MR. BELLO: That's correct.

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1 VICE CHAIR MILLER: Because it was pre-
2 1958 and because it's not a conversion, because it's
3 the same use. It was apartment house to apartment
4 house as opposed to a single-family house dwelling to
5 apartment house or whatever. Is that right?

6 MR. BELLO: That's correct, Ms. Miller.

7 VICE CHAIR MILLER: And could you just
8 confirm to me how we know that interpretation is
9 correct that this is not a conversion under 401.3? Is
10 it because of 211, Commission Order 211?

11 MR. BELLO: Well, it's not only because of
12 Zoning Commission Order 211. It actually involved --
13 I think the amendment under 211 was actually triggered
14 by an appeal case before the Board of Zoning
15 Adjustment, and that case centered on this very
16 question.

17 And the Board of Zoning Adjustment
18 affirmed the history of interpretation of the Zoning
19 Administrator's office and baited the Zoning
20 Commission to do something about it because the BZA
21 Members felt that there probably was some merit in
22 controlling for density purposes the proliferation of
23 conversions.

24 So if the Zoning Commission wanted to go
25 all the way, they certainly had the opportunity to do

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1 so in this order, but I think where they went is very
2 clear.

3 CHAIRPERSON GRIFFIS: Other questions?

4 VICE CHAIR MILLER: Well, my other
5 question just was you cited some Zoning Regulation
6 about once you get the building permit that you're
7 almost guaranteed to get the Certificate of Occupancy
8 or something to that effect, and I just missed the
9 regulation you were citing.

10 MR. BELLO: 3202.

11 CHAIRPERSON GRIFFIS: 3203.11.

12 MR. BELLO: 3203.11, I'm sorry.

13 CHAIRPERSON GRIFFIS: 3203.11.

14 VICE CHAIR MILLER: What?

15 CHAIRPERSON GRIFFIS: 3203.

16 VICE CHAIR MILLER: Yes.

17 CHAIRPERSON GRIFFIS: .11.

18 VICE CHAIR MILLER: Thank you.

19 CHAIRPERSON GRIFFIS: Other questions from
20 the Board? Cross?

21 MR. TAYLOR: I have no questions for him
22 at this time.

23 CHAIRPERSON GRIFFIS: Okay. Anything
24 else, Mr. Brown?

25 MR. BROWN: No, that concludes our case in

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1 chief subject to our right to closing arguments and
2 rebuttal.

3 CHAIRPERSON GRIFFIS: Good. Let me assess
4 time for your case presentation. How much time do you
5 think you will need?

6 MR. TAYLOR: I guess no more than what the
7 applicant --

8 COURT REPORTER: Use the microphone.

9 MR. TAYLOR: I'm sorry. I'm sure it will
10 take no longer than the applicant took. Since --

11 CHAIRPERSON GRIFFIS: I will afford you
12 all the time you want. However, I just want to get
13 just an estimate.

14 MR. TAYLOR: I will endeavor to be as
15 brief as possible and I would like to have it
16 concluded within a half hour.

17 CHAIRPERSON GRIFFIS: Excellent. I think
18 that's appropriate. Do we want to just take two
19 minutes and stretch your legs and come back to that?
20 Let's do. Let's take -- and we will be fast, but
21 let's stand up for a minute.

22 MR. TAYLOR: Okay. Let's see for a minute
23 here.

24 (Whereupon, at 7:26 p.m. a recess until
25 7:36 p.m.)

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1 CHAIRPERSON GRIFFIS: Actually, we were
2 committed to concluding tonight, so I'm a little
3 concerned about ANC then. Are we assuming that they
4 aren't making a case in this?

5 MS. BAILEY: Yes, Mr. Chairman.

6 CHAIRPERSON GRIFFIS: Did he give you any
7 indication?

8 MS. BAILEY: The ANC has left. They told
9 me that they were going to leave so --

10 CHAIRPERSON GRIFFIS: Okay. What do we do
11 with that?

12 VICE CHAIR MILLER: They didn't ask that
13 the record remain open or anything like that?

14 MS. BAILEY: No, they didn't specifically
15 ask that the record remain open for them to file
16 anything, no.

17 VICE CHAIR MILLER: Okay.

18 CHAIRPERSON GRIFFIS: Okay. A little
19 patience would have served, but there it is. Let's
20 move ahead.

21 MR. TAYLOR: Thank you, Mr. Chairman.
22 From the point of view of the District of Columbia,
23 it's regrettable that we weren't able to conclude here
24 in about 10 minutes.

25 We believe this is an extremely simple

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1 case that if beyond the plain language of the
2 regulations without any particular spin applied to
3 them and based on the precedence of this body, which
4 are subsequent to any precedent which was rightfully
5 or wrongfully cited by Mr. Tesfaye, this is a very
6 simple case where your guidance mandates that the
7 Certificate of Occupancy not be granted.

8 The primary case in that regard would be
9 the appeal of Marsel Elliott, which I suspect you have
10 in front of you.

11 CHAIRPERSON GRIFFIS: Application No.
12 15657.

13 MR. TAYLOR: That is correct. And I'm
14 going to ask Mr. LeGrant to walk through the
15 application of the Office of the Zoning Administrator
16 of that decision.

17 CHAIRPERSON GRIFFIS: I'm not -- of the
18 1992 decision?

19 MR. TAYLOR: Yes, how that was applied to
20 the instant matter.

21 CHAIRPERSON GRIFFIS: Okay. That makes
22 sense.

23 VICE CHAIR MILLER: How --

24 COMMISSIONER MITTEN: Can I just ask?

25 VICE CHAIR MILLER: Yes.

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1 COMMISSIONER MITTEN: What is the exhibit
2 number or what is it attached to?

3 CHAIRPERSON GRIFFIS: Oh, you didn't
4 provide the actual case in the record, did you?

5 MR. TAYLOR: I don't believe I did.

6 CHAIRPERSON GRIFFIS: Right.

7 MR. TAYLOR: Your decisions are not
8 automatically a part of your record?

9 CHAIRPERSON GRIFFIS: No, not physically.
10 We have -- we were provided a copy because we asked --

11 MR. TAYLOR: Oh.

12 CHAIRPERSON GRIFFIS: -- our attorney to
13 provide those.

14 COMMISSIONER MITTEN: Oh, okay, great.

15 CHAIRPERSON GRIFFIS: I'm sorry you didn't
16 have it.

17 COMMISSIONER MITTEN: I just wanted to be
18 sure that I had everything that everyone else does.

19 CHAIRPERSON GRIFFIS: Do you have a copy?

20 UNIDENTIFIED SPEAKER: I have a copy.

21 CHAIRPERSON GRIFFIS: Okay.

22 COMMISSIONER MITTEN: I'm ready.

23 CHAIRPERSON GRIFFIS: Making copies.

24 VICE CHAIR MILLER: Can I ask what is
25 going to happen here? I don't really understand. Mr.

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1 -- it's LeGrant?

2 MR. LeGRANT: Yes.

3 VICE CHAIR MILLER: Yes. How is it you're
4 going to walk us through this order? It's not like
5 you weren't -- you didn't issue the order.

6 MR. LeGRANT: Well --

7 VICE CHAIR MILLER: I mean, it's a BZA
8 order. You weren't involved with this order, were
9 you?

10 MR. LeGRANT: Not with the order. I'm
11 going to speak to the application of the ordinance and
12 the bases that -- my understanding of the application
13 of the ordinance on this case, just pure application
14 of the Zoning Regulations and the deficiencies of this
15 application and why the Zoning Administrator denied
16 the application of the Certificate of Occupancy, and
17 I will go to those three points.

18 VICE CHAIR MILLER: Oh, okay. I thought
19 he meant you were going to walk through this Elliott
20 case. Okay.

21 MR. LeGRANT: Okay.

22 VICE CHAIR MILLER: I misunderstood.
23 Thank you. Sorry.

24 MR. LeGRANT: So the basic deficiency of
25 this case is that there is a minimum lot area of 900

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1 square feet that we believe applies to the conversion.
2 It's section 401. The lot size in question is 1,710
3 square feet. Six units require 5,400 square feet or
4 six times 900 square feet. It's the basic density
5 issue here. The second point is that the parking
6 space dimensions of the --

7 MR. BROWN: Excuse me. We have already
8 excluded that issue from -- see, that was --

9 CHAIRPERSON GRIFFIS: Your mike.

10 MR. BROWN: Oh, excuse me. That was my
11 concern.

12 CHAIRPERSON GRIFFIS: Understood.

13 MR. BROWN: And that's why I raised the
14 issue.

15 CHAIRPERSON GRIFFIS: But we don't have a
16 second concern on parking issues in this.

17 MR. LeGRANT: Okay. Okay.

18 CHAIRPERSON GRIFFIS: Let's stick to 401.

19 MR. BROWN: Okay. But for the record, it
20 does note that the Zoning Administrator's office and
21 perhaps not Mr. LeGrant, but having not disclosed the
22 issue previously in their letter, it's on his mind.
23 And so it does give pause for concern which
24 unfortunately may lead to a return visit, but we'll --

25 CHAIRPERSON GRIFFIS: How much more do you

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1 know of that's on the mind of the Zoning
2 Administrator? Indeed. I understand. And I just
3 don't know how to deal with it. I mean, it just opens
4 us up to something we can't --

5 MR. BROWN: I agree with you and I
6 understand, and I'm just venting my frustration.

7 CHAIRPERSON GRIFFIS: Okay.

8 MR. BROWN: And we'll move on.

9 CHAIRPERSON GRIFFIS: That's what we're
10 here for.

11 MR. LeGRANT: Okay.

12 CHAIRPERSON GRIFFIS: Or maybe not.

13 MR. LeGRANT: So the deficiencies of the
14 parking space dimensions and the driveway grade are
15 excluded?

16 CHAIRPERSON GRIFFIS: Absolutely.

17 MR. LeGRANT: Okay.

18 CHAIRPERSON GRIFFIS: Wow, what was that?

19 MR. LeGRANT: Those were aspects that the
20 -- my reading of the plans and the diagrams, the
21 inspection report spoke to those issues, but I
22 won't --

23 CHAIRPERSON GRIFFIS: But there has been
24 no official action from the Zoning Administrator or
25 would we anticipate one at this late date on the

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1 issuance of the permit or the issuance or non-issuance
2 of the Certificate of Occupancy? So for us it's a not
3 germane and jurisdictional question.

4 MR. LeGRANT: Okay.

5 CHAIRPERSON GRIFFIS: So we just stick to
6 the 401.3.

7 MR. LeGRANT: 401.3.

8 CHAIRPERSON GRIFFIS: 4 or whatever
9 section you want to rely to, but that is obviously
10 what Mr. Crews cites in his letter for not issuing the
11 Certificate of Occupancy.

12 MR. LeGRANT: Yes.

13 CHAIRPERSON GRIFFIS: As well as 2000 and
14 something.

15 MR. LeGRANT: I don't know. Do you have
16 any further questions of me?

17 MR. TAYLOR: Okay. Do you feel
18 comfortable? Well, I can do that as part of our
19 summation. Let me go to some other areas then. We'll
20 do it this way. If you would, I'm going to ask you to
21 take a look at Certificate of Occupancy 60942, the one
22 that was issued in 1967.

23 And what portion, if not all of the
24 building, is this -- is covered by this Certificate of
25 Occupancy?

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1 MR. LeGRANT: This Certificate of
2 Occupancy states that permission is granted to United
3 Church of God Incorporated to use the first and second
4 floors of the building, and it described the lot and
5 square number of the premises, 1124 E Street, for the
6 following purposes, apartment house. And, again, the
7 date is April 14, 1967.

8 MR. TAYLOR: In your reading of the plans
9 -- let's make this simple. Grab the mike so we don't
10 have to keep switching.

11 MR. LeGRANT: Sure.

12 MR. TAYLOR: Do the plans that were
13 approved at one time by DCRA limit themselves to use
14 of the first and the second floors as dwelling units?

15 MR. LeGRANT: The plans show use of the
16 first floor, second floor and basement.

17 MR. BROWN: Mr. Chairman, the plans, while
18 I'm sure they exist, but they are not part of the
19 record and it gives me concern that, you know, at this
20 late date we're going down that path.

21 CHAIRPERSON GRIFFIS: Noted.

22 MR. TAYLOR: It gives me great concern
23 that he, my opposing counsel, is willing to have you
24 take at face value his certification that there is no
25 change and the previous Certificate of Occupancy

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1 sufficiently covers the current plans when the
2 Government is not allowed to bring rebuttal forward on
3 that issue.

4 CHAIRPERSON GRIFFIS: I'm not sure how the
5 plans rebut the notion of the three unit, six unit
6 apartment building as not a conversion.

7 MR. TAYLOR: The germane part of this is
8 that the Certificate of Occupancy that was in effect
9 prior to Mr. Tesfaye's ownership of the building
10 allowed use of the first and the second floors for
11 purposes of an apartment house. There is no
12 Certificate of Occupancy of which I am aware that has
13 ever allowed the basement floor of the building to be
14 used as an apartment house.

15 CHAIRPERSON GRIFFIS: I'm not sure I
16 understand.

17 MR. TAYLOR: That is why Certificates of
18 Occupancy specify that this portion of a building may
19 be used for a specific purpose. You are being asked
20 to essentially rule that the entire structure should
21 be certified as suitable for apartment house use.

22 CHAIRPERSON GRIFFIS: What was the
23 basement certified for?

24 MR. TAYLOR: To our knowledge, nothing.

25 CHAIRPERSON GRIFFIS: It was just a

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1 basement. I see. So I'm not sure the plans help us
2 then. Let's just get to the Certificate of Occupancy.
3 Is there a preclusion of an area in the Certificate of
4 Occupancy that you're getting to?

5 MR. TAYLOR: Yes.

6 CHAIRPERSON GRIFFIS: What is the
7 preclusion?

8 MR. TAYLOR: Areas outside the first and
9 second floor which in this case would be the basement.

10 CHAIRPERSON GRIFFIS: Okay. So the point
11 that the first and second floor, as listed on the
12 Certificate of Occupancy, read precluding or
13 prohibiting apartment use in the basement.

14 MR. TAYLOR: And there is no pre-1958 use
15 of that space as an apartment house or as any kind of
16 dwelling unit.

17 CHAIRPERSON GRIFFIS: Mr. LeGrant, is that
18 the way it's reviewed?

19 MR. LeGRANT: Yes. When we looked at
20 Certificates of Occupancy, there is that provision to
21 specify which portions of a structure are authorized
22 for the use and this is consistent in the Certificates
23 of Occupancy that I have reviewed to date.

24 CHAIRPERSON GRIFFIS: And so what would
25 the basement floor be prohibited to be used as?

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1 MR. LeGRANT: Well, any residential
2 apartment use could not be extended to the basement
3 level.

4 CHAIRPERSON GRIFFIS: Just single-family
5 homes in the R-4 could go in the basement.

6 MR. BROWN: I mean, besides the fact that
7 the plans and all this isn't before the record, I'm
8 not so sure it's relevant because, one, we have
9 established through Mr. Crews, subject to our
10 providing additional backup information, this is a
11 pre-1958 three unit apartment building. Beyond that
12 the fact that it's the first and second floor and not
13 the basement or for the basement, the first and second
14 floor isn't relevant. The fact that it's an
15 apartment, pre-1958 apartment building --

16 CHAIRPERSON GRIFFIS: Right. We'll let
17 you --

18 MR. TAYLOR: So in other words, Mr. Crews'
19 unsubstantiated statement is to be given more weight
20 than the actual Certificate of Occupancy that is
21 before you. That makes no sense.

22 CHAIRPERSON GRIFFIS: Well, no, we're
23 asserting. We're trying to understand the argument of
24 which you're making --

25 MR. TAYLOR: Yes.

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1 CHAIRPERSON GRIFFIS: -- in your case
2 presentation, not weighing the validity of one's
3 words. Okay. So I understand.

4 MR. TAYLOR: And as far as questions for
5 the witness, I meant that I am going to be kind of
6 jumping around back and forth because the primary
7 argument, as stated last month, is a legal argument
8 for which I will take responsibility for making myself
9 either as part of a closing or at your direction as
10 part of our presentation.

11 CHAIRPERSON GRIFFIS: Okay.

12 VICE CHAIR MILLER: I just want to say
13 something. I'm not sure where you're going, but the
14 way I see this is this is an appeal of an action by
15 the Zoning Administrator and that action was the
16 denial of a Certificate of Occupancy and the grounds
17 for that was the ZA's interpretation of a regulation.

18 So it seems to me that that's what is at
19 issue and not that we don't go into areas -- like he
20 didn't say that it didn't apply because the building
21 didn't exist before, it wasn't an apartment house
22 before 1958 or, you know, a certain floor wasn't used
23 that way. I mean, the reasoning that is being
24 challenged is his interpretation of that regulation.

25 And, secondly, there has been an estoppel

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1 argument, so wouldn't your case go to those two
2 issues?

3 MR. TAYLOR: It does, but see now, this --
4 and forgive me, this is -- this comes back to some of
5 the difficulties last time and why Mr. Crews was not
6 here. The -- what you are asking for is a legal
7 argument and I am prepared to make that legal
8 argument, but at your request I have Mr. LeGrant here.
9 And so if you would like for me to go ahead and
10 explain the legal argument, I would be very happy to
11 do so at this point.

12 VICE CHAIR MILLER: I just want to say
13 just so that I'm not mischaracterized or you don't
14 misunderstand me, the only factual issues that I can
15 see in this appeal relate to the question of estoppel.
16 So I don't want to preclude. I'm not saying, you
17 know, if you have a witness that is going to rebut
18 something that the appellant said that relates to
19 estoppel then, you know, I'm not saying you shouldn't
20 do that. I'm just saying --

21 MR. TAYLOR: And I appreciate that
22 statement. I will try to go that direction and I will
23 give the legal argument on the question of the
24 interpretation of the regulation if that is
25 satisfactory to the Board.

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1 CHAIRPERSON GRIFFIS: Yes. I don't want
2 to terminate prematurely Mr. LeGrant's testimony
3 because I don't totally agree that it's just -- that
4 there is just a fact base in the estoppel. There is
5 fact base in terms of understanding how 401.3 was
6 applied and we have heard from an expert witness how
7 that would be applied globally. Now, we have the
8 Zoning Administrator, Mr. LeGrant, representing a
9 specific of how that has been applied.

10 So, essentially, it's -- and you have
11 stated it in there. Maybe that's enough, but I don't
12 -- it is critical to have had that as testimony and I
13 would be open to hearing a little bit more if there
14 is. And if not, then absolutely, let's move on to the
15 legal analysis.

16 MR. TAYLOR: Okay. Then let me just tie
17 up a few loose ends here. Mr. LeGrant, do you agree
18 that the Zoning Regulations have an interest in the
19 proliferation of the density of a neighborhood?

20 MR. LeGRANT: Yes, one of the primary
21 purposes of zoning is to regulate the density of uses.

22 MR. TAYLOR: And does that apply to the
23 instant matter in your opinion?

24 MR. LeGRANT: Yes.

25 MR. TAYLOR: And could you explain that a

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1 little further?

2 MR. LeGRANT: The -- changing the use from
3 three units to six units constitutes changing the use
4 in the way that it triggers other zoning standards.
5 For example, the parking spaces aside, there is a
6 parking requirement that is keyed to the number of
7 units. Many Zoning Regulations are keyed to the
8 number of units. That's one of the basic aspects of
9 what we regulate. We look to what are the number of
10 units in a particular application so as to determine
11 what regulations apply.

12 MR. TAYLOR: As you interpret regulations,
13 is there any way for that building to be turned into
14 a 1,000 unit apartment and still follow the
15 regulations?

16 MR. LeGRANT: It would have to meet not
17 only the minimum lot standard of 900 square feet per
18 unit, but all the other applicable standards that
19 would apply in terms of the building envelope, the
20 size of the building, the parking, as I had mentioned
21 before. Those would be the basic aspects of
22 regulating that type of use.

23 MR. TAYLOR: Okay. Okay. Was a Stop Work
24 Order ever issued on this project?

25 MR. LeGRANT: Yes, in the record there is

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1 an example of a Stop Work Order issued for, I believe,
2 work occurring on Sundays that was issued. I can look
3 it up. I believe it was in August 2005.

4 MR. BROWN: Mr. Chairman, one, they are
5 not part of the record. Two --

6 COURT REPORTER: Microphone.

7 MR. BROWN: Sorry.

8 MR. LeGRANT: Okay.

9 MR. BROWN: Those aren't part of the
10 record. I'm not so sure how germane they are and,
11 two, Stop Work Orders by and large are building code-
12 related not zoning issues. So we're kind of
13 marching --

14 CHAIRPERSON GRIFFIS: But can be zoning
15 issues.

16 MR. TAYLOR: Well, it --

17 CHAIRPERSON GRIFFIS: Was it in the
18 record?

19 MR. TAYLOR: It goes to the estoppel
20 issue. We have had testimony today that there were no
21 Stop Work Orders ever issued.

22 CHAIRPERSON GRIFFIS: Right.

23 MR. TAYLOR: And that --

24 CHAIRPERSON GRIFFIS: I don't have any
25 problem with it.

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1 MR. TAYLOR: And that therefore --

2 CHAIRPERSON GRIFFIS: Are they in the
3 record? Have you submitted them? Do we have physical
4 copies of them?

5 MR. TAYLOR: Not at this point.

6 CHAIRPERSON GRIFFIS: Okay.

7 MR. TAYLOR: I would be happy to go ahead
8 and submit now.

9 CHAIRPERSON GRIFFIS: Good. We need those
10 in.

11 MR. TAYLOR: Okay.

12 MR. BROWN: I mean, I will --

13 MR. TAYLOR: Or if it's better, I will
14 submit -- I will send over submissions tomorrow if it
15 is easier for -- or more convenient.

16 CHAIRPERSON GRIFFIS: No.

17 MR. BROWN: Certainly, I mean, we need to
18 be careful because even if it occurred, which I deny,
19 work on Sunday does not rise to the level and we have
20 to be focused, does not rise to the level of somehow
21 undermining an estoppel argument. I mean, that's --
22 I mean, context is important. I mean, let's --

23 COMMISSIONER MITTEN: Could we maybe just
24 kind of fast forward over a little bit of this which
25 is how many Stop Work Orders were issued?

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1 CHAIRPERSON GRIFFIS: Right.

2 MR. TAYLOR: Do you have any knowledge of
3 other Stop Work Orders that --

4 MR. TESFAYE: That's the only one that I
5 have --

6 COMMISSIONER MITTEN: Is the only basis
7 for the issuance of the Stop Work Order work on
8 Sunday?

9 MR. LeGRANT: You certainly can read what
10 it states. Violations, no work on Sundays, 7:00 a.m.
11 to 7:00 p.m. Monday through Saturday only. The
12 official is Juan Scott.

13 CHAIRPERSON GRIFFIS: So that's it.

14 COMMISSIONER MITTEN: Could we -- in the
15 interest of moving along, what is the relevance of
16 that?

17 MR. TAYLOR: We have testimony that there
18 were no Stop Work Orders issued and that was being
19 used to lay the foundation for the justifiable and
20 reasonable reliance upon the DCRA decision. It's also
21 being brought forward as support for the element that
22 there was no notice provided --

23 CHAIRPERSON GRIFFIS: Okay.

24 MR. TAYLOR: -- to Mr. Tesfaye.

25 CHAIRPERSON GRIFFIS: Understood. So it's

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1 rebuttal, it's rebuttal to the testimony.

2 MR. TAYLOR: And so I'm just simply --

3 CHAIRPERSON GRIFFIS: We got it, we got
4 it.

5 MR. TAYLOR: -- discrediting.

6 CHAIRPERSON GRIFFIS: Let's get in there.

7 Which is rebutting the statement that there were no
8 Stop Work Orders. I think that the substance and
9 relevance the Board will take up. Whether that goes
10 to any zoning issue is pretty clear. It does not
11 unless I'm unaware of working on Sundays in the
12 regulations and we'll deal with it accordingly. Okay.

13 COMMISSIONER MITTEN: I guess what I would
14 like is, you know, we have had this thing with the
15 Certificate of Occupancy doesn't apply to the
16 basement. That is off target. We have a Stop Work
17 Order that is not germane. That is off target even
18 though maybe Mr. Tesfaye said something to the
19 contrary. It still doesn't matter, so could we just
20 like get to the heart of it?

21 CHAIRPERSON GRIFFIS: Right.

22 MR. TAYLOR: Okay. And, finally, let's
23 see. Mr. LeGrant, is it the current practice of the
24 Office of the Zoning Administrator when issuing
25 Certificates of Occupancy to list the number of units

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1 for which the certificate covers?

2 MR. LeGRANT: Yes.

3 MR. TAYLOR: Why is that?

4 MR. LeGRANT: That is as I spoke earlier.

5 Several Zoning Regulations are keyed onto the number
6 of units. In the interest of future regulation of a
7 particular use, we need a record and a baseline at a
8 future point when there is a question about the use.
9 We need that established and that Certificate of
10 Occupancy is the document that establishes the use and
11 the number of recognized units.

12 MR. TAYLOR: Okay. Thank you. I would
13 like to go ahead and make the legal argument at this
14 point.

15 CHAIRPERSON GRIFFIS: Good.

16 VICE CHAIR MILLER: Could I ask a
17 question?

18 CHAIRPERSON GRIFFIS: Let's just take
19 quick questions of this and we'll get some cross and
20 then we can go straight into that. Starting on that,
21 you have indicated it's current practice to list the
22 number of units in the C of O for an apartment
23 building as it's issued. Is that correct?

24 MR. LeGRANT: Yes.

25 CHAIRPERSON GRIFFIS: And when did that

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1 current practice start? Do you know?

2 MR. LeGRANT: I do not know.

3 CHAIRPERSON GRIFFIS: And the C of O is on
4 record here. Are there a listing of number of units?

5 MR. LeGRANT: The two C of Os that -- no,
6 not the 1964 nor the 1967.

7 CHAIRPERSON GRIFFIS: Okay. It just lists
8 apartment.

9 MR. LeGRANT: It says apartment house.

10 CHAIRPERSON GRIFFIS: Okay. Ms. Miller?
11 I'm sorry, thanks.

12 VICE CHAIR MILLER: Mr. LeGrant, are you
13 familiar with Zoning Commission Order No. 211 and BZA
14 Order 12434?

15 MR. LeGRANT: Yes.

16 VICE CHAIR MILLER: And is that something
17 that you consider in applying the regulation that
18 we're talking about, 401.3?

19 MR. LeGRANT: In addition to this case is
20 the Elliott case, which I believe is going to be set
21 forth in the legal argument.

22 VICE CHAIR MILLER: I'm just wondering
23 just in your practice, did you look to the Zoning
24 Commission order or do you look to that order? Do you
25 factor that order in? How do you reconcile that

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1 order?

2 MR. LeGRANT: Okay. I believe that the
3 Elliott case is more germane to the subject matter.
4 The Elliott case speaks to the minimum lot size that
5 is required for apartment house units, including the
6 conversion of apartment house use.

7 COMMISSIONER MITTEN: To that point, let
8 me just maybe get a little bit more specific. Do you
9 or have you considered in issuing Certificates of
10 Occupancy Zoning Commission Case No. 211?

11 MR. LeGRANT: No.

12 COMMISSIONER MITTEN: Okay. Did you
13 consider Application No. 15657 which is the Elliott
14 case? Did you consider it, not are you presenting it
15 to buttress your argument? Did you consider it?

16 MR. TAYLOR: By the terms of your
17 question, that sounds like a question for Mr. Crews.

18 MR. LeGRANT: Yes.

19 COMMISSIONER MITTEN: Well, did DCRA take
20 it into consideration?

21 MR. LeGRANT: Well, DCRA takes it into
22 consideration.

23 COMMISSIONER MITTEN: Now or then?

24 MR. LeGRANT: Well, since it was issued.

25 COMMISSIONER MITTEN: So you take BZA

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1 orders into consideration, but not Zoning Commission
2 orders into consideration?

3 MR. LeGRANT: The date of the Elliott
4 case, which is --

5 COMMISSIONER MITTEN: It's really -- I
6 don't want to -- I'm just asking you a general
7 question.

8 MR. LeGRANT: Okay.

9 COMMISSIONER MITTEN: You take BZA orders
10 into consideration, but not Zoning Commission orders?

11 MR. LeGRANT: No, both are taken into
12 consideration.

13 COMMISSIONER MITTEN: Okay. On the
14 Elliott case, and you have to forgive me if I haven't
15 read it through thoroughly, but my scanning of this,
16 it doesn't indicate that in this particular case that
17 the apartment house use was -- that the apartment
18 house use existed prior to 1958. Is it your view that
19 this was a conversion, that apartment house use
20 existed prior to 1958? Point number 5 and what?

21 MR. TAYLOR: You're looking at the wrong
22 case, Matt.

23 MR. LeGRANT: This is the other one here.

24 MR. TAYLOR: This is the Elliott case
25 right here.

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1 MR. LeGRANT: Right, and it was
2 constructed in 1948.

3 COMMISSIONER MITTEN: It was constructed
4 in 1948, but the building was constructed in 1948, but
5 did the apartment house use exist prior to 1958?

6 MR. LeGRANT: Yes.

7 CHAIRPERSON GRIFFIS: Speak up. I
8 don't --

9 MR. LeGRANT: Yes, yes.

10 COMMISSIONER MITTEN: Yes, it did?

11 MR. LeGRANT: Yes.

12 COMMISSIONER MITTEN: And what do you base
13 that on?

14 MR. LeGRANT: Well, the -- it states that
15 a three story plus basement apartment building was
16 constructed in 1948.

17 COMMISSIONER MITTEN: Would you say that
18 one more -- just say it one more time. I'm sorry.

19 MR. LeGRANT: Yes. In the Elliott case,
20 it describes that a three story plus a basement
21 apartment building, which was -- that was constructed
22 in 1948.

23 COMMISSIONER MITTEN: I see that. I guess
24 I'm just -- knowing how this case may not have been --
25 obviously, the issue that the -- I don't know, what do

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1 you call it, those guys, Mr. Tesfaye and his crew.

2 MR. LeGRANT: Yes.

3 COMMISSIONER MITTEN: Their assertion is
4 that it's very important whether or not the apartment
5 house existed prior to 1958 or not.

6 MR. LeGRANT: Yes.

7 COMMISSIONER MITTEN: So I'm suggesting
8 perhaps that that is not enough of a basis because it
9 could just be a sentence that the distinction isn't
10 being -- that the purpose of the sentence isn't to
11 make the distinction.

12 MR. TAYLOR: Maybe if I could help clarify
13 this.

14 COMMISSIONER MITTEN: Would you turn on
15 your microphone?

16 MR. TAYLOR: Thank you. If you would look
17 at page 1, paragraph 5 where it says "Inasmuch as the
18 apartment building predates the current zoning
19 requirements of the R-4 District, the structure and
20 the use of the structure have been grandfathered."
21 While it does not specifically state the use prior to
22 1958, the fact that the use was grandfathered I think
23 is a reasonable inference to make.

24 COMMISSIONER MITTEN: Okay. There again
25 I'm just wondering, because to say the current zoning

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1 requirements, that's current as of 1992. It's not 100
2 percent clear to me. I would be very interested how
3 in relying on this particular case, which I think is
4 interesting, how the fact pattern is parallel. And
5 maybe you can't tell from the order. Maybe you can't
6 nail it down. But if you're going to take into
7 consideration this zoning order, there are other
8 zoning orders that are germane.

9 So could you tell us how you reconciled
10 the other cases with this interpretation?

11 MR. LeGRANT: Right. I think the question
12 is what is more germane and the Elliott case speaks to
13 the conversion of an apartment building that was
14 clearly built before -- that was described in the
15 record as existing prior to 1958.

16 So now that, I think, speaks to that. We
17 have a case here that for an apartment building
18 conversion, we have an order that is very specific.
19 I think the other case spoke to a conversion of a
20 rooming house to apartment units. And in this case,
21 it's apartments to apartments.

22 COMMISSIONER MITTEN: Well, just based on
23 my struggles with Mr. Bello, I think there is -- I
24 mean, I did get some clarity out of the conversation
25 and I would -- I mean, I seriously would urge you to

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1 revisit what 211 says and at least make an argument to
2 the Commission more than you have so far or do it in
3 your legal argument about why that is not as germane
4 or more germane than this particular appeal or this
5 particular variance application.

6 CHAIRPERSON GRIFFIS: Good. And let me
7 ask a couple of questions on this. Are you aware, was
8 this a self-certified application? They didn't have
9 self-certification in '92? Well, then that would --

10 MR. BROWN: Back in the Dark Ages.

11 CHAIRPERSON GRIFFIS: That's true. I
12 think I was 1 years-old at that time. Isn't that the
13 testimony? Okay. Let's move ahead.

14 MR. TAYLOR: Okay. I would like to go
15 ahead and address the legal issues --

16 CHAIRPERSON GRIFFIS: Sure.

17 MR. TAYLOR: -- that are involved here and
18 I promise that I will take less than a half hour to do
19 so.

20 CHAIRPERSON GRIFFIS: Please.

21 MR. TAYLOR: The reason that the Zoning
22 Administrator considers the Elliott case to be binding
23 upon him is that the facts are virtually on all
24 corners. This, the building in Elliott, was located
25 in an R-4 Zone just as the instant building is

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1 located. The building in Elliott was constructed and
2 used as an apartment prior to 1958, at least by what
3 the Zoning Administrator is considering the clear
4 implication of the text of this order.

5 Of course, it could have been more
6 explicit, but since the real purpose here is to
7 determine if the Zoning Administrator had a reasonable
8 basis for making his decision, I have to give the
9 argument of what the Zoning Administrator had before
10 him as a reasonable basis.

11 The property in Elliott was going to be
12 expanded from a 13 unit building to a 15 unit
13 building. In making that expansion there was going to
14 be no change in the exterior of the building. Now, in
15 the instant matter, it is alleged that there is to be
16 no change to the exterior of the building and then we
17 have also heard that there was a permit for a deck and
18 then there was another deck that was added by someone
19 else without a permit, which DCRA will have to address
20 in another forum.

21 The key determination of Elliott was that
22 the 900 foot lot area space did apply to this, because
23 it was construction upon this building that affected
24 the density of its use and it was increasing that
25 density. Therefore, the grandfather clause no longer

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1 applied.

2 The Zoning Administrator in denying the
3 Certificate of Occupancy followed Elliott straight
4 down the line. We have an increase in the number of
5 units going from what was a grandfathered though
6 nonconforming use and expanding that or, in Mr.
7 Bello's terms, intensifying that. However you cut it,
8 it's more nonconforming as a 15 unit apartment than it
9 was a 13 unit apartment.

10 Similarly, this building is more
11 nonconforming as a six unit apartment condominium than
12 it was nonconforming as a three unit apartment
13 building. I would point out the important
14 philosophical note that is on page 4 of the Elliott
15 opinion.

16 It does point out correctly without citing
17 the regulation that proposed construction should
18 comply with existing regulations and that it would be
19 paralleled in today's numbers as Rule 3202.1. which
20 states that "Except as provided in some irrelevant
21 situations, a building permit shall not be issued for
22 the proposed erection, construction, conversion or
23 alteration of any structure unless that structure
24 complies with the provisions of this title."

25 That is irrespective of what the

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1 previously existing structure may have had attendant
2 to it. It also states that it is the intent of the
3 Zoning Regulations to have nonconforming aspects of
4 property diminish over time. That is completely
5 contrary to what is being proposed for this example
6 and was being proposed in Elliott to where the Zoning
7 Regulations' nonconformance was being proposed to
8 increase not diminish.

9 Now, if you look at the 12434 case, Lobel
10 I believe, in that matter the proposition was to go
11 from a seven unit dwelling to -- excuse me, from a
12 nine unit dwelling down to a seven unit dwelling.
13 While not specifically addressed in this context, it
14 still fits the philosophy. The nonconformance of that
15 building was being decreased by allowing the building
16 to go from nine units to seven units. This philosophy
17 has been stated on other occasions by this body.

18 I would just refer you quickly to
19 Application No. 15502, the Kramer application, where
20 you will find the virtually identical statement on
21 page 7 where it reads "Any proposed construction
22 should comply with existing regulations. It is the
23 intent of Zoning Regulations to have nonconforming
24 aspects of property diminish over time. To allow the
25 proposed construction in the Kramer matter would

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1 create rather than eliminate a nonconformity."

2 The very same language is used in
3 Application 15628 by a person whose name I will not
4 even denigrate by trying to pronounce where on page 5
5 it reads "The Board notes that the Zoning Regulations
6 do not allow the proposed use in," in this case, "an
7 R-1-B District. Any proposed construction should
8 comply with existing regulations. It is the intent of
9 the Zoning Regulations to have nonconforming aspects
10 of property diminish over time." And, again, "To
11 allow the construction would increase the
12 nonconformance rather than decrease the
13 nonconformance."

14 When it comes to Zoning Order 211, and I
15 believe you have this one right now, Matt, right here,
16 the Government submits that Mr. Bello's either legal
17 analysis or expert lay opinion is diametrically
18 opposite of what this zoning order does. What it
19 states in paragraph 2 is essentially that multiple
20 dwellings that were already multiple dwellings in 1958
21 at this point in time that had been turned into
22 apartments were not subject to the 900 square foot lot
23 area requirement.

24 And in the third paragraph the Commission
25 found that that was a problem. It very plainly states

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1 that the intent of the Zoning Regulations is to apply
2 such a criteria to conversions of buildings which are
3 multiple dwellings to apartments. In that regard,
4 this case or this zoning order is in direct
5 contravention of No. 12434.

6 In 12434 you originally had a nine unit
7 boarding house, still a multiple dwelling, but a
8 boarding house that was being converted to an
9 apartment, seven units. That was allowed in spite of
10 the fact that the 900 square foot lot area was not
11 being met. Zoning Order 211 by its own terms
12 indicates that that was a mistake.

13 I know that it says that the provision had
14 been consistently interpreted in a such and such
15 manner. Apparently, they had not reviewed 12434 when
16 they wrote this opinion, because Zoning Order 211 is
17 a diametric, if anything, I would say an overturning
18 of any precedential value of 12434.

19 Let me clarify that. Okay. To the extent
20 that in 12434 there was a nine unit rooming house, a
21 multiple dwelling, the proposal was to turn that nine
22 unit rooming house into a seven unit apartment. In
23 12434, he said, oh, it was grandfathered, we're
24 letting it go. This order says that the conversions
25 of buildings which are multiple dwellings, for

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1 example, rooming houses which is what 12434 was,
2 changing those into apartments, they should have to
3 apply the 900 square foot criteria to that conversion.

4 That is not what 12434 said. This would
5 overturn that and it is overturning it in two ways.
6 It is overturning it by simply saying that by history
7 we have not allowed this to happen. I think that was
8 incorrect, but that's what it says. Also, in context,
9 Zoning Commission Order 211, I was not party to this
10 in 1978 so I can only go by what it says and it
11 doesn't mention it being the result of an appeal. It
12 was a Commission order regarding promulgating an
13 amendment to the regulations to clarify that this
14 applied to the -- to apartments following 1958.

15 Let me say that more artfully, that if you
16 were going to increase this or turn your multiple
17 dwellings into apartments and do the construction
18 necessary, the results had to conform with the 900
19 square foot lot requirement. If you look on page 2,
20 the part that never seems to get cited of this, it
21 describes what the amendment would do.

22 And as fortuitous as it is, the exact
23 amended language that this is putting forward as an
24 amendment to the regulations was, indeed, adopted and
25 is part of the regulations today. Therefore, 211 does

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1 not support the proposition that the instant building
2 should be allowed to increase in its nonconforming
3 use.

4 In fact, if you look at number 211, it
5 very nicely states the Commission finds that such a
6 regulation as they are putting forward would prevent
7 excessive density in the R-4 District. They were
8 trying to lower the density in this District not
9 increase it as is the case with 1124 E street today.

10 I would also point to another item that is
11 in Mr. Bello's expert report and that is where he
12 cites to Rule 3203.8, "Any use that is authorized by
13 a Certificate of Occupancy may be established and
14 continued pursuant to the terms of the certificate and
15 the provisions of this title in effect on the date
16 that the certificate is issued subject to the
17 following conditions.

18 (C) "Any amendment to the use authorized
19 by the certificate," and the Government submits that
20 use as a three unit apartment is not the same thing as
21 use as a six unit apartment, "shall comply with the
22 provisions of this title in effect on the date that
23 the certificate is amended." That is very clear. It
24 does not include any grandfathering.

25 Before we completely run away from Mr.

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1 Bello's opinion, he states that Appeal No. 12434 and
2 Zoning Commission Order 211 are unequivocal in their
3 conclusions that, number one, the Zoning Administrator
4 has since May 12, 1958 consistently interpreted
5 section 330.5(c) and its predecessor section not to be
6 applicable to multiple dwellings in existence as of
7 May 12, 1958. I would submit that the wording of
8 Order 211 is the exact opposite of that assertion. It
9 specifically applies the 900 square foot requirement
10 to multiple dwellings becoming apartments.

11 Okay. I won't get into that. And I
12 believe that concludes the legal argument for issue
13 two that is before this Board of why the Zoning
14 Administrator felt justified in not issuing that
15 Certificate of Occupancy.

16 Now, I do have one other factual thing
17 that I need to bring to Mr. LeGrant's attention and
18 that is the very short discussion of this -- excuse
19 me, this is a preliminary certificate or, excuse me,
20 probationary Certificate of Occupancy. I forget.
21 What is the word?

22 MR. LeGRANT: Well, it's provisional. It
23 was --

24 MR. TAYLOR: Provisional.

25 MR. LeGRANT: -- cited as a provisional

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1 Certificate of Occupancy.

2 MR. TAYLOR: Is there -- does DCRA issue
3 provisional Certificates of Occupancy?

4 MR. LeGRANT: Not to my knowledge.

5 MR. TAYLOR: Thank you. That concludes
6 the legal portion of this. The estoppel will be
7 addressed in closing argument.

8 CHAIRPERSON GRIFFIS: Question?

9 VICE CHAIR MILLER: I just have one
10 question on this. If you just look at the regulations
11 on their face separate from the interpretations in
12 these various orders, 401.3 where it talks about
13 conversions to apartment house and that is where the
14 minimum lot area of 900 square feet kicks in, how is
15 it a conversion if a building was an apartment
16 building before 1958?

17 MR. TAYLOR: Okay. One of the issues that
18 has not been addressed before this panel is the
19 question of nonconforming structure and nonconforming
20 use. There are definitions for both that are in the
21 regulations. It's inevitable that there has to be a
22 certain amount of intertwinement in between them, but
23 in issuing a Certificate of Occupancy you are having
24 to certify that the building is suitable for a
25 specific use.

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1 Now, use as an apartment house may be
2 grandfathered, but the building itself is going to be
3 suitable for a certain number of apartments and right
4 now the regulations on their face do not permit that
5 building to be certified for six apartments. The
6 Government would certainly encourage Mr. Tesfaye to
7 come before this Board requesting a variance of the
8 zoning requirements to allow such utilization of that
9 structure.

10 VICE CHAIR MILLER: Okay.

11 CHAIRPERSON GRIFFIS: Follow-up? Okay.

12 MR. TAYLOR: I won't bore you with a
13 closing statement where I give out my legal argument
14 on why it should not -- for the regulatory basis of
15 why the Certificate of Occupancy should -- is properly
16 denied, because I just gave it and I trust you
17 remember it.

18 CHAIRPERSON GRIFFIS: Absolutely.

19 MR. TAYLOR: In looking at estoppel, one
20 of the questions that inevitably would come up is what
21 are the actual requirements. D.C. case law is all
22 over the --

23 CHAIRPERSON GRIFFIS: Okay. Let's go
24 right to it because we have been through estoppel so
25 many times, it is incredible. We have got this. The

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1 test, you don't need to lay it out for us, but you can
2 address each one, acting in good faith, affirmative
3 acts on the District, expense of permit improvements
4 and so on.

5 MR. TAYLOR: Okay. I will start with the
6 -- I will list these in the order as they were used in
7 the case of Rafferty v. the District of Columbia
8 Zoning Commission. It's 583 A2d 169, the expensive
9 and permanent improvements. The Government does not
10 contest that there have been expensive improvements
11 made to this property.

12 CHAIRPERSON GRIFFIS: Okay.

13 MR. TAYLOR: The question then were they
14 made in good faith? That is a judgment call and we
15 have testimony that Mr. Tesfaye believed that he was
16 allowed to move forward. But we get to the third
17 element, were they made in justifiable and reasonable
18 reliance and that is where the situation gets much
19 more cloudy. It is not whether they were made in
20 reliance, but whether they were made in a justifiable
21 and a reasonable reliance. And I would submit to you
22 that they were not.

23 We know that estoppel is judicially
24 disfavored because the public interest is in the
25 integrity and enforcement of the Zoning Regulations.

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1 And the case of Murray v. Board of Zoning Adjustment,
2 572 A2d 1055, D.C. Court of Appeals from 1990, is
3 directly on point to this matter.

4 In that the court stated that a property
5 owner who made commitment for architectural plans upon
6 receiving the Zoning Administrator's ruling, despite
7 knowledge of neighborhood opposition, invites
8 application of the self-created hardship doctrine and
9 precludes application of estoppel, given the
10 likelihood that the Zoning Administrator's ruling will
11 be appealed, and it was.

12 CHAIRPERSON GRIFFIS: What was that you
13 were quoting?

14 MR. TAYLOR: This is from Murray v. BZA,
15 572 A2d 1055.

16 CHAIRPERSON GRIFFIS: Okay.

17 MR. TAYLOR: Similarly, I don't think
18 there was any -- at least at the time that the appeal
19 was filed by the ANC, that automatically gave notice
20 to Mr. Tesfaye that there was a potential violation of
21 zoning requirements and it brought into question the
22 reliance upon the act of the District Government
23 official in issuing the building permit.

24 We are also as citizens, every one of us,
25 charged with the constructive knowledge of the

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1 regulations. The regulations and the statute give
2 credence to the fact that Government officials are not
3 perfect and make mistakes. That is why we have
4 specific provisions regarding the revocation of
5 permits issued in error, and right here in this case
6 we have a building permit that was issued in error.
7 It was appealed by the ANC putting everyone on notice
8 that at the very least there were questions about the
9 propriety of that issuance.

10 There was a moving forward with the
11 completion of the project in spite of that knowledge
12 and now, we are in the situation where -- we're in
13 essentially a rock and a hard place where we have a
14 structure that is clearly not compliant. We have a
15 structure that is increasing the density of this
16 neighborhood in contravention of the intent of the
17 Zoning Regulations to decrease that density.

18 And on the other hand, we have someone who
19 has put in a lot of money. Someone's interests are
20 going to be harmed, whether it be the surrounding
21 citizens, whether it be Mr. Tesfaye. The Government
22 acknowledges that is an unfortunate situation that it
23 came to this.

24 Again, the reason that we did not revoke
25 the permit at the time the appeal was filed was to

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1 allow this Board to clarify the regulations to the
2 extent there was any ambiguity. To the extent that we
3 did not revoke the building permit at the time that
4 you denied the appeal as untimely is really for
5 judicial economy and the same reason.

6 We knew that this was coming before you
7 and also the reason that DCRA could not issue that
8 Certificate of Occupancy is because that under the
9 regulations and under Zoning Order 211 and
10 particularly under the much later Elliott opinion, the
11 guidance was that the lot area requirement had to be
12 enforced and the C of O could not be issued. Thank
13 you.

14 CHAIRPERSON GRIFFIS: Excellent. Thank
15 you very much. Any other questions from the Board?
16 Is there cross of the witness?

17 MR. BROWN: No, there is none.

18 CHAIRPERSON GRIFFIS: No cross?

19 MR. BROWN: No cross.

20 CHAIRPERSON GRIFFIS: Okay. Very well.
21 That's going to conclude our proceedings this evening,
22 except for closings.

23 MR. BROWN: Well, and I'm -- very briefly,
24 Mr. Chairman --

25 CHAIRPERSON GRIFFIS: Right.

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1 MR. BROWN: -- given the hour. Several
2 things are worth noting. One, I think we have laid
3 out in probably painstaking detail the estoppel
4 argument and the District has not offered anything
5 that even remotely undermines that.

6 On that issue alone, I think the Board is
7 in a position to reach a Bench decision this evening,
8 and I say that in a certain level of urgency that will
9 go throughout my closing remarks, is that the District
10 seems to have held off doing anything, just as Mr.
11 Taylor said, waiting for the Board to act. And I
12 think it would be appropriate for the Board to act
13 quickly and decisively and tell DCRA that they did not
14 have the right to deny the C of O and to, in fact,
15 instruct them to issue the C of O.

16 Otherwise, it's very clear that Mr. Taylor
17 and DCRA are going to come back and take additional
18 steps, including the parking issue, which will end up
19 before you once again.

20 It's very clear that on the zoning issue,
21 Mr. Bello's testimony I think establishes his
22 expertise and the thoughtfulness for which he reviewed
23 the longstanding interpretation of the Zoning
24 Commission order and gave you clear guidance so that
25 211, I think, acts as a real road map to your decision

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1 on this issue and then his further analysis.

2 But I think the level of urgency here is
3 significant and I would ask the Board on the issue of
4 estoppel, as well as the substantive issues, that if
5 you can't act tonight by a Bench decision, that we act
6 very quickly to clearly lay out the Board's position
7 for all the parties and particularly the Department of
8 Consumer and Regulatory Affairs.

9 CHAIRPERSON GRIFFIS: Excellent. Thank
10 you very much. Let me take a minute. Okay.
11 Appreciate that opportunity, just a quick conference
12 just in terms of our process and what we would need
13 and it looks like two things.

14 One, at this late hour it probably isn't
15 wise for us to begin deep deliberation. I shouldn't
16 say that. I somewhat kid. I think we could do it,
17 but I would rather have everyone fresh and actually
18 get to their responsibilities that I know we all have.

19 We also had had the record left open for
20 a brief piece, but the additional documentation if it
21 can be found of the C of O required in 1958. I would
22 keep -- well, we're going to set this for the decision
23 on the 11th which gets us there pretty quickly, and I
24 think we would have -- I don't know that we need
25 anything else actually submitted into the record

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1 unless others would require anything. I don't know
2 that we need draft orders even.

3 MR. TAYLOR: Would it be appropriate to
4 let the ANC submit a position paper to you in lieu of
5 their absence?

6 CHAIRPERSON GRIFFIS: No, it wouldn't be
7 appropriate.

8 MR. TAYLOR: Okay.

9 CHAIRPERSON GRIFFIS: The difficulty is we
10 don't -- we wouldn't -- it would need to be crossed or
11 at least addressed. I know we went late this evening.
12 I wish actually they would have just stayed and we
13 could have clarified and made some progress, but at
14 this point I can't and we need to set that. We're not
15 setting any special dates here. This is our -- that
16 is the regular scheduled decision making date, so I
17 think it's appropriate to proceed in that fashion.
18 Others? Yes?

19 MR. BROWN: You would like the C of O
20 information no later than?

21 CHAIRPERSON GRIFFIS: The 5th, Wednesday,
22 3:00.

23 MR. BROWN: And I suspect the whole world
24 is going to be closed Monday and Tuesday.

25 CHAIRPERSON GRIFFIS: Are you open Monday?

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1 Okay.

2 MR. BROWN: Are they? But --

3 CHAIRPERSON GRIFFIS: The office is always
4 open on Monday. They will be here cleaning the
5 tables.

6 MR. BROWN: I will personally deliver the
7 documents to you.

8 CHAIRPERSON GRIFFIS: There it is.

9 MR. BROWN: All right. Close of business,
10 July 5th. And also perhaps Dennis, Mr. Taylor, and I
11 can enlist each other's support. He has more
12 immediate access to the DCRA records than I do.

13 CHAIRPERSON GRIFFIS: Absolutely. I think
14 it's appropriate for each of the case presentations
15 today, so I would hope that there would be a search in
16 earnest. Okay. Anything else then? Anything else
17 required? Very well. Any other questions
18 procedurally?

19 Thank you all very much. I appreciate you
20 all lasting so long with us in getting all this
21 together. That way we don't have to come back in
22 October of next year in some sort.

23 MR. TAYLOR: Thank you. We appreciate
24 your lasting so long this evening yourselves. We
25 realize that you have been in this room for even

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1 longer than we have.

2 CHAIRPERSON GRIFFIS: 12 hours now. Okay.
3 Very well. Any other business, Ms. Bailey? Very
4 well. Not noting any other business, let's adjourn.

5 MR. TAYLOR: Thank you.

6 CHAIRPERSON GRIFFIS: Have a great night.

7 (Whereupon, the Public Hearing was
8 concluded at 8:45 p.m.)

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