

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

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TUESDAY,  
FEBRUARY 20, 2007

+ + + + +

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

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS Chairperson  
RUTHANNE G. MILLER Vice Chairperson  
CURTIS ETHERLY, JR. Board Member

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY Secretary  
BEVERLY BAILEY Sr. Zoning Spec.  
ESTHER BUSHMAN General Counsel

D.C. OFFICE OF THE ATTORNEY GENERAL:

LORI MONROE, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

MAXINE BROWN-ROBERTS

This transcript constitutes the minutes from the Public Hearing held on February 20, 2007.

<u>AGENDA ITEM</u>	<u>PAGE</u>
<u>WELCOME:</u>	
Geoffrey Griffis . . . . .	4
<u>GEORGETOWN VISITATION PREPARATORY SCHOOL</u>	
<u>APPLICATION NO. 17549 - ANC-2E:</u> . . . . .	10
<u>WITNESSES:</u>	
Kate Albrecht . . . . .	11
Sister Mary Hannan . . . . .	17
Dan Kerns . . . . .	20
Osborne George . . . . .	33
<u>OFFICE OF PLANNING:</u>	
Maxine Brown-Roberts . . . . .	52
<u>ANC-2E:</u>	
Ron Lewis . . . . .	61
<u>LETTERS OF SUPPORT - EXHIBITS 22, 23, 26-31,</u>	
<u>33, 35, 36, 37, 42:</u> . . . . .	84
<u>LETTER IN OPPOSITION - EXHIBIT 21:</u> . . . . .	84
<u>CLOSING REMARKS:</u>	
Kate Albrecht . . . . .	84
<u>MOTION TO APPROVE APPLICATION 17549:</u> . . . . .	87
<u>VOTE TO APPROVE APPLICATION 17549:</u> . . . . .	98
<u>JMM CORPORATION</u>	
<u>APPEAL NO. 17504 - ANC-6C:</u> . . . . .	106
<u>APPELLANT WITNESSES:</u>	
Jonathan Katz . . . . .	122/332
Jose Montiel . . . . .	177
ZA Bill Crews . . . . .	218
<u>OPPOSITION WITNESSES:</u>	
Matthew Green . . . . .	223/323
ZA Bill Crews . . . . .	228
Clement Stokes . . . . .	265
James Leonard . . . . .	310
<u>ANC-6C:</u>	
Mark Dixon . . . . .	329
<u>SET FOR DECISION ON MARCH 6, 2007:</u> . . . . .	348
<u>ADJOURN:</u>	
Geoffrey Griffis . . . . .	351

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
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14  
15  
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P-R-O-C-E-E-D-I-N-G-S

9:55 a.m.

CHAIRPERSON GRIFFIS: Good

morning, ladies and gentlemen. Let me call to order our 20<sup>th</sup> of February 2007 morning Public Hearing of the Board of Zoning Adjustment of the District of Columbia. My name is Geoff Griff, Chairperson. Joining me today is the Vice Chair, Ms. Miller, and Mr. Etherly, our esteemed colleague. The rest of them are out sick, so you've got us.

That being said, let's move directly ahead. I'm going to dispense with a lot of my openings, as we have one case today and I can get into any specifics that are needed. However, there are some critical pieces that everyone here should understand and let's begin.

First of all, when coming forward to speak to the Board, you will need to have filled out two witness cards. Witness cards are available at the table where you will

1 provide testimony. Those two cards go to the  
2 Court Reporter sitting to my right on the  
3 floor. That Court Reporter is creating the  
4 official transcript of the record. Therefore,  
5 everything that you say should be said into a  
6 microphone, so that it can get into the record  
7 and be on the transcript.

8 So with that, when you come  
9 forward, I'm also going to ask that you state  
10 your name and address for the record, only do  
11 this once, obviously, then we can make sure  
12 that you are properly given credit for the  
13 statements and testimony that you put into the  
14 record.

15 I would ask that people turn off  
16 their cell phones and beepers, at this time,  
17 and any other noise making devices, so that we  
18 don't have a disruption of the transmission  
19 into the record. And I would also let  
20 everyone know that as well as, as I turn off  
21 my own cell phone and get through all of this,  
22 creating the transcript, we are being

1 broadcast live on the Office of Zoning's  
2 website, so you will see cameras moving  
3 around, but pay no attention to them.

4 In going forward, of course, our  
5 special exceptions and variances will follow  
6 the following order. We will first hear from  
7 the applicant, their case presentation. We  
8 will then go to any Government reports  
9 attendant to the application. Third, we will  
10 hear from the Advisory Neighborhood  
11 Commissioners and Commission report within  
12 which the property is located.

13 Fourth, we will hear parties or  
14 persons in support of the application. Fifth,  
15 we will hear persons or parties in opposition  
16 to an application. And Sixth, finally, we  
17 will return to the applicant for any closing  
18 remarks, rebuttal witnesses and any other  
19 summations that they may need to provide.

20 It should be clear in my opening  
21 in what I have just said that anyone here  
22 present at any time in our Public Hearing can

1 present testimony as persons. Anyone at all.  
2 Parties, of course, are a differing  
3 participation and we will establish party  
4 status if there is request for that.

5 The Sunshine Act does require that  
6 this Board conduct its hearing in the open and  
7 before the public. We do enter into Executive  
8 Session for reviewing the record and facts on  
9 a case. We can also utilize those Executive  
10 Sessions for deliberation if the Board deems  
11 that needed. This is in accordance with our  
12 rules, regulations and also the Sunshine Act.

13 Moving directly ahead, let me say  
14 a very good morning to Ms. Bailey with the  
15 Office of Zoning, Ms. Bushman also with the  
16 Office of Zoning, Ms. Monroe on my left is  
17 with the Office of the Attorney General and  
18 Mr. Moy with the Office of Zoning.

19 Everyone should understand that  
20 all of the cases heard before us in special  
21 exceptions and variances are categorized by  
22 our judicial system as contested cases.

1 Therefore, there is some very important things  
2 to understand.

3 In contested cases, first of all,  
4 we are creating an official record within this  
5 room. Anything that you say into the  
6 microphone that goes into the transcript is  
7 part of the record. Anything that you have  
8 submitted in writing is also part of the  
9 official record. That record is the only  
10 piece of which the Board will base its  
11 deliberations on.

12 So if you believe that there is  
13 information that we ought to take into  
14 consideration in making our decisions, then  
15 you should make sure that it is into the  
16 record. Do not assume that it will be if you  
17 haven't put it in.

18 Likewise, if we are on recess or a  
19 very quick break today and we're out in the  
20 halls or running down for a quick lunch to get  
21 back up to work and then get back into  
22 hearings, if you see us, would you, please,

1 refrain from having private conversations with  
2 us. That may well to some in the general  
3 public give an appearance of us receiving  
4 information outside of the record and  
5 therefore would not be allowed.

6 So with that, I think we  
7 understand all our protocols today. Why don't  
8 we ask all those present if you are going to  
9 present testimony to the Board, I would ask  
10 that you, please, stand and give your  
11 attention to Ms. Bailey, as she is going to  
12 swear you in.

13 MS. BAILEY: Would you, please,  
14 raise your right hand?

15 (Whereupon, the witnesses were  
16 sworn.)

17 MS. BAILEY: Thank you.

18 CHAIRPERSON GRIFFIS: Excellent.  
19 Thank you all very much. At this time then,  
20 we can hear if there are any preliminary  
21 matters attendant to the case that's on our  
22 schedule today. Preliminary matters are those

1 which relate to whether a case will or should  
2 be heard, if proper notice, adequate timing of  
3 posting, if there are any other elements that  
4 would delay us hearing the case today, this is  
5 the proper time to come forward and let us  
6 know.

7           You can come forward and have a  
8 seat at the table as an indication of a  
9 preliminary matter for the Board's attention.  
10 Ms. Bailey, I'll ask you if you are aware of  
11 any preliminary matters?

12           MS. BAILEY: Mr. Chairman, Members  
13 of the Board, to everyone, good morning.

14           CHAIRPERSON    GRIFFIS:            Good  
15 morning.

16           MS. BAILEY: Staff does not have  
17 any, sir.

18           CHAIRPERSON GRIFFIS: Very well.  
19 Not seeing any other indication of preliminary  
20 matters for the morning, why don't we call the  
21 first case?

22           MS. BAILEY: Application No. 17549

1 of Georgetown Visitation Preparatory School,  
2 pursuant to 11 DCMR 3104.1, for a special  
3 exception to increase a private school student  
4 enrollment cap from 435 to 490 students, and  
5 to increase the cap on faculty and staff from  
6 110 to 120, under section 206 of the Zoning  
7 Regulations. The property is Zoned R-3 and it  
8 is located at 1524 35<sup>th</sup> Street, N.W. The  
9 property is also known as Square 1292, Lot  
10 202.

11 MS. BAILEY: Excellent. Thank  
12 you. Are we ready? Whenever you are ready.  
13 You can just turn the microphone on. There is  
14 a button on the base. Perfect.

15 MS. ALBRECHT: Good morning. My  
16 name is Kate Albrecht. I'm with the Law Firm  
17 of Kirkland and Ellis. I'm an alumni of the  
18 station and I represent the school in  
19 connection with this application. We were  
20 last before you on January 16<sup>th</sup>. At that  
21 time, the school was very close to a final  
22 agreement with its neighbors and with the ANC

1 regarding this application.

2 In the week following that  
3 hearing, we reached a final agreement with the  
4 ANC and we entered into an agreed  
5 Transportation Management Plan. Subsequently,  
6 the application, based on that plan, received  
7 unanimous support from ANC-2E and has received  
8 support from the Office of Planning and the  
9 Department of Transportation.

10 Several of our neighbors have also  
11 submitted letters of support, including  
12 residential neighbors, immediately adjoining  
13 the property and institutional neighbors in  
14 the neighborhood, such as Georgetown  
15 University and Holy Trinity Parish.

16 On January 2<sup>nd</sup>, prior to the last  
17 hearing, we submitted a prehearing statement  
18 that addressed the applicant's satisfaction of  
19 sections 206 and 3104 of the zoning  
20 regulations. On February 6<sup>th</sup>, we filed a  
21 supplemental prehearing statement for the  
22 purpose of filing the agreed TMP and for

1 highlighting the key aspects of the plan for  
2 the Board.

3 We have several witnesses here  
4 today. Sister Mary Berchmans is here to speak  
5 about the history and the mission of the  
6 school. Dan Kerns is the head of the school  
7 and he is prepared to address admissions, the  
8 new approach to admissions, the series of  
9 neighborhood meetings that we held, the terms  
10 of the Transportation Management Plan and the  
11 current status of any measures that have  
12 already been put into effect.

13 We also have with us Osborne  
14 George of Osborne George and Associates. He  
15 will discuss the traffic impact assessment  
16 that was performed and submitted as part of  
17 the school's original prehearing statement and  
18 he can also address the efficacy of the  
19 technical aspects of the Transportation  
20 Management Plan, such as the dedicated turn  
21 lane and the traffic cop.

22 I would like to first present a

1 short overview of the application prior to  
2 that testimony. The application of the school  
3 is very simple. We're only seeking an  
4 increase in the student cap from 435 to 490  
5 and an increase in the faculty and staff cap  
6 from 110 to 120. There is no construction.  
7 There is no major expansion of the school and  
8 there are no programmatic or operational  
9 changes on the horizon.

10 The application is filed under  
11 sections 3104 and 206 of the Zoning  
12 Regulations. The Zoning Regulations here  
13 require for private schools that the way the  
14 school is operated should not become  
15 objectionable to adjoining property based on  
16 noise, traffic, the number of students and the  
17 school should have adequate parking.

18 As Dan will explain in more  
19 detail, the school has a very large campus.  
20 Because of the size of the campus and the way  
21 it is utilized, there is really no danger that  
22 the number of student will create noise or

1 that the number of students can't be  
2 accommodated on the campus.

3 In addition, there is no argument  
4 that the school has parking well in excess of  
5 the requirements of the Zoning Regulations.  
6 The only element of section 206 that is  
7 implicated here is traffic. This is the topic  
8 that has been the focus of the extensive  
9 meetings with the neighborhood. The school is  
10 confident that its proposal will not have a  
11 significant impact, significant negative  
12 impact on the neighborhood traffic, but at the  
13 same time, we recognize that there is severe  
14 congestion in Georgetown and that this is a  
15 serious concern to neighbors.

16 The school is willing to control  
17 and to reduce its own contribution to that  
18 traffic. This willingness coupled with their  
19 desire to have the support of the neighborhood  
20 for this application has led to the  
21 development of this Transportation Management  
22 Plan.

1           The plan itself, as I'm sure you  
2 realize, is very comprehensive. It is  
3 designed to reduce the level of Visitation's  
4 traffic contribution, to the level that it  
5 would have reasonably been expected to have  
6 been if we were at 435. The parties realize  
7 that there may be some trial and error here in  
8 effectively making or reaching that result.

9           And so while the plan is very  
10 detailed, there is also flexibility built into  
11 the plan, so that it can be amended as  
12 necessary to reach that goal in the future.  
13 With that overview, I would first like to have  
14 Sister Mary Berchmans provide her testimony to  
15 the Board.

16           CHAIRPERSON GRIFFIS: Excellent.  
17 Thank you very much. Let me just give a  
18 little bit of direction, because, first of  
19 all, all the filings are incredibly complete  
20 and, in fact, last time the Board, obviously,  
21 was prepared to move forward noting the  
22 importance of having the last bit of

1 communication and dialogue happen, obviously,  
2 as a result of even more success.

3 So my point being, I think we can  
4 summarize an awful lot. If you want to give  
5 direction to your witnesses, get us quickly  
6 through this, because what I think will  
7 probably be more productive is getting into  
8 the heart of the Board's questions, which will  
9 probably be after we hear everyone, OP  
10 included.

11 MS. ALBRECHT: Okay.

12 SISTER HANNAN: I'm Sister Mary  
13 Berchmans Hannan. I live at 1500 35<sup>th</sup> Street,  
14 N.W., Washington, D.C. Good morning. I would  
15 like to offer you a thumbnail sketch of the  
16 place that Georgetown Visitation has held in  
17 the city of Washington for over 200 years.  
18 Our school's growth is parallel to the growth  
19 of our city since the school's foundation in  
20 1799.

21 Our history is replete with  
22 examples of the outreach which the school has

1 extended to the city and its people. As a  
2 young lady's academy flourished, the sisters  
3 also established a poor school for students  
4 who could not afford a private education. The  
5 sisters not only educated these children, but  
6 also fed and clothed them. They also held  
7 classes in the evening and on weekends for  
8 children of slaves.

9 Today, the school is committed to  
10 continue this outreach to a diverse student  
11 body. This year over 25 percent of our  
12 students receive financial aid. We have  
13 offered over \$1 million in financial  
14 assistance as we have welcomed students from  
15 the Opportunity Scholarship Program as well as  
16 refugees from Katrina.

17 We hold a Saturday school for  
18 seventh grade girls from our city schools.  
19 This program invites our students to act as  
20 mentors to these young girls and our faculty  
21 drives for the enrichment programs on Saturday  
22 mornings.

1                   Georgetown Visitation has been an  
2 active participant in the Georgetown area  
3 churches ecumenical outreach to the homeless  
4 for several years. Our girls have become such  
5 a vital part of this program that they and the  
6 faculty or staff member now prepare meals and  
7 carry them to the homeless at the Lutheran  
8 Church on Wisconsin Avenue five or six times  
9 during the winter months.

10                   Once a month our students prepare  
11 meals and carry them to the homeless on  
12 McKenna's Wagon. Each year, our mothers and  
13 daughters gather to clean and paint classrooms  
14 and general areas in an elementary school in  
15 the city. This program is now in its tenth  
16 year.

17                   Our educational program emphasizes  
18 the importance of global awareness, but also  
19 trains our students to be active citizens.  
20 Women of faith certainly, but also a vision  
21 and strong purpose. The schools' reputation  
22 in these areas has created a freshman

**NEAL R. GROSS**

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WASHINGTON, D.C. 20005-3701

1 applicant pool of over 400 student for only  
2 115 places. Rarely can we accept transfer  
3 students, because our attrition rate is  
4 minuscule.

5 Last year we had only one student  
6 leave Visitation. Our school would be most  
7 grateful to your assent toward an increased  
8 cap for our -- for its enrollment. I would  
9 now like to introduce our head of school, Mr.  
10 Dan Kerns, who will comment on our  
11 application.

12 CHAIRPERSON GRIFFIS: Excellent.  
13 Thank you.

14 MR. KERNS: My name is Dan Kerns.  
15 I live at 3612 Winfield Lane in Washington,  
16 D.C. Sister Berchmans has reviewed our  
17 history and mission. I would just like to  
18 highlight and discuss several aspects of the  
19 petition you have before you, the process we  
20 have followed with our neighbors and the  
21 Traffic Management Plan that Ms. Albrecht has  
22 mentioned.

1           As you know, we are looking to  
2           increase our student enrollment from 435 to  
3           490. We do not anticipate the larger student  
4           number, but rather see our target population  
5           to be more in the area of 465 students with  
6           some additional room in the cap to deal with  
7           the unpredictable nature of enrollment  
8           management.

9           Our application respectfully  
10          acknowledges that we have been over our cap of  
11          435 for several years. This increase occurred  
12          inadvertently, accidentally and not in any way  
13          part of a plan to permanently increase our  
14          size. Twice in the past few years, we have  
15          had significant spikes in the enrollment yield  
16          for our freshman class.

17          In each case, the next year we  
18          made earnest efforts to respond to the  
19          increase by accepting fewer students to the  
20          ninth grade. This was successful in terms of  
21          reducing and stabilizing the freshman class  
22          number, but was not effective in reducing

1 overall school size, given the fact that we  
2 were committed to the larger class of accepted  
3 students for the four years that they were  
4 with us.

5 This was coupled with an extremely  
6 low and again unpredictable level of  
7 attrition. These two factors have led to an  
8 enrollment that this year is 30 students over  
9 the established cap. After the second spike  
10 in freshman class size, it became apparent to  
11 us that this was not an anomaly, but a trend  
12 and one that came at the same time we noted it  
13 almost doubling with freshman applications  
14 over the previous five years.

15 We then conducted a strategic  
16 review of our program enrollment and  
17 demographic trends in our feeder schools and  
18 our overall capacity given our resources and  
19 facilities. This petition for a larger  
20 student body is part of a forward looking  
21 enrollment plan that will help to support  
22 Visitation's future.

1           We have planned this increase to  
2           have minimal impact on the neighborhood and  
3           Ms. Albrecht mentioned some of the aspects,  
4           that there is no construction, parking,  
5           student drop-off, student pick-up will  
6           continue to be exclusively on campus. And as  
7           you can see from the drawings and from other  
8           aerial projections, that we have adequate  
9           space on the campus to accommodate this modest  
10          increase.

11           We do acknowledge that any  
12          increase in size has the potential of  
13          impacting traffic in the area. The  
14          discussions that we referenced earlier in  
15          January with our neighbors have continued and  
16          the Traffic Management Plan that we present to  
17          you today, we feel is responsive to the  
18          neighborhood concerns and will actually  
19          improve the traffic in Visitations immediate  
20          vicinity.

21           We are grateful for all of the  
22          many people who are involved in preparation of

1 the document. ANC Commissioners Lewis and  
2 Skelsey and Barbara Zartman of the Citizens  
3 Association of Georgetown were especially  
4 active in the discussions and helped forge the  
5 wording of the document.

6 The management plan is based on  
7 the extensive traffic survey conducted by O.R.  
8 George and Associates and has been reviewed by  
9 Inspector Patrick Burke of the Metropolitan  
10 Police Department who was formerly the  
11 department's head of traffic enforcement.

12 We appreciate the professional  
13 competencies of both and feel our situation  
14 has been well-researched and reviewed. There  
15 are several important characteristics of the  
16 plan and I will just summarize them briefly.

17 The first is that it provides for  
18 both traffic management and reduction of  
19 traffic volume conducted with the school. The  
20 second is that it grants some immediate relief  
21 during the peak morning time, that was the  
22 time of greatest concern. Visitation has

1 taken the following steps to implement the  
2 plan:

3 This morning, we had our off-duty  
4 traffic officer on-site at the intersection of  
5 35<sup>th</sup> and Volta. The priority of this officer  
6 is to move traffic through the intersection as  
7 well as enforce District traffic regulations.  
8 We have staggered the hours of non-  
9 instructional school staff to keep them away  
10 from the peak time. Staff are now to arrive  
11 before 7:30 or after 8:30.

12 It is important to mention that  
13 all the studies point to the impact of school  
14 traffic on the morning rush. The surveys  
15 indicated and Mr. George will substantiate  
16 this that due to the time of our dismissal and  
17 the many activities students assume after  
18 school that we have no significant impact on  
19 the afternoon.

20 We have appointed a traffic  
21 coordinator who will enforce all school  
22 regulations and facilitate alternative

1 transportation arrangements by offering a  
2 variety of incentives for our families to  
3 encourage use of Metro and other public  
4 transportation and to facilitate carpools  
5 among parent drivers and with students legally  
6 permitted to drive more than one student.

7           These incentives will include  
8 school subsidies for Metro and a \$500 carpool  
9 rebate to parents driving three or more  
10 students to school. We have adopted new  
11 policies for vendors and buses that we use for  
12 co-curricular activities bringing all that  
13 traffic onto campus, rather than onto 35<sup>th</sup>  
14 Street.

15           Mr. George will also mention the  
16 defined right lane on campus from southbound  
17 35<sup>th</sup> Street. We are considering HOV parking  
18 on campus and mandatory classes for student  
19 drivers on D.C. traffic laws and safe and  
20 courteous driving.

21           There are two other aspects of the  
22 plan. The first is that Visitation is

1 committed that this requested increase not  
2 only will not cause an increase in traffic to  
3 the neighborhood, but will reduce the volume  
4 from existing levels. To that end, we have  
5 agreed to maintain a traffic level consistent  
6 with and hopefully under that which one  
7 anticipates with the current cap of 435. Next  
8 year, this will be a reduction of 7 to 12  
9 percent from the traffic caused by our present  
10 enrollment.

11 The second is to establish a level  
12 of accountability to the neighbors, to the ANC  
13 and to this body. Visitation will present an  
14 annual traffic report that will not only list  
15 current enrollment figures, but include a  
16 survey done by an independent consultant to  
17 validate the impact of the management plan.  
18 If we do not make the qualitative and  
19 quantitative benchmarks we have mutually set  
20 with our neighbors, the school agrees to take  
21 additional steps to bring the numbers in line  
22 with the standards.

1           This has been a collaborative and  
2 a collegial process and the document that has  
3 emerged supports both the needs of Visitation  
4 as well as the broader neighborhood community.  
5 We are also pleased at the process that the  
6 past few months has opened up a dialogue with  
7 our neighbors, one that we are committed to  
8 continue.

9           The school has proposed and we are  
10 willing to spearhead a committee of the  
11 schools in our local area that could work with  
12 ANC-2E Commissioner Skelsey's Education  
13 Committee to address some of the concerns that  
14 have become evident in this process.

15           For over 200 years Visitation has  
16 been a valued and supportive member of the  
17 Georgetown community. We are equally  
18 concerned today to not only be a good  
19 neighbor, but to work towards common solutions  
20 to the issues of the neighborhood. We thank  
21 you for your time and for your consideration  
22 of our petition today.

1 CHAIRPERSON GRIFFIS: Excellent.  
2 Thank you very much.

3 MS. ALBRECHT: I would also like  
4 to introduce, at this time, Osborne George.

5 CHAIRPERSON GRIFFIS: Excellent.

6 MS. ALBRECHT: I believe the Board  
7 is probably familiar with him. He has  
8 testified before you many times as an expert.  
9 He has over 30 years of experience in traffic  
10 engineering and we would like to offer him as  
11 an expert in that area in this case.

12 CHAIRPERSON GRIFFIS: Let's get  
13 him to a mike. We probably have some  
14 questions for him. Any difficulty  
15 establishing Mr. George again as an expert  
16 witness? Very well. Let's move ahead.  
17 Before me gets into this though, let me just  
18 see if the Board has any questions of the  
19 first two witnesses and also ask if the ANC is  
20 present?

21 MR. LEWIS: Yes.

22 CHAIRPERSON GRIFFIS: Do you have

1 any cross examination of the two witnesses  
2 that you just heard?

3 MR. LEWIS: No.

4 CHAIRPERSON GRIFFIS: Excellent.  
5 Thank you very much. Mr. Kerns, thank you.  
6 Let me just say, because I think we can move  
7 on, Mr. George is going to get into some  
8 factual pieces that we may have some technical  
9 questions of, but, first of all, I appreciate  
10 both of your testimonies today, that really  
11 summarized well actually a lot of what was  
12 already in the written submission.

13 In my view of this from the last  
14 time and then from getting prepared for today,  
15 I think you summarized it incredibly well of  
16 what we're here to do under 206 and the  
17 special exception and that is looking at the  
18 impact of what this increase of enrollment and  
19 staff would be. I mean, a minimal of 10 and  
20 really I don't think anything so far, we've  
21 got a lot more to get through in the next five  
22 minutes that we'll see if it changes my

1 perception.

2 But the fact of the matter that I  
3 see right now is summarized perfectly what you  
4 said, and that is not only is this a small  
5 increase that won't impact the negative  
6 aspect, and that is traffic, because you also  
7 honed that in well, because that's really what  
8 we're here under 206 on this specific  
9 application.

10 Not only will it not negatively  
11 increase or impact it, but, in fact, with this  
12 management plan begins to decrease that  
13 impact. And really, I haven't seen -- I think  
14 we'll hear more on this, but look, we have  
15 seen dozens of these applications. The Board  
16 is very familiar with each and every little  
17 aspect and each application is different.

18 The site is different. The school  
19 is different. The program is different. The  
20 emphasis is different. The demand is  
21 different. The neighborhood is different.  
22 But we know the base elements of it. When we

1 look at this, it is encouraging to see that  
2 what you have really substantively put  
3 together is a management plan. And what does  
4 that mean?

5 It's you are not going to do away  
6 with cars. You're not going to -- I love the  
7 first statement in your -- I'm probably going  
8 to far on this right now, but the first  
9 paragraph in your application says look,  
10 you're not the cause and you're not the cure  
11 of Georgetown's traffic congestion. However,  
12 you play a part of it. And I think that's  
13 well said in what was done today in your  
14 openings, but also in the written submission  
15 and that is okay, so now how do you continue  
16 into this era of being compatible with the  
17 rest of the pieces?

18 And believe me, I don't think that  
19 Mr. George will reemphasize this. I know what  
20 he is going to say is through this management  
21 plan you are able to really decrease the  
22 impact, whether it be in terms of the

1 ridership and the carpooling or just in terms  
2 of the peak impact. And that's what is really  
3 amazing what we see, as it's always the  
4 morning drop-offs and pick-ups in the  
5 afternoons. Those are the big times.

6 Well, it's also when everyone else  
7 is trying to get where they need to go during  
8 the day, you know. So anyway, I'm very  
9 encouraged by this and actually I think it's  
10 an exceptionally well done plan and  
11 application. But that is probably going more  
12 towards closings than anything, so why don't  
13 we get some more information on that, Mr.  
14 George.

15 MR. GEORGE: Good morning, Mr.  
16 Chairman and Members of the Board. For the  
17 record, Osborne George. I provided witness  
18 cards for the Court Reporter.

19 CHAIRPERSON GRIFFIS: Excellent.

20 MR. GEORGE: All right. Mr.  
21 Chairman, we began our evaluation by looking  
22 at the relief that the applicant has sought.

1 And as you have heard before, they are seeking  
2 to regularize the enrollment from the approved  
3 435 students to a cap of 490. The 55 students  
4 we were able to quantify the projected trips  
5 that they are likely to generate.

6 Obviously, the school has been at  
7 its location for quite a long time and we were  
8 able to compute rates at which vehicles arrive  
9 at the campus.

10 CHAIRPERSON GRIFFIS: Right.

11 MR. GEORGE: Our estimate is that  
12 the additional 55 students would generate,  
13 approximately, 38, between 38 and 46 trips  
14 during the morning and afternoon peak hours.

15 CHAIRPERSON GRIFFIS: Good. You  
16 know, it was one of the most concise  
17 descriptions of trip generation. Mr. George,  
18 I know you have been involved in numerous of  
19 these and the Board and other experts and  
20 arguments of what a trip is and how many trips  
21 generate when someone comes in and then  
22 leaves. How many trips is it? And the

1 confusion of it.

2 I think it was great what you put  
3 in and I think it's very clear the Board's  
4 knowledge of it and then specifically to this.  
5 I think what I would like to get to is just,  
6 directly to, why don't you speak about how.  
7 I know it is proposed turn lane.

8 MR. GEORGE: Yes.

9 CHAIRPERSON GRIFFIS: And such and  
10 the removal of parking on the street that is  
11 for school only. Why don't we talk a little  
12 bit about just the detail of that, what you  
13 see that impact is and then what you see in  
14 terms of your expert status of the  
15 availability of that happening.

16 MR. GEORGE: Yes.

17 COURT REPORTER: Is there an  
18 exhibit number for this?

19 MS. ALBRECHT: Yes.

20 MR. GEORGE: Our report is in --

21 MS. ALBRECHT: I'll present it.

22 MR. GEORGE: -- it's part of the

1 prehearing statement. I'm not sure what tab  
2 it is in, but it's the traffic and back study.

3 CHAIRPERSON GRIFFIS: Tab H.

4 MR. GEORGE: Tab H. And the  
5 proposed lane configuration change is shown at  
6 page 16, pages 16 and 17.

7 CHAIRPERSON GRIFFIS: Excellent.

8 MR. GEORGE: Basically, the school  
9 has several hundred feet of frontage between  
10 P Street to the south and pretty much at Q  
11 Street to the north. And north of Volta Place  
12 as shown in the exhibit on page 17 or perhaps  
13 Exhibit 16 would show the existing situation  
14 better.

15 The frontage of the school has RPP  
16 parking. There are a total of 12 parking  
17 spaces along there.

18 CHAIRPERSON GRIFFIS: And that's  
19 where most of the traffic is coming in from  
20 north?

21 MR. GEORGE: From the north.

22 CHAIRPERSON GRIFFIS: To turn

1 right.

2 MR. GEORGE: Yes.

3 CHAIRPERSON GRIFFIS: Okay.

4 MR. GEORGE: Yes. At the same  
5 time, along the frontage, just to the south  
6 you notice a portion that's labeled -- that's  
7 shaded red where there is no parking allowed  
8 between 7:00 a.m. and 6:30 p.m. on school  
9 days.

10 CHAIRPERSON GRIFFIS: Excellent.

11 MR. GEORGE: All right. I think  
12 that was put into place to allow for some  
13 loading and parking of buses and so on to  
14 accommodate the school's activities.

15 CHAIRPERSON GRIFFIS: So what is  
16 being proposed is just flipping that across  
17 Volta?

18 MR. GEORGE: Yes, yes. And the  
19 proposed configuration is shown on page 17,  
20 which would allow for an exclusive right turn  
21 lane maintaining the through lane. The rest  
22 of the intersection remains as it is today.

1                   CHAIRPERSON   GRIFFIS:       That's  
2                   excellent.  So if they are coming south on, if  
3                   I understand this correctly, 35<sup>th</sup> Street,  
4                   vehicles that are trying to get into  
5                   Visitation and that stop sign, of course,  
6                   everyone is stopping.

7                   MR. GEORGE:  Yes.

8                   CHAIRPERSON GRIFFIS:  Full stop,  
9                   right, at that line?

10                  MR. GEORGE:  Well, on top of  
11                  that --

12                  CHAIRPERSON GRIFFIS:  Allowing  
13                  pedestrians to cross intermittently.  And then  
14                  see what that does is if you were waiting to  
15                  turn left, you could cue up and it would delay  
16                  the traffic from going across that  
17                  intersection.  So what you are saying is that  
18                  line will be set up so that cars can move out  
19                  of the flow of traffic to get into Visitation?

20                  MR. GEORGE:  That is exactly  
21                  correct.

22                  CHAIRPERSON GRIFFIS:  Gotcha.

1 MR. GEORGE: And in addition, as  
2 you heard from Mr. Kerns, the school has  
3 already initiated the traffic control by the  
4 Metropolitan Police Department, that has  
5 begun.

6 CHAIRPERSON GRIFFIS: Yes.

7 MR. GEORGE: And we think that  
8 this should work very efficiently and should  
9 relieve the congestion, the cuing along 35<sup>th</sup>  
10 Street to the north.

11 CHAIRPERSON GRIFFIS: That's a bus  
12 route, too, on 35<sup>th</sup> Street, right?

13 MR. GEORGE: A portion of it. The  
14 bus route, I'll refer you to either the  
15 exhibits that are either to the left or to the  
16 Exhibit page 2 of the report. You'll notice  
17 that Q Street, which comes from east of  
18 Wisconsin Avenue, and then it is offset and  
19 continues west between Wisconsin Avenue and  
20 35<sup>th</sup> Street. That's classified as an arterial  
21 roadway.

22 The bus route runs along Q Street

1 and then turns north along 35<sup>th</sup> Street to  
2 Reservoir Road. It does not go to the south  
3 right along the frontage of the school.

4 CHAIRPERSON GRIFFIS: Great.

5 MR. GEORGE: All right. And  
6 related to that, Mr. Chairman, I would note  
7 that there are five bus routes along there and  
8 that should fit well with the school's  
9 proposal to enhance public transportation  
10 usage.

11 CHAIRPERSON GRIFFIS: Well said.

12 MR. GEORGE: Yes.

13 CHAIRPERSON GRIFFIS: Excellent.  
14 I don't have any other questions or detail  
15 required from my perspective, but let me open  
16 it up to any other Board Members. Mr.  
17 Etherly?

18 BOARD MEMBER ETHERLY: Thank you  
19 very much, Mr. Chair. I would agree with your  
20 assessment of the case kind of at the outset  
21 in terms of I think a very formidable amount  
22 of documentation put forth in the record that

1 I think very clearly lays out a lot of what we  
2 are dealing with.

3 What I wanted to perhaps explore a  
4 little bit is a reference in the OP report,  
5 but I want to eventually get to you, Mr.  
6 George, in terms of a question regarding it,  
7 but perhaps let me start with Ms. Albrecht.

8 MR. GEORGE: Sure.

9 BOARD MEMBER ETHERLY: And then  
10 perhaps look to Mr. Kerns or Sister Berchmans,  
11 is it?

12 SISTER HANNAN: Berchmans.

13 BOARD MEMBER ETHERLY: Berchmans.  
14 Excellent. I want to be sure that I do not do  
15 injustice to that name. The issue of special  
16 events, in your prehearing statement at  
17 Exhibit C, you lay out a fairly, you know,  
18 extensive list of organizations and groups  
19 that over the past 18 to 24 months have made  
20 use of the campus facilities in some fashion  
21 or another.

22 There is perhaps, unless I missed

1 it, not any direct reference in the  
2 Transportation Management Plan to how you  
3 would propose to deal with the issue of  
4 special events. So perhaps as a question  
5 starting with you, Ms. Albrecht, but again  
6 looking to Mr. Kerns, is it your or has it  
7 been your experience that in terms of, if you  
8 will, external use of the campus those events  
9 aren't significant enough or substantial  
10 enough to necessarily create or raise any  
11 issues?

12 I will note that the Office of  
13 Planning's report says very clearly that they  
14 have not been made aware of any adverse  
15 traffic considerations with regard to external  
16 events. So I'm just more or less just really  
17 trying to put a pin in that particular  
18 comment. So if you could, could you speak a  
19 little bit to that and whether or not you have  
20 thought about the need for any transportation  
21 management actions as relates to external  
22 events or third-parties that use the campus

1 for whatever reason?

2 MS. ALBRECHT: My understanding of  
3 the various groups, I think there is one  
4 important thing to note first, which is that  
5 there is very infrequency for the different  
6 groups. There are a few groups that we allow  
7 to use parking on a daily basis. They are  
8 included in the Transportation Management  
9 Plan, in that they are now prohibited from  
10 arriving on campus during the peak times as a  
11 condition to being allowed to use campus  
12 parking.

13 BOARD MEMBER ETHERLY: Okay.

14 MS. ALBRECHT: So they are  
15 directly addressed by the Traffic Management  
16 Plan and would have to comply with all of the  
17 regulations in that plan.

18 BOARD MEMBER ETHERLY: And these  
19 are users that are utilizing parking inventory  
20 on the site?

21 MS. ALBRECHT: Exactly.

22 BOARD MEMBER ETHERLY: Okay. But

1 they have very specific restrictions as to  
2 when they can access that?

3 MS. ALBRECHT: Exactly.

4 BOARD MEMBER ETHERLY: Do you have  
5 a sense of how many entities or organizations  
6 have that type of arrangement in place?

7 MS. ALBRECHT: I believe that  
8 there are, approximately, 25 excess spaces  
9 that the school does not utilize that it makes  
10 available to, for instance, Holy Trinity  
11 faculty, who otherwise don't have parking at  
12 their school. And this is excess that the  
13 school doesn't use, because it has sufficient  
14 parking for its own needs.

15 BOARD MEMBER ETHERLY: Okay. And  
16 those would be, those excess spaces would be  
17 utilized primarily during the school day?

18 MS. ALBRECHT: Yes.

19 BOARD MEMBER ETHERLY: Okay. Any  
20 of those particular uses extend into the  
21 evening or what have you?

22 MS. ALBRECHT: I don't believe so

1 and I'll let Dan address that more  
2 specifically.

3 BOARD MEMBER ETHERLY: Okay.

4 MR. KERNS: We also make our  
5 parking available to Holy Trinity Parish and  
6 School on a regular basis for evening  
7 activities, but they have been very willing,  
8 as they follow our process, to modify, amend  
9 or in some way adjust their use of our parking  
10 to fulfill whatever requirements we have.

11 It's interesting. We get very few  
12 complaints about usage, special event usage  
13 either as it relates to traffic or as it  
14 relates to noise. But I think Holy Trinity,  
15 since they are very much a neighbor and one  
16 that we work with closely, they will be on  
17 board with any changes that we might want to  
18 implement.

19 There have been -- and just to  
20 make one point, we do have someone 24 hours a  
21 day at the front gate. And we have some  
22 events that take place in the evening with

1 some outside groups. The gate attendant has  
2 now got the responsibility to make sure that  
3 there is no drop-off/pick-up outside the -- on  
4 35<sup>th</sup> Street as best we can. We're trying to  
5 control all of that in the evening as well.

6 I think we can also make it part  
7 of any agreement that we have for additional  
8 groups who ask to use our space. It is to use  
9 our space with the understanding that drop-  
10 off/pick-up and parking all have to remain  
11 within the confines of the campus.

12 BOARD MEMBER ETHERLY: Okay. And  
13 I appreciate that. That pretty much answers  
14 my questions. I would perhaps venture one  
15 final question and that would be does the  
16 school anticipate any marked change in terms  
17 of the external use of the property, of the  
18 campus? Do you expect that you might look to,  
19 at some point, get more aggressive with  
20 respect to outside events or you feel that you  
21 are going to pretty much maintain this same  
22 level of usage that you have had over the past

1 few years or so?

2 MR. KERNS: I think the same level  
3 of usage. We do have summer camps and we have  
4 a summer camp arrangement that we anticipate  
5 that we will continue, but we don't see any  
6 marked change in how we operate at the campus  
7 over time.

8 BOARD MEMBER ETHERLY: Okay.

9 MR. KERNS: We see this as being  
10 pretty consistent with what we have always  
11 been doing.

12 BOARD MEMBER ETHERLY: Okay.  
13 Excellent. That concludes my questions, Mr.  
14 Chair. I don't think I need to turn anything  
15 to Mr. George. Thank you.

16 CHAIRPERSON GRIFFIS: Thank you  
17 very much. Good questions. Ms. Miller?

18 VICE CHAIR MILLER: Good morning.  
19 I just want to make a few comments first and  
20 say that, I mean, I think it's clear from the  
21 record that this school has a very long  
22 history of living in the neighborhood with no

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1 adverse impacts and, in fact, very positive  
2 impacts on the community. And I think it's  
3 also evident in the manner in which you have  
4 worked with the ANC and the Office of Planning  
5 in trying to work out a solution to any  
6 traffic problems, which seem to be the only  
7 issue here that flows at all from the increase  
8 in enrollment.

9           And I think it's also unusual in  
10 your case that not many private schools have  
11 on-site parking for so many cars, that there  
12 isn't a problem with parking on the streets  
13 and I don't know if there is anyone and there  
14 certainly isn't one that has come before us  
15 that has a guard at the gate to monitor. So  
16 I think that you are in a special position.

17           Now, that being said, what's  
18 before us really is this Traffic Management  
19 Plan which you all have worked so hard at.  
20 And my basic question on that is does it have  
21 a provision that I haven't seen that makes it  
22 self-enforcing in any way or how do you

1 envision what happens if the school doesn't do  
2 all these wonderful things that is presented  
3 in the TMP?

4 MS. ALBRECHT: That was definitely  
5 an issue that came up in negotiations. And  
6 the way we chose to address it was by  
7 requesting that it be made a condition to the  
8 BZA's order, so that if the school doesn't  
9 comply with the agreement going forward, it  
10 would be -- it would call into question  
11 compliance with this order.

12 And so enforcement would fall  
13 under the jurisdiction of DCRA and the BZA.  
14 We wanted to do that to avoid making it  
15 somehow litigious or we wanted to avoid  
16 creating an unnecessary adversarial atmosphere  
17 between the neighbors going forward. So this  
18 way, we have flexibility to amend the plan,  
19 but there is also an enforcement mechanism  
20 that keeps jurisdiction where it belongs,  
21 which is the BZA because that's the initial  
22 impetus for the application and the original

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1 cap.

2 VICE CHAIR MILLER: Okay.  
3 Because, I mean, I do notice on page 4, for  
4 instance, that if there is noncompliance with  
5 certain regulations that are in the handbook,  
6 then there are immediate penalties, such as  
7 fines or, you know, what I'm talking about,  
8 page 5, and then it goes on to page 5.

9 MS. ALBRECHT: Maybe I  
10 misunderstood your question then.

11 VICE CHAIR MILLER: No, I don't  
12 think you did.

13 MS. ALBRECHT: There are two  
14 levels of enforcement.

15 VICE CHAIR MILLER: Right.

16 MS. ALBRECHT: I think that  
17 paragraph speaks to enforcement for students.  
18 And the new transportation management  
19 coordinator will have responsibility for  
20 enforcing penalties and fines against students  
21 for violating the Transportation Management  
22 Plan. If the school then wasn't enforcing it

1 properly, I think then that would become a  
2 second problem, a second violation.

3 VICE CHAIR MILLER: That's right.  
4 No, you didn't misunderstand me. I was just  
5 saying that's the only provision in this  
6 agreement that actually self-enforces without  
7 having to go to the BZA, for instance, or the  
8 Zoning Administrator if it were not to occur.  
9 So I understand what you are saying.

10 MS. ALBRECHT: Okay.

11 CHAIRPERSON GRIFFIS: Good.  
12 Anything else? Questions at this time?  
13 Excellent questions. Okay. Let's move ahead  
14 then. Is there anything else you need Mr.  
15 George to cover?

16 MS. ALBRECHT: No, if the Board is  
17 satisfied, I think that's all we needed to  
18 cover, at this time.

19 CHAIRPERSON GRIFFIS: I think  
20 we're good, at this time. Does the ANC have  
21 any cross of Mr. George?

22 MR. LEWIS: No, sir.

1 CHAIRPERSON GRIFFIS: Questions?  
2 Let's move ahead then to the Office of  
3 Planning. Ms. Brown-Roberts is here with us  
4 this morning. A very good morning to you.

5 MS. BROWN-ROBERTS: Thank you.  
6 Good morning, Mr. Chairman and Members of the  
7 Board. The Office of Planning is recommending  
8 approval of the special exception request for  
9 an increase in the student enrollment cap and  
10 faculty cap, subject to the Transportation  
11 Management Plan submitted by the applicant and  
12 supported by ANC-2E as conditioned in our  
13 report.

14 OP commends the applicant's  
15 willingness to work with the ANC to reach an  
16 agreement concerning the traffic management  
17 associated with the requested increase in  
18 student enrollment and staff increase. The  
19 application was reviewed according to the  
20 school's operation and traffic management  
21 guided by the provisions of section 206. We  
22 believe that the applicant satisfied these

1 provisions.

2 The school has worked extensively  
3 with ANC-2E in creating an acceptable Traffic  
4 Management Plan. Key elements of the TMP  
5 include addition of off-duty MPD officer, the  
6 potential creation of a dedicated right turn  
7 lane on southbound 35<sup>th</sup> Street, the  
8 designation of a transportation manager and  
9 coordinator for oversight of the TMP and  
10 staggering the arrival times of personnel  
11 during the morning period to reduce the number  
12 of arrivals during peak hours.

13 The Office of Planning believes  
14 that the proposed increase are likely to  
15 become objectable to the neighborhood because  
16 of traffic as determined by the applicant's  
17 traffic study and DDOT's concurrence with  
18 same. In discussions with OP, DDOT has  
19 indicated its support for the school Traffic  
20 Management Plan.

21 No significant impacts are  
22 anticipated if the school continues with the

1 stated hours of operation and in conformance  
2 with the Traffic Management Plan and we,  
3 therefore, recommend approval by the Board  
4 subject to the condition outlined. Thank you,  
5 Mr. Chairman.

6 CHAIRPERSON GRIFFIS: Excellent.  
7 Thank you very much. You know, it's  
8 fascinating, obviously, you got it from the  
9 applicant, but the whole enrollment and  
10 acceptance and the year tabulation was  
11 excellent and very informative. And actually,  
12 it's the first time that I have seen it laid  
13 out in that understandable fashion.

14 We have always had, even when we  
15 used to do the university and campus plans,  
16 the whole enrollment and the unscientific  
17 element of the applications come in, the  
18 acceptances go out and then you sit and wait  
19 and you wonder, all right, how many are  
20 actually going to pick those up, right?

21 And this was fascinating to see  
22 how the years had come though. It also was

1 fascinating to understand that there is a  
2 doubling of applications and there is an  
3 increase of actually demand for this, because  
4 of this, I think, great kind of global  
5 awareness and active citizenry that is being  
6 pushed here.

7           Anyway, that was very helpful in  
8 understanding the holistic aspect of this  
9 application. The other piece was there was  
10 something else I was going to ask OP about,  
11 but I have lost it now. So I'll move ahead.  
12 Ms. Miller, did you have a question?

13           VICE CHAIR MILLER: Yes. Ms.  
14 Brown, I was wondering if you could comment on  
15 the enforcement question that I had raised?  
16 I think since I have been on the Board,  
17 basically, or certainly of late, that the TMPs  
18 that have come before us basically have been  
19 self-enforcing. And I am just interested in  
20 your opinion as to whether you think that this  
21 would work well being set up this way.

22           MS. BROWN-ROBERTS: I think we

1 have sort of brought to the BZA that usually  
2 the TMPs are left outside of the Board's  
3 conditions. However, I think it was stressed  
4 to us by the ANC that it was sort of a  
5 condition of approval by them. And so we sort  
6 of decided that we would sort of leave that up  
7 to the direction of the Board. You know, if  
8 they wanted to do that, that would be okay  
9 with us, too.

10 VICE CHAIR MILLER: Okay. And my  
11 other question goes to your recommendation  
12 that there be a term for 10 years. It seems  
13 like the school has been operating for over  
14 200 years. Why would we now put on a term of  
15 10 years?

16 MS. BROWN-ROBERTS: I'm actually  
17 not sure of where that came from. This is not  
18 my case, so I'm not sure of exactly where the  
19 10 year came from.

20 VICE CHAIR MILLER: Okay. Fair  
21 enough. Thank you.

22 CHAIRPERSON GRIFFIS: Good.

1 MS. BROWN-ROBERTS: Okay.

2 CHAIRPERSON GRIFFIS: Good. Well,  
3 we'll give you harder hitting questions now  
4 that we know that you are vulnerable and it's  
5 not your case. Can you address a little bit  
6 just about the reporting, which I think Ms.  
7 Miller was getting to, in terms of  
8 enforceability, but also in reporting.

9 There is a recommendation that the  
10 school submit a traffic summary to the BZA and  
11 the ANC and DDOT. Is it more appropriate to  
12 send it to the Zoning Administrator, in that,  
13 I'll just qualify that, because, of course,  
14 our proceeding at the end of a hearing, the  
15 record will close.

16 MS. BROWN-ROBERTS: Yes.

17 CHAIRPERSON GRIFFIS: There would  
18 be no place or record for it to go.

19 MS. BROWN-ROBERTS: Right. I  
20 think in all the cases that we have done, it  
21 has always been something that it goes to  
22 DDOT, between DDOT and the ANC. And that's

1 where the issues usually get resolved.

2 CHAIRPERSON GRIFFIS: Okay. Okay.  
3 Yes, I think that's appropriate. I mean, we  
4 have a compliance officer that is working very  
5 hard in the Office of Zoning and I think it  
6 would be appropriate that the compliance  
7 officer be delivered information when there  
8 was an element of discussion or disagreement  
9 prior to going to the Zoning Administrator.

10 So either the school or the ANC  
11 could bring it to the compliance officer, but  
12 to have them maintain files with no real  
13 connection to anything official may raise the  
14 level of the appearance of some sort of  
15 responsibility here in the Office of Zoning  
16 that they would not actually have.

17 MS. BROWN-ROBERTS: Right. I  
18 mean, I think for the -- going to that extent  
19 would be an issue where, you know, they have--  
20 they are not or can't come to an agreement and  
21 then that would be another level to proceed  
22 to.

1 CHAIRPERSON GRIFFIS: Right.

2 MS. BROWN-ROBERTS: But I don't  
3 see that, you know, as the initial impetus to  
4 go there. I think that would be something to  
5 work out between DDOT and the ANC and the  
6 applicant and then if that doesn't work, then  
7 they have the option to proceed.

8 CHAIRPERSON GRIFFIS: Excellent,  
9 excellent. And then I think Ms. Miller's  
10 question of the 10 years, I had the same  
11 question of why we had a condition proposed by  
12 the Office of Planning, but they didn't really  
13 discuss. The only thing I could glean was the  
14 fact that there is a 10 year horizon for the  
15 TMP in which it will be totally revisited or  
16 the opportunity for it to be totally revisited  
17 is there.

18 And, of course, if there is an  
19 agreement for a new plan, then that old one  
20 would maintain in itself in force.

21 MS. BROWN-ROBERTS: All right.

22 CHAIRPERSON GRIFFIS: So I think

1 it's probably appropriate for the Board to  
2 look at separating those elements out in terms  
3 of the time set up for the TMP.

4 MS. BROWN-ROBERTS: Yes.

5 CHAIRPERSON GRIFFIS: And then our  
6 own thought into the -- based on the facts in  
7 the record of whether there is a time limit on  
8 our special exception. So that's all I have,  
9 at this point. Others? Does the applicant  
10 have any cross examination of the Office of  
11 Planning?

12 MS. ALBRECHT: No.

13 CHAIRPERSON GRIFFIS: ANC? Very  
14 well. Thank you very much. Let' move ahead  
15 then. I don't have outside of that which has  
16 already been established through the Office of  
17 Planning, we do have the police department,  
18 the letter of support from Patrick Burke,  
19 inspector. I don't have an exhibit on that,  
20 but I know it's in the record.

21 MS. ALBRECHT: It's Exhibit 41.

22 CHAIRPERSON GRIFFIS: Excellent.

1 Thank you. And we can move to the ANC.

2 MR. LEWIS: Good morning. My name  
3 is Ron Lewis. I'm ANC Commissioner from ANC-  
4 2E, which is the ANC that is fortunate enough  
5 to have Georgetown Visitation School in its  
6 District. I live at 3400 Reservoir Road, N.W.  
7 I am actually delighted to be here today,  
8 because I'm very pleased, as I think the  
9 entire neighborhood is and as the ANC itself  
10 has demonstrated in the filing that you have  
11 before you, with how this process has gone,  
12 both procedurally and end result.

13 When we started this, there was an  
14 obvious choice. We could have taken the path  
15 that most of the other schools and neighbors  
16 have done, and you have seen all too often  
17 where it is just a free-for-all, and everyone  
18 has valid points and in the end it just has to  
19 be sorted out in a very contentious process  
20 and one does the best one can.

21 In this case, because of the  
22 history of the school being such a good

1 neighbor and the neighbors appreciating that  
2 and all of us recognizing that these were  
3 tough, but potentially solvable issues, we all  
4 determined to work this through together, if  
5 at all possible. And I'm very grateful to the  
6 Board for letting that happen for giving us  
7 the time to let the process go to it's natural  
8 conclusion, to the school for its constant  
9 collegial and forthcoming approach on this, to  
10 the immediate neighbors who got it right away.

11 They understood that it's in  
12 everybody's interest to solve this, that  
13 traffic is very bad in the mornings  
14 especially, that the school certainly  
15 contributes to it and other factors contribute  
16 to it as well. And it's the best thing to do  
17 to work it out and to the Citizens Association  
18 of Georgetown, which was enormously helpful  
19 because of their institutional experience in  
20 working with these issues.

21 So we came up with a Traffic  
22 Management Plan that we think is innovative

1 and effective. To get there, we first agreed  
2 that traffic is the only issue here. We agree  
3 with that, that the campus is so large, the  
4 students are so well behaved that there just  
5 aren't any other issues. And so by focusing  
6 on traffic, we could actually resolve this.

7 We next agreed that morning  
8 traffic was the issue, not only from the  
9 traffic report, we analyzed those numbers very  
10 carefully, but from the neighbors own  
11 observation and we met with the neighbors a  
12 number of times. Afternoon traffic doesn't  
13 come in the rush hour. Morning traffic is  
14 earlier and so it's imperceptible.

15 Morning traffic is a perfect storm  
16 of everyone trying to use 35<sup>th</sup> Street at once.  
17 And so the plan that we all devised, I think,  
18 addresses this creatively. If, in fact, as it  
19 is designed to do, traffic will be no greater  
20 in the key rush hour than it would have been  
21 at 435 students and 110 faculty and staff.  
22 There is simply no effect of this, no adverse

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1 effect of this decision, which otherwise is  
2 well-justified as you observed by the  
3 application and enrollment pressures.

4 And that's exactly what the plan  
5 is designed to do. And I think it will do  
6 that and I would like to answer a couple of or  
7 respond to a couple of questions that you have  
8 raised.

9 Ms. Miller, you asked about self-  
10 enforcement. I think there are additional  
11 layers of self-enforcement that I would like  
12 to mention to you, because that is what  
13 everyone has in mind. This process has been  
14 so good that we have every expectation that it  
15 will not be back before you.

16 The first level is that the ANC is  
17 actually a party to the agreement and so the  
18 ANC through its secondary schools committee  
19 will be monitoring the agreement and dealing  
20 with the school constantly and I have every  
21 expectation in a very cooperative and  
22 collegial way. So if there are issues, they

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1 are going to be seen right away before they  
2 start to fester and addressed.

3 The agreement itself in Section  
4 II(c)(2) and in Section II(c)(4), 2 is on page  
5 2 and 4 is on page 3, itself described the  
6 continuing process of dialogue and new facts  
7 coming up from additional traffic studies as  
8 need be and continuing efforts to improve it,  
9 which are addressed in (c)(4) that are a very  
10 big part of this process.

11 I mean, this is a work in  
12 progress. We think it's starting off at a  
13 very good point and we think it's going to get  
14 better. This traffic reduction that we all  
15 have in mind, it says explicitly, is not a  
16 target, but a limit. And so we would hope  
17 this plan will evolve cooperatively over its  
18 lifetime and simply get better and better.

19 I also want to mention the 10 year  
20 term. That came as a surprise to us as well  
21 in OP's filing. We had not expected it. We  
22 would be perfectly content if there were no 10

1 year limit. I mean the TMP is self-enforcing  
2 in that regard as well. It has an initial 10  
3 year term that either will be modified by  
4 agreement or will simply continue. So if you  
5 didn't have a 10 year term in your order, the  
6 TMP would still work just as well.

7 And, Mr. Etherly, your question  
8 about special events, we are comfortable. I'm  
9 glad that you asked the question about will  
10 the current pattern of relatively limited  
11 number of events continue and we're confident  
12 with the answer that it will. But I also want  
13 to point out these events are mostly the ones  
14 that might be of concern in the evening.

15 In the evening, in that  
16 neighborhood, traffic is not as big a concern  
17 as on-street parking. And the fact that these  
18 events all have parking on campus is a plus  
19 for the neighborhood with a gate attendant to  
20 make sure that it's orderly. So it has not  
21 been a problem. And if it becomes one, it's  
22 well-encompassed within the continuing

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1 discussions that the TMP calls for.

2 So with that said, the ANC  
3 enthusiastically supports the TMP. You know,  
4 whether this can be a model elsewhere I don't  
5 know. I hope the process will, because we  
6 believe it has arrived at a very good result.  
7 I'll be happy to answer any questions that you  
8 may have.

9 CHAIRPERSON GRIFFIS: Excellent.  
10 Thank you very much. I think as part of our  
11 new configuration of offices we have a model  
12 TMP case that we can put it into and put it on  
13 the shelf right there. I think it's very well  
14 said and I think you are to be commended in,  
15 frankly, what I see from the result in the  
16 record of the TMP is exactly what you have  
17 stated, that the community came together to  
18 work towards a common goal, knowing that there  
19 were different aspects and different  
20 perspectives maybe, but as soon as everyone  
21 committed to the fact that they were all going  
22 toward the same general direction, it was

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1 obvious to come together to make something  
2 workable.

3 Perhaps we see those elements of  
4 the contention where no one has agreed and no  
5 one really is going in the same general  
6 direction and that's what we do. We bring it  
7 together and, obviously, focus directly on the  
8 fact. That's not the case here. And I think  
9 you have said it well as the applicant has  
10 also said that what has been created is a  
11 detailed, a measurable, a monitorable plan,  
12 but it also lends itself to flexibility in  
13 order to change over time.

14 A lot has changed in 200 years. A  
15 lot has changed in 20 years since the ANC has  
16 been around. Obviously, we want to project  
17 out and not in any way stifle the natural  
18 living situations in those surrounding areas  
19 and also the school, so that it can be  
20 amenable throughout.

21 I thought your statements are  
22 right on. In fact, they directly go to

1 exactly what we are here for. You have  
2 indicated the fact that traffic was the  
3 critical issue and the only element of the  
4 special exception of 206 that the ANC was  
5 concerned that may well have the potential of  
6 creating an undue problem or difficulty and  
7 that you found that there was, in fact, with  
8 this implementation and negotiation to details  
9 of the TMP no adverse effect.

10 And, in fact, went into further  
11 detail. I think that's excellently done and  
12 it's exactly the way the Board will look at  
13 this in our decisions, our deliberation and it  
14 goes right to the heart of the matter. Ms.  
15 Miller, questions?

16 VICE CHAIR MILLER: I would also  
17 like to congratulate you for working so well  
18 with the school on behalf of the ANC. I  
19 probably should have asked Office of Planning  
20 this question, but we can go back to them.  
21 But first of all, do you have a copy of the  
22 Office of Planning report?

1 MR. LEWIS: Yes.

2 VICE CHAIR MILLER: Okay. You  
3 noted that the term of 10 years was a surprise  
4 to you, so the ANC didn't consider that, I  
5 assume?

6 MR. LEWIS: We didn't ask for it,  
7 no.

8 VICE CHAIR MILLER: Okay. Now,  
9 there are other conditions that Office of  
10 Planning has recommended and I'm wondering if  
11 you have any comments on them or whether the  
12 ANC considered them? I know that the first  
13 three deal with -- the first one is the 10  
14 years we have discussed. The second one is  
15 the enrollment number, which you are on the  
16 record for and the third one was staff, which  
17 you are on the record for.

18 MR. LEWIS: Right.

19 VICE CHAIR MILLER: But then I  
20 think that they are putting forth some older  
21 conditions again from the past order.

22 MR. LEWIS: Well, yes, we assume

1 that the past order, except as modified in two  
2 respects, the student cap and the faculty and  
3 staff cap, will remain in effect. That has  
4 been our assumption and I believe the school's  
5 assumption throughout.

6 VICE CHAIR MILLER: Can I ask you  
7 with respect just for filling the record, has  
8 there been any problem with the grounds and  
9 the landscaping being maintained in a neat and  
10 orderly condition?

11 MR. LEWIS: None at all.

12 VICE CHAIR MILLER: And any  
13 problem with trash and refuse?

14 MR. LEWIS: No.

15 VICE CHAIR MILLER: Okay. And are  
16 you on board with -- I guess we talked about  
17 who the report should be sent to, the annual  
18 reports regarding the TMP, the traffic  
19 summary. We were discussing DDOT and the ANC.  
20 Do you think that is sufficient or do you have  
21 an opinion about whether the Zoning  
22 Administrator should get reports?

1           MR. LEWIS: I really think it's  
2 sufficient. If a problem comes up that we  
3 can't resolve communally, then we will come  
4 back to the zoning officials. I do think it's  
5 wise to make it a condition that entering into  
6 and abiding by the TMP is a condition of the  
7 zoning approval. That's a pure last resort,  
8 but I do think that's wise. I don't think  
9 regular reports are particularly necessary.

10           VICE CHAIR MILLER: Okay. So it's  
11 not even just to whom they are sent, you don't  
12 think that that needs to be a condition of the  
13 order that there be regular reports?

14           MR. LEWIS: Well, the TMP itself  
15 mandates regular reports to the ANC. And so  
16 if the TMP is adopted, that will be self-  
17 enforcing and I don't think the order needs to  
18 go beyond that.

19           VICE CHAIR MILLER: Okay.

20           MR. LEWIS: But we have not  
21 specifically, we the ANC, addressed that  
22 issue.

1 VICE CHAIR MILLER: Right.

2 MR. LEWIS: And whatever the Board  
3 thinks is right is, I'm sure, fine with us.

4 VICE CHAIR MILLER: Okay. Thank  
5 you. Ms. Brown, I just want to follow-up with  
6 you on a couple of things.

7 MS. BROWN-ROBERTS: Sure, yes.

8 VICE CHAIR MILLER: I was under  
9 the impression that, and it wasn't in the  
10 record though, the Office of Planning had  
11 discussed with the ANC the issue about  
12 reporting to DDOT, the BZA and ANC with  
13 respect to the traffic summary. And having  
14 heard the ANC state that they don't think that  
15 that's necessary or at least Mr. Lewis and  
16 that it wasn't addressed by the ANC as a  
17 whole, do you have a comment as to why you  
18 would recommend it? I know this isn't your  
19 case now, so but --

20 MS. BROWN-ROBERTS: Yes, but it  
21 was my understanding that that was the case  
22 that the ANC had insisted that it be made a

1 part of the condition of approval by the BZA.  
2 That was my understanding.

3 VICE CHAIR MILLER: Does the  
4 Office of Planning have a position whether it  
5 should be?

6 MS. BROWN-ROBERTS: No, I think,  
7 you know, if it was left up to us, it would  
8 not be conditioned, you know, just from past  
9 history of how we have addressed TMPs, you  
10 know, just to be consistent.

11 VICE CHAIR MILLER: Okay. And  
12 also with respect to the older provisions,  
13 conditions that were being recommended, again,  
14 do you have an opinion on inclusion of them in  
15 this order?

16 MS. BROWN-ROBERTS: Again, those  
17 were just brought over from the old order just  
18 to be, again, consistent.

19 VICE CHAIR MILLER: I have one  
20 other question. On page 2 of the Office of  
21 Planning's report, it looks like one of the  
22 conditions that Office of Planning didn't

1 include in its recommendation, which is kind  
2 of a big condition, but was the one dealing  
3 with extracurricular activities.

4 MS. BROWN-ROBERTS: Um-hum.

5 VICE CHAIR MILLER: Do you see  
6 that one? Shall be as projected by the  
7 applicant and shall be generally in accordance  
8 with the type of activities currently  
9 existing.

10 MS. BROWN-ROBERTS: Yes. I'm not  
11 sure why that wasn't brought forward.

12 VICE CHAIR MILLER: That's okay.  
13 Well, it's kind of vague I think.

14 MS. BROWN-ROBERTS: Yes.

15 VICE CHAIR MILLER: That's  
16 probably one of the reasons.

17 MS. BROWN-ROBERTS: Yes, I think.

18 VICE CHAIR MILLER: Okay.

19 MS. BROWN-ROBERTS: Yes, again, it  
20 was one of the old conditions.

21 CHAIRPERSON GRIFFIS: Okay. Does  
22 the ANC have comment on that?

1           MR. LEWIS: Yes, if I could just  
2 clarify. I think there probably was a minor  
3 misunderstanding between the ANC and OP for  
4 which I'll take responsibility. We certainly  
5 feel that the TMP as a whole should be a  
6 condition of the zoning approval. But as for  
7 the reporting, we really had not addressed  
8 that.

9           CHAIRPERSON GRIFFIS: Good.  
10 Anything else? Fabulous. Very well. Then  
11 let's move ahead. Does the applicant have any  
12 cross of the ANC?

13           MS. ALBRECHT: No.

14           CHAIRPERSON GRIFFIS: Very well.  
15 Thank you very much.

16           MR. LEWIS: Thank you.

17           CHAIRPERSON GRIFFIS: We do  
18 appreciate it. Yes, good. We appreciate,  
19 first of all, taking the time to get here, but  
20 then, of course, to be here to present it and  
21 obviously for the questions, clarifications  
22 that the Board and the applicant might have

1 had.

2 With that then, let's move ahead.  
3 Are there any other persons present in  
4 Application 17549 that would like to present  
5 testimony today, persons in support? Persons  
6 in opposition? Very well, not noting any  
7 other individuals here present to provide  
8 testimony on this application, let's move  
9 ahead. A couple of last questions from the  
10 Board, at this point.

11 MS. ALBRECHT: Could I just  
12 interject one thing really quickly?

13 CHAIRPERSON GRIFFIS: Sure.

14 MS. ALBRECHT: Inspector Patrick  
15 Burke was here earlier and had wanted to  
16 testify.

17 CHAIRPERSON GRIFFIS: We heard  
18 tell of a metropolitan police officer  
19 wandering around, that's why we came out late,  
20 actually, we were a little nervous.

21 MS. ALBRECHT: He was hoping to  
22 testify in person, but he had a meeting at MPD

1 with the Chief of Police and had to leave, so  
2 he asked us to express his regrets and refer  
3 you to his letter, which you have already  
4 noted in the record.

5 CHAIRPERSON GRIFFIS: Excellent.  
6 No, I appreciate that and it's probably a good  
7 use of his time. Very well. What else?  
8 Questions?

9 VICE CHAIR MILLER: Ms. Albrecht,  
10 I'm just wondering if you can address some of  
11 the older conditions that are being proposed  
12 to be carried forward by OP? One is outdoor  
13 activities shall take place under staff  
14 supervision at all times. Maybe you all can--  
15 I'm not sure what that means. I mean, we're  
16 trying to make our conditions very clear, so  
17 that they can be easily enforceable.

18 So I'm wondering, first of all,  
19 whether there has been any problem with  
20 outdoor activities? It sounded like, I think  
21 someone said on the record, perhaps Mr. Lewis,  
22 that the school is so big and the girls are so

1 well behaved that there haven't been any  
2 problems. But do you have any comment on that  
3 condition?

4 MS. ALBRECHT: To my knowledge,  
5 there haven't been any problems with any of  
6 the conditions set forth in the Board's  
7 previous order. So in that respect, we don't  
8 really have any problem with them remaining in  
9 the order, but they also really aren't  
10 necessary in the sense that these are all  
11 things the school does as a matter of course  
12 in its normal operating procedures.

13 VICE CHAIR MILLER: How often is  
14 the trash collected?

15 MR. KERNS: How often is the trash  
16 collected? It is collected on a daily basis  
17 from all of the types of outdoor containers  
18 that might be visible and it's taken to a  
19 place in the center of campus and then picked  
20 up on a bi-weekly basis by a trash and  
21 recycling group.

22 MS. ALBRECHT: If I may address

1 the additional conditions offered by the  
2 Office of Planning, I would just like to make  
3 clear for the record, the school also did not  
4 have prior notice of the conditions with  
5 respect to the term of the approval or the  
6 additional reporting requirements. And I  
7 defer to Ron Lewis' testimony on how that  
8 probably came about, but I just wanted to make  
9 it clear that we didn't know about that  
10 either.

11 VICE CHAIR MILLER: No, thank you  
12 very much.

13 CHAIRPERSON GRIFFIS: Very well.  
14 Any others, yes?

15 MR. LEWIS: Sorry, but I do just  
16 want an opportunity to clarify on that last  
17 exchange. When I said that the students are  
18 very orderly outside, etcetera, I would think  
19 that one reason is that they are subject to  
20 supervision and I think that is pretty clear  
21 what it means. You know, schools know how to  
22 position faculty and staff outside when their

1 students are outside. That was in the  
2 original order, not that long ago, and we  
3 really would urge that it and the other  
4 conditions stay in.

5 VICE CHAIR MILLER: Just to  
6 follow-up, do you think if there wasn't this  
7 condition, that they wouldn't be supervised  
8 and there would be a problem with the  
9 students?

10 MR. LEWIS: I'm sure -- let me put  
11 it the other way. I'm sure they will be  
12 supervised if the condition is in there and be  
13 orderly, etcetera. And I see no reason to  
14 take the chance on there being anything else.

15 VICE CHAIR MILLER: Okay. Thank  
16 you.

17 MR. LEWIS: Thank you.

18 VICE CHAIR MILLER: Mr. Lewis, can  
19 you come back for one more minute?

20 MR. LEWIS: Sure.

21 VICE CHAIR MILLER: Just so we can  
22 totally milk this subject. How about with

1 respect to the trash being picked up? Well,  
2 No. 6 says "Trash and refuse generated by the  
3 center shall be kept from public view and  
4 collected at least twice a week." Do you  
5 think that condition is necessary also for  
6 that to occur?

7 MR. LEWIS: I really did. I think  
8 that's, in due respect, hard to answer. I  
9 think it's necessary, because one never knows  
10 what would happen if it isn't in there. We  
11 have all the good will in the world with  
12 Visitation School, but nevertheless, the  
13 conditions are clear and are there for a  
14 reason.

15 Recently in other locations in  
16 Georgetown, trash has become a big problem.  
17 Some of it is the residents, some of it is the  
18 restaurants, some of it is the businesses.  
19 Visitation has not been a problem and we would  
20 not want to change anything that risks in that  
21 regard.

22 VICE CHAIR MILLER: I hear what

1 you're saying. And just to finish this out,  
2 do you think that the same holds true for No.  
3 5, "The grounds and landscaping of the  
4 facility shall be maintained in a neat and  
5 orderly condition at all times?"

6 MR. LEWIS: I do, because the  
7 grounds are so visible and such a key part of  
8 the Georgetown experience for anybody in that  
9 part of Georgetown, that keeping them  
10 manicured is important. The school is willing  
11 to do it. The school was willing to do that  
12 as a condition some years ago and I think that  
13 it's very important to continue that.

14 VICE CHAIR MILLER: Okay. Thank  
15 you.

16 MR. LEWIS: Thank you.

17 CHAIRPERSON GRIFFIS: Very well.  
18 Any other questions, clarifications from the  
19 Board, at this time? If not, I think it's  
20 probably appropriate for us to move ahead to  
21 closing remarks by the applicant.

22 Although, let me make one note in

1 a sidestep back. Exhibit No. 21, we normally  
2 might have a room full of people to provide  
3 testimony, let me just make note, of course,  
4 in the record, the numerous letters of  
5 support. Exhibit 42, 37, 36, 35, 33, 31, 30,  
6 29, 28, 27, 26, 23 and 22. I probably missed  
7 a couple.

8 We have a letter of opposition,  
9 Exhibit No. 21, which I hadn't read for a  
10 while. I picked it up today again to review,  
11 just to make sure we were actually looking at  
12 and addressing any of the elements that were  
13 brought up in concern of the opposition. And  
14 I believe we have as traffic congestion is a  
15 major point of that letter.

16 Very well. I think that's all  
17 that I have to identify in the record and have  
18 given the opportunity for everyone in their  
19 participation. Let's move ahead.

20 MS. ALBRECHT: As we stated  
21 earlier, I believe that the record in this  
22 case, including the prehearing statement, the

1 exhibits that you have just mentioned and the  
2 testimony today demonstrates how we have  
3 satisfied the special exception standards in  
4 this case.

5 Based on the support of the  
6 Government agencies as well as the ANC, we  
7 respectfully request that the Board approve  
8 the school's request for a cap increase,  
9 conditioned upon the entry into and compliance  
10 with the TMP.

11 As noted, the school has no  
12 objections to the historical conditions that  
13 have been put into place, although the  
14 school's position is that they are not  
15 necessary, because these are all things that  
16 the school does as a part of its normal  
17 operating procedures.

18 We would also like to note that we  
19 are opposed to a 10 year term on the approval  
20 absent some articulated reason why it's  
21 necessary. We don't think that the TMP  
22 requires it or that there is any special

1 conditions about how the school is run or the  
2 conditions in the neighborhood that make that  
3 necessary, at this time.

4 And as for the additional  
5 reporting requirements, we did not know about  
6 them in advance and we don't think they are  
7 necessary, but they also don't necessarily  
8 change the administration of the TMP. So I  
9 think that we probably oppose them in that  
10 they are not necessary, but they are not  
11 detrimental to the school either.

12 Lastly, because we are entering  
13 the application and admission season and in  
14 light of the general support for the  
15 application, we would ask that or we would  
16 request that we get a Bench decision and a  
17 summary order either today or as quickly as  
18 possible in light of the time of the year that  
19 we are in right now.

20 CHAIRPERSON GRIFFIS: Excellent.  
21 Thank you very much. It's 11:08. I think we  
22 have time. And more importantly and in all

1 seriousness, directness, I think this is  
2 absolutely ready to move ahead for the Board's  
3 deliberation. We have had, from the Board's  
4 perspective, ample time to look at this as we  
5 were fully prepared to move ahead last time  
6 and then seeing the new submissions that have  
7 come in, obviously, we have spoken extensively  
8 about each of those.

9           And more importantly, it should be  
10 well-understood that the Board has taken  
11 extensive time to read on our own and  
12 deliberate all the elements in it, which is  
13 why we have been able to move quickly through  
14 this. I think that there is no reason why we  
15 wouldn't move ahead today in a deliberative  
16 fashion.

17           And in doing so, I think it would  
18 be appropriate and expeditious to do it under  
19 a motion and I would move approval of  
20 Application 17549 for Georgetown Visitation  
21 Preparatory School under a special exception  
22 under 206, which would allow for the

1 enrollment cap from 435 to 490 and also the  
2 staff increase from 110 to 120.

3 And I will take a second to that  
4 motion noting that we will go through and  
5 craft some conditions attendant to it.

6 VICE CHAIR MILLER: Second.

7 CHAIRPERSON GRIFFIS: Excellent.  
8 Thank you very much. First, I'm going to  
9 speak to those that I do not believe  
10 conditions that I would support and then we  
11 can move to the conditions in which we can put  
12 in or craft for the order.

13 I tend to agree and I think the  
14 Office of Planning was well-intended in terms  
15 of their reporting. I haven't seen anything  
16 come up to the Board's attention that the  
17 reporting extending it beyond what is already  
18 stated in the management plan, extending it to  
19 the BZA or other groups, would address any  
20 potential adverse impact.

21 I think the reporting is there and  
22 I think that's appropriate to do it.

1 Obviously, it doesn't curtail any other  
2 vehicles of communication, implementation or  
3 enforcement or punitive action from taking  
4 place, but it has to start with a minimal and  
5 the base reporting, which is in the TMP, so I  
6 don't think that would be appropriate for us  
7 to put in as also discussed from the other  
8 elements.

9 In terms of the period of years, I  
10 think also well-intended, the Office of  
11 Planning. I think that may have been  
12 misinterpreted by the time limit of the  
13 management plan and I don't believe that this  
14 special exception would require a time limit.  
15 We have discussed and, I think, evaluated time  
16 limits on special exceptions substantially for  
17 the record, so I won't reintroduce those  
18 discussions today.

19 Except for the fact that it is an  
20 excellent vehicle for the Board and again it's  
21 a base element of addressing a potential  
22 adverse impact or some conditioning, a known

1 impact that needs to be monitored. None of  
2 that seems to be apparent in this case. One  
3 might go directly to the base fact that there  
4 is a 200 year history of use for the  
5 Visitation School.

6 I'll open it up to others to look  
7 at other conditions and as we go through this  
8 or I will continue. Yes, Ms. Miller?

9 VICE CHAIR MILLER: I want to make  
10 it -- well, I certainly think the conditions  
11 should be, obviously, the enrollment number,  
12 the number of students shall not exceed 490  
13 and the school shall have a maximum of 120  
14 staff members. And I want to address like I'm  
15 looking in the order that is presented in the  
16 Office of Planning report.

17 The next three were the older  
18 conditions that I raised. And I had some  
19 concerns about them, because I don't think  
20 that they are necessary and I think that they  
21 clutter the order a little bit and they may  
22 even be a little bit insulting to the school.

1 But on the other hand, there is no -- it  
2 doesn't create any problems for the school.  
3 The school is doing this anyway.

4 I guess I would like to suggest to  
5 the Office of Planning maybe in the future  
6 that some of the older conditions when another  
7 special exception comes before us, maybe they  
8 be reexamined by the ANC as well. Because I  
9 think in this case, I would be hesitant to  
10 strike them, because the ANC didn't get an  
11 opportunity to consider and weigh in on this  
12 issue.

13 Even though we asked Mr. Lewis'  
14 opinion, the ANC itself didn't have an  
15 opportunity. And Mr. Lewis had some concerns.  
16 So, therefore, I would suggest that we leave  
17 them in, even though I don't think they are  
18 really necessary.

19 And then the big question goes to  
20 the Traffic Management Plan. And I think it  
21 is a model Traffic Management Plan. I commend  
22 the parties for so apparently collegially

1 working together and improving it looks like  
2 the neighborhood and the traffic situation.

3 And although we don't usually  
4 attach a Traffic Management Plan, I'm  
5 comfortable with doing that in this case,  
6 because I think that it's the crux of this  
7 decision. And it only deals with traffic  
8 management, which is the issue here, and it's  
9 so well-written with respect to how it's going  
10 to be carried out, so that enforcement can  
11 follow all the details if it's attached. So  
12 that's where I'm at on this.

13 CHAIRPERSON GRIFFIS: Excellent.  
14 So you are proposing a condition that might  
15 read something to the fact that a  
16 Transportation Management Plan, as attached,  
17 will be implemented and govern the management  
18 of school-related transportation. So we would  
19 have a condition that there is such a thing  
20 and that we would attach this document to the  
21 order?

22 VICE CHAIR MILLER: Yes, yes. I'm

1 not sure how different that is from the way  
2 Office of Planning worded it, but to that  
3 effect, yes. I mean, Office of Planning says  
4 the Traffic Management Plan agreed to buy the  
5 school and the ANC shall be established,  
6 implemented and monitored in accordance with  
7 the terms of the plan as attached.

8 CHAIRPERSON GRIFFIS: Okay.  
9 Excellent. So there it is. Anything else?  
10 So what you are proposing is for Mr. Etherly  
11 and my review, is the outdoor activities would  
12 take place under staff supervision at all  
13 times, the grounds and landscape and facility  
14 will be maintained in a neat and orderly  
15 condition at all times.

16 Trash refuse would be generated by  
17 the center and kept from the public's view,  
18 collected twice a week. Those are obviously  
19 the ones that were left over. And then the  
20 Traffic Management Plan shall be established,  
21 implemented and monitored in accordance with  
22 the terms of the plan and is attached.

1                   VICE CHAIR MILLER: In addition to  
2 the numbers of students and staff.

3                   CHAIRPERSON GRIFFIS: Right,  
4 right, exactly. Okay. Anything else? Any  
5 other conditions proposed? Very well. Any  
6 other comments, any other deliberation on any  
7 of the other aspects? Yes?

8                   VICE CHAIR MILLER: I guess so as  
9 not to leave this one hanging, it appears that  
10 there was one other condition that may have  
11 been in a previous order that the Office of  
12 Planning did not recommend and we give great  
13 weight to the Office of Planning. And I think  
14 that that one is so vague as to be worthless,  
15 and I'll read it again, so we know what we are  
16 talking about.

17                   And that is "The number of  
18 extracurricular activities shall be as  
19 projected by the applicant and shall be  
20 generally in accordance with the type of  
21 activities currently existing. I think that  
22 is just so poorly written and really doesn't

1 mean anything that I'm comfortable leaving  
2 that out, given that Office of Planning also  
3 didn't recommend it.

4 CHAIRPERSON GRIFFIS: Taking full  
5 responsibility for a previous Board that wrote  
6 that condition, that's well-said. Okay.  
7 Thank goodness we don't have to regulate. All  
8 right. Noting all of that, let me hear from  
9 any others then and further deliberation on  
10 this. Ms. Miller did say and we perhaps joked  
11 a little bit about it, but this has been an  
12 extraordinarily successful situation and  
13 application brought forth.

14 And I think the crafting of the  
15 Transportation Management Plan is excellent.  
16 And, you know, it goes down to succinctly the  
17 writing of it. There is substance. There is  
18 direction. There is directness. There is  
19 understandability. And there is, obviously,  
20 a basis of reality of, one, what is trying to  
21 be met and, two, how it is going to be met.

22 It doesn't need to be so difficult

1 as we perhaps have seen all too often, but  
2 rather I think the difference that I can  
3 really point to here is that there was a clear  
4 commitment on everyone's part to work towards  
5 the general and similar goal. Let's hope that  
6 that can be seen over and again.

7 All right. I think we have it  
8 clear on all the elements then that are before  
9 us under 206 and we do have a motion before  
10 us.

11 BOARD MEMBER ETHERLY: Mr. Chair?

12 CHAIRPERSON GRIFFIS: Yes, sir.

13 BOARD MEMBER ETHERLY: If I may?

14 CHAIRPERSON GRIFFIS: Yes, please.

15 BOARD MEMBER ETHERLY: Just as we  
16 move towards the motion, I'll also note that  
17 it is perhaps, I don't necessarily think, a  
18 precedent, but it is a rare, but welcome fact  
19 to also have an alumna of the institution  
20 representing the alma mater before the Board.

21 CHAIRPERSON GRIFFIS: It doesn't  
22 make a conflict, but we had always looked into

1 that.

2 BOARD MEMBER ETHERLY: Excellent.

3 CHAIRPERSON GRIFFIS: We got them  
4 all cleared.

5 BOARD MEMBER ETHERLY: Excellent.  
6 So I'm ready to move forward, Mr. Chair.

7 CHAIRPERSON GRIFFIS: Excellent.  
8 Well-said.

9 SISTER HANNAN: Sir?

10 CHAIRPERSON GRIFFIS: I think that  
11 only evidences the fact that -- I'm going to  
12 let you speak in two seconds, but we're in a  
13 motion, so I can't have address from the  
14 public, at this point. But that brings a  
15 serious note to my mind, Mr. Etherly, and I  
16 think it should be understood that this Board,  
17 in my experience, in the several years I have  
18 been on it, has been incredibly perceptive of  
19 detail.

20 Whether we acknowledge it or not,  
21 the detail is always taken in. And that is  
22 really the basis of what, not really, it is

1 the basis of our decisions and deliberation.  
2 It's the facts. It's the details that are  
3 created in the record.

4 And lastly, it's not the amount of  
5 letters of support that were in part of this  
6 application. It wasn't the weighing of the  
7 letters in opposition. It wasn't the counting  
8 up of who liked or didn't like. Rather, it  
9 was the base fundamental facts that were  
10 presented and done so in an incredibly  
11 succinct way.

12 So in light of that succinctness,  
13 I'll stop talking. We have a motion before  
14 us. It has been conditioned, seconded and  
15 conditioned. If there is no further  
16 deliberation or comments from the Board, I  
17 would ask for all those in favor of the motion  
18 to signify by saying aye.

19 ALL: Aye.

20 CHAIRPERSON GRIFFIS: And opposed?  
21 Abstaining? Very well. Ms. Bailey, if you  
22 would record the vote?

1 MS. BAILEY: Mr. Chairman, the  
2 vote is recorded as 3-0-2 to approve the  
3 application. Mr. Griffis made the motion,  
4 Mrs. Miller second, Mr. Etherly supports the  
5 motion. Not present with us today are Mr.  
6 Mann and a Zoning Commission member.

7 CHAIRPERSON GRIFFIS: Excellent.  
8 Thank you. And I'm sorry, I couldn't let you  
9 address us before with the motion before us  
10 and in the middle, but now?

11 SISTER HANNAN: I just think it's  
12 a wonderful opportunity for us to thank Kate  
13 and her conferee in helping us develop this  
14 plan. And I think Mr. Lewis certainly has had  
15 his part in it also. So we are very grateful,  
16 in the name of the school, for all those who  
17 have crafted such a wonderful plan. And we  
18 are very proud of Kate.

19 CHAIRPERSON GRIFFIS: Excellent,  
20 excellent. Well, well done. And good luck.  
21 Ms. Miller?

22 VICE CHAIR MILLER: I would like

1 to move that we waive our orders and issue a  
2 summary order in this case.

3 CHAIRPERSON GRIFFIS: Excellent  
4 motion. I would second that motion. Is there  
5 any discussion, comments, any disagreement?  
6 Very well then. We'll waive our rules and  
7 regulations and issue a summary order on this  
8 case. If there is anything further, any other  
9 questions, procedures? Very well. Thank you  
10 all very much.

11 MR. KERNS: Thank you.

12 CHAIRPERSON GRIFFIS: Enjoy the  
13 morning.

14 MS. ALBRECHT: Thank you.

15 CHAIRPERSON GRIFFIS: Ms. Bailey,  
16 is there any other business for the Board in  
17 this morning's session?

18 MS. BAILEY: No.

19 CHAIRPERSON GRIFFIS: If there is  
20 no further business, let's adjourn.

21 (Whereupon, the Public Hearing was recessed at  
22 11:23 a.m. to reconvene at 1:10 p.m.)



1 my opening statement, I will go through and  
2 then hopefully we'll get a better cadence as  
3 we move ahead. Most of this is proforma for  
4 the understanding of how our proceedings are  
5 going to be conducted, so let me continue on  
6 that.

7 Copies of today's hearing agenda  
8 are available for everyone. They are located  
9 on the table where you entered into the  
10 hearing room. Of course, we have one appeal  
11 on the afternoon case, so it should not be an  
12 extensive or exhaustive schedule.

13 Please, be aware of several  
14 things. First, all proceedings before the  
15 Board of Zoning Adjustment are recorded. They  
16 are recorded in two fashions. First, the  
17 Court Reporter sitting on the floor to my  
18 right is creating the official transcript. We  
19 are also being broadcast live on the Office of  
20 Zoning's website.

21 Attendant to both of those, I ask  
22 several things. First of all, you will need

1 to fill out two witness cards. Witness cards  
2 are available right in front of you where you  
3 will provide testimony to the Board. Those  
4 two cards go to the Court Reporter prior to  
5 coming forward. So anybody here today that  
6 will be presenting information, testimony or  
7 be called as a witness should fill out those  
8 witness cards, get them to the Court Reporter.

9 Also, I would ask that people turn  
10 off all their cell phones and other devices  
11 that may disrupt the transmission of our  
12 proceedings.

13 You will need to at all times  
14 speak into a microphone, otherwise, you will  
15 not be on the official record and, therefore,  
16 will not be taken into consideration in the  
17 Board's deliberation. The microphone should  
18 be on. I'll give you the detailed technical  
19 aspects on that. When starting off, first,  
20 please, state your name and address for the  
21 record. You will only need to do this once  
22 and we will proceed.

1           The order of procedure for the  
2 appeal application will be as follows: First,  
3 we're going to hear statement of the witnesses  
4 of the appellant. Then we will hear from the  
5 Zoning Administrator, the Government's  
6 official case. We will hear from any of the  
7 other intervenors, the ANC and then we will go  
8 to the rebuttal and closing statements by the  
9 appellant.

10           I'll make sure that everyone knows  
11 exactly the order as we go through that, but,  
12 obviously, we will hear from the appellant,  
13 the Government, the appellee and then closing  
14 back at the appellant.

15           Cross examination of witnesses is  
16 permitted by the appellant and appellee and  
17 intervenors in the appeal. If we establish,  
18 as we call this case forward, intervenors,  
19 everyone will know their standing in this  
20 appeal and, therefore, will be able to conduct  
21 cross examination.

22           There are rules and regulations

1 that allow me to give direction, time limits,  
2 jurisdictional limitations of the cross  
3 examination. I'm not going to go through all  
4 of those, at this time, just note that I will  
5 interject as needed in the specific areas.

6 MR. KATZ: Mr. Chairman?

7 CHAIRPERSON GRIFFIS: Yes?

8 MR. KATZ: At the appropriate  
9 time, I need to inform you --

10 CHAIRPERSON GRIFFIS: Here, have a  
11 seat, but turn your microphone on. I just  
12 need you to state your name and address, so  
13 you are on the record.

14 MR. KATZ: My name is Jonathan  
15 Katz representing Fun Fair Video, JMM. I  
16 would not have interrupted, but for --

17 CHAIRPERSON GRIFFIS: That's all  
18 right.

19 MR. KATZ: -- a major problem with  
20 interpretation. Our law firm has everyone  
21 speaking Spanish and I'm the only intermediate  
22 speaker in Spanish, everyone is fully fluent.

1 We have been open for over eight years. I  
2 just asked -- had to ask the interpreter two  
3 times, first to interpret everything and then  
4 to interpret word for word when it didn't  
5 sound like that.

6 The interpreter said she cannot do  
7 that. She also informed me that she doesn't  
8 do much litigation interpretation. The last  
9 interpreter we had was able to do that. Now,  
10 there is another interpreter here, but my  
11 client's rights are not being sufficiently  
12 protected if we don't have an interpreter who  
13 is able to interpret word for word.

14 CHAIRPERSON GRIFFIS: Word for  
15 word. Okay. I'm a little confused at whether  
16 we would need a litigation interpreter, but  
17 let me just ask the interpreter directly.

18 Is there difficulty? Am I going  
19 too quickly in all of this?

20 INTERPRETER NEWCOMB: I cannot do  
21 a simultaneous translation. I cannot do. I  
22 can tell him more or less exactly what you

1 said, but not word for word. So I'm sorry.

2 MR. KATZ: It can be a pause.

3 CHAIRPERSON GRIFFIS: Okay. So we  
4 can take a pause between statements and that  
5 will get more clearly and directionally what  
6 is being said?

7 INTERPRETER NEWCOMB: I would be  
8 happy to do that. I've done that before.

9 MR. KATZ: Unfortunately, Mr.  
10 Griffis, I object to this particular  
11 interpreter. Maybe the other one is  
12 available. While a litigation interpreter,  
13 someone with litigation experience is not  
14 automatically necessary for a hearing, the  
15 problem is that I was speaking to both of  
16 these interpreters, whose names aren't in the  
17 record yet, telling them this is -- if they  
18 haven't done litigation before, it is  
19 necessary for them to inform anybody speaking  
20 that, you know, they have to slow down or  
21 repeat something if they don't get it.

22 CHAIRPERSON GRIFFIS: Sure.

1           MR. KATZ: My client is a Spanish  
2 speaker. There is no way he is going to be  
3 able to have a fair hearing, especially as he  
4 is testifying today, under these  
5 circumstances.

6           CHAIRPERSON GRIFFIS: Okay.

7           MR. KATZ: I have to respectfully  
8 object.

9           CHAIRPERSON GRIFFIS: Okay.

10          MR. KATZ: And ask for this  
11 interpreter --

12          CHAIRPERSON GRIFFIS: No, I  
13 understand. We'll get to the bottom of this.

14          MR. KATZ: -- be dismissed.

15          CHAIRPERSON GRIFFIS: Of course,  
16 he is represented by you, so he has great  
17 faith that he will be actually represented  
18 here. But I totally understand the fact that  
19 he needs to fully understand all of the  
20 proceedings that are happening here today.  
21 Let's ask the other interpreter.

22          Do you have any -- well, we're

1 going to need both actually, depending on how  
2 long we go. So let's do this.

3 MR. KATZ: I apologize. I was not  
4 aware this would -- there would be this kind  
5 of problem, because the last time the  
6 interpreter we had was flawless, certified by  
7 the Federal Court system, I forget her name.  
8 It may be in there. Anybody who is certified  
9 by the Federal Court system is more than  
10 qualified. It's not necessary to be federally  
11 certified, but I mean, she was flawless, so I  
12 assumed that that was the pool of quality that  
13 was being drawn from.

14 CHAIRPERSON GRIFFIS: Right.  
15 Okay. Let's do this. I'm going to get  
16 through my openings. They are procedural in  
17 nature and, obviously, if your client doesn't  
18 understand anything, as it will become  
19 apparent in the process, and I can always  
20 correct it, there's nothing I think that will  
21 be substantially prejudicial if he doesn't  
22 understand each and every word of this. And

1 then we can call the case and get to the  
2 bottom of how we proceed within this case.

3 MR. KATZ: Unfortunately, this is  
4 a very contentious matter. The interpreter  
5 has been saying not a word during your last  
6 few sentences. I cannot agree that this is a  
7 fair proceeding if this interpreter stays  
8 here. The other one might be fine. I have  
9 not seen his performance. This is based on my  
10 having dealt with interpreters intensely for  
11 at least 5 to 10 cases a year since 1998, ever  
12 since our law firm opened.

13 My client cannot get a fair  
14 hearing if he does not understand everything  
15 that is happening. The direct examination  
16 questions I'm going to be asking relate to  
17 what is said in opening statements. The cross  
18 examination questions he is asked might relate  
19 to them. There is no way he can have a fair  
20 hearing, otherwise, and I haven't even had to  
21 go to D.C. Law, which is probably going to say  
22 the same thing, at least for courts, and this

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1 is litigation that each -- you know, a Spanish  
2 speaker is entitled to understand what is  
3 going on.

4 He is not able to understand what  
5 is going on with this interpreter. I'm not  
6 asking to automatically postpone it if we can  
7 have sufficient interpreters. If the  
8 interpreter behind me is good enough by  
9 himself, fine. If you're saying that he has  
10 to do tag team because of the voice with  
11 opera, and if we can't find anyone else, I'm--  
12 my position is we can't have a fair hearing  
13 unless we have sufficient interpreters today  
14 or on another day.

15 CHAIRPERSON GRIFFIS: Interesting.

16 INTERPRETER NEWCOMB: Mr. Griffis,  
17 I am willing to let the other interpreter  
18 here.

19 CHAIRPERSON GRIFFIS: Okay. Why  
20 don't we hear from the other interpreter just  
21 briefly and see. Do you believe that you are  
22 going to be able to do word for word

1 translation?

2 INTERPRETER FUXMAN: I can. It  
3 would be helpful to me if it's slow and if  
4 there are pauses, but I am able to.

5 CHAIRPERSON GRIFFIS: Okay.

6 INTERPRETER FUXMAN: Convey the  
7 message.

8 CHAIRPERSON GRIFFIS: What we're  
9 going to ask of you is to just give an  
10 indication if you need an opportunity to catch  
11 up.

12 INTERPRETER FUXMAN: Yes.

13 CHAIRPERSON GRIFFIS: In which  
14 case we can pause. With that then, it should  
15 be known that the record will be closed at the  
16 conclusion of this case, except for any  
17 materials the Board specifically requests. We  
18 will be very specific as to any material that  
19 we will need into the record.

20 The Sunshine Act requires that  
21 this Board conduct its hearings in the open  
22 and before the public. This Board does enter

1 into Executive Session, both during and after  
2 hearings on each case. This is for the  
3 purposes of reviewing the record on cases that  
4 are in process or are about to be called.  
5 This is in accordance with the rules,  
6 regulations and also the Sunshine Act.

7 The decision of this Board in all  
8 contested cases must be based exclusively on  
9 the record that's created before us today. So  
10 that we ask persons that are present, please,  
11 not to engage Board Members in private  
12 conversations this afternoon, if you see us on  
13 a recess or on a break.

14 I would like to say a very good  
15 afternoon to Ms. Bailey with the Office of  
16 Zoning, Ms. Bushman also with the Office of  
17 Zoning on my left, the Office of Attorney  
18 General is represented by Ms. Monroe and Mr.  
19 Moy representing the Office of Zoning is with  
20 us also on my left.

21 At this time, the Board will  
22 consider any preliminary matters. Preliminary

1 matters are those which relate to whether a  
2 case will or should be heard today. We have  
3 heard one, hopefully we have cured it. Let us  
4 move ahead then and ask, Ms. Bailey, if you  
5 have any preliminary matters for the Board's  
6 attention for this afternoon's cases?

7 MS. BAILEY: Mr. Chairman, Members  
8 of the Board, to everyone good afternoon.

9 CHAIRPERSON GRIFFIS: Good  
10 afternoon.

11 MS. BAILEY: It's always something  
12 new, Mr. Chairman, always something new.  
13 Staff does not have any preliminary matters,  
14 sir.

15 CHAIRPERSON GRIFFIS: Very well.  
16 Let me ask those participants that are here  
17 today whether the appellant and appellee have  
18 any preliminary matters prior to calling this  
19 case?

20 MR. KATZ: I do.

21 CHAIRPERSON GRIFFIS: Yes?

22 MR. KATZ: I ask that the

1 interpreter be sworn in, his full name and  
2 address be provided, all information be  
3 provided for interpreting this hearing.  
4 Seeing that I said I was caught surprised that  
5 we are not given interpreters who seem to have  
6 much experience at hearings or a lot more  
7 being able to pay attention, focus and  
8 interpret, then just being there when people  
9 are conversing across the coffee table.

10 CHAIRPERSON GRIFFIS: Sworn in?  
11 You want the interpreter sworn in? Is that  
12 what you said? What purpose would that serve?

13 MR. KATZ: Well, only if witnesses  
14 are sworn in.

15 CHAIRPERSON GRIFFIS: We're going  
16 to swear the witnesses in.

17 MR. KATZ: Oh, the interpreter  
18 needs to be sworn in to confirm that they are  
19 fully and faithfully interpreting what's going  
20 on. So this way the interpreter knows that he  
21 will be obligated to inform the Board if he is  
22 having trouble understanding anything.

1 CHAIRPERSON GRIFFIS: Sure.

2 MR. KATZ: Otherwise, if he is not  
3 sworn in, he has no obligation and we don't  
4 have a fair hearing.

5 CHAIRPERSON GRIFFIS: Interesting.  
6 Okay. Any other preliminary matters?

7 MR. GREEN: Good afternoon, Mr.  
8 Chairman and Members of the Board. My name is  
9 Matthew J. Green, Jr. and I'm an Assistant  
10 Attorney General and I represent the  
11 Department of Consumer and Regulator Affairs.  
12 We have no preliminary matters, but since the  
13 Chairman is an experienced Chairman under the  
14 APA, he is familiar with the requirements that  
15 all witnesses be sworn in, including any  
16 interpreters.

17 He understands that and I think  
18 you have been doing this long enough and I  
19 think it's presumptuous of anyone to assume  
20 otherwise.

21 CHAIRPERSON GRIFFIS: Okay. Thank  
22 you. With that then, let me ask all those who

1 are here that are going to participate in this  
2 hearing if you would, please, stand and give  
3 your attention to Ms. Bailey. She is going to  
4 swear you in. We'll have the witnesses and  
5 the interpreter.

6 MS. BAILEY: Mr. Katz, did you  
7 want your client and also the interpreter to,  
8 please, stand to take the oath?

9 MR. KATZ: Thank you.

10 MS. BAILEY: Would you, please,  
11 raise your right hand?

12 (Whereupon, the witnesses were  
13 sworn.)

14 MS. BAILEY: Thank you.

15 CHAIRPERSON GRIFFIS: Okay. I  
16 think we're ready to call then, not having any  
17 other preliminary matters, the witnesses have  
18 been sworn in, except for, as I understand it,  
19 the ANC member has just come in.

20 Good afternoon, sir. Are you  
21 going to present testimony today for the  
22 Board?

1 MR. DIXON: I'm not sure.

2 CHAIRPERSON GRIFFIS: As part of  
3 the witnesses of the Government's case?

4 MR. GREEN: We would ask the ANC  
5 Chair be sworn in, Mr. Chairman.

6 CHAIRPERSON GRIFFIS: If you  
7 wouldn't mind just standing up and giving your  
8 attention to Ms. Bailey, she is going to swear  
9 you in.

10 (Whereupon, the witness was  
11 sworn.)

12 CHAIRPERSON GRIFFIS: Excellent.  
13 It appears that we are all here. Let's move  
14 ahead then. I am anticipating and let me hear  
15 from each of those here today that we would  
16 provide 30 minutes for the appellant and the  
17 appellee and the ANC, within reason ANC, to  
18 present their case as we do have the initial  
19 filings, at least from the JMM Corporation.  
20 30 minutes?

21 MR. KATZ: 30 minutes for -- I'm  
22 sorry, I'm supposed to --

1 CHAIRPERSON GRIFFIS: That's all  
2 right.

3 MR. KATZ: 30 minutes for  
4 evidence? I thought the rule said 60 minutes?  
5 I don't think I'm going to need any more than  
6 that and I probably won't need more than 30,  
7 but just in case.

8 CHAIRPERSON GRIFFIS: I'm going to  
9 set the clock for 30. We'll watch it. If it  
10 has to run over, we can provide that. The  
11 rules do set up that an equitable time,  
12 judicial and equal time will be set and there  
13 is a standard of reason of 60 minutes that is  
14 set, but I set the time, but I want to be  
15 within reason.

16 MR. KATZ: I mean, I doubt that  
17 I'm going to be going over 30 minutes, but  
18 just in case and since I had no -- you know,  
19 this is how I prepared the case.

20 CHAIRPERSON GRIFFIS: Perfect.

21 MR. KATZ: For 60 minutes.

22 CHAIRPERSON GRIFFIS: You're going

1 to set the standard that will equitably be  
2 applied across the way, but I'm going to set  
3 it up for 30, so we get a judgment of where we  
4 are. So when you are ready, we can proceed.

5 And also, I'll note, obviously,  
6 the clock is going to run. 30 minutes is  
7 down. We're going to need to slow this down  
8 for the interpretation and for everything  
9 else. So I'll keep my words to a minimum.  
10 Whenever you are ready.

11 MR. KATZ: Sorry. Chair Griffis,  
12 when you say 30 minutes, you're talking only  
13 about time for evidence versus argument?

14 CHAIRPERSON GRIFFIS: No, for your  
15 case presentation.

16 MR. KATZ: I'm not going to be  
17 able to present this case in 30 minutes.

18 CHAIRPERSON GRIFFIS: How much  
19 time do you need?

20 MR. KATZ: Since we -- if, you  
21 know, we're talking about argument as well, I  
22 need up to 90 minutes. It's probably not

1 going to go beyond 60. In all candor, I  
2 wasn't under any notice that it would be less  
3 than the usual 60 minutes that's in the rules.  
4 If it's going to be less than that, I'm going  
5 to have to ask for time beyond today to  
6 readjust my arguments to condense them.

7 I can't fairly do this where we  
8 have three critical issues and a bunch of  
9 Constitutional and statutory arguments. I  
10 just -- plus presenting evidence. I just  
11 can't do it.

12 CHAIRPERSON GRIFFIS: All right.  
13 Let's go. We'll set it for 60.

14 MR. KATZ: Thank you. Good  
15 afternoon, everybody. I hope I'm not starting  
16 at a disadvantage, if I seem contentious at  
17 all, because that is not my intention at all.  
18 It is obvious to all of you, I'm sure, that  
19 this is my first hearing here, that is no  
20 excuse, of course, for any stumbles or  
21 whatever. I know it is my obligation to know  
22 how procedures go here.

1 I certainly did not mean any  
2 offense to anybody when I asked that the  
3 interpreter be sworn in. There is specific  
4 swearing in procedure used for interpreters  
5 that hasn't been used here and I will not push  
6 it.

7 But to move on though, I don't  
8 mean here to argue everything that's in the  
9 briefs. I welcome all interruptions if you  
10 are the decision makers, I take no offense at  
11 anything, no matter how hostile or friendly  
12 the questions seem. You are letting me know  
13 what is on your mind and what you want to know  
14 and I would welcome all questions.

15 We're really dealing with three  
16 issues here that are on appeal from  
17 administrative decisions by Administrative Law  
18 Judge Simon. First of all, from the hearing  
19 that we had in March of 2002 in front of him.  
20 He is an Administrative Law Judge or was with  
21 the DCRA, followed in the summer of 2002 with  
22 a hearing in front of Administrative Law Judge

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1 McCoy.

2 Administrative Law Judge Simon had  
3 nothing before him other than two notices of  
4 infraction and I'll be perhaps detailing a  
5 little more beyond what's in our filings about  
6 why he had no authority under the statute to  
7 issue anything other than fines, even though  
8 Judge Simon went beyond that and directed the  
9 Office of Enforcement, I believe, to issue a  
10 notice to cease and desist and said to stop  
11 operating until getting the appropriate  
12 Certificate of Occupancy.

13 Judge McCoy ordered later in 2002  
14 after Judge Simon to revoke the Certificate of  
15 Occupancy and also to revoke the mechanical  
16 amusement license, which is used for viewing  
17 videos and as I have argued at page 17 of our  
18 initial brief and arguments that was filed  
19 November 6<sup>th</sup>, which is perhaps a misnomer,  
20 because the document entitled "Initial Brief  
21 and Arguments," I guess, is from November of  
22 this year and our supplemental brief is dated

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1 from around June or July of this year.

2 But as I have detailed there on  
3 page 17 of the document entitled "Initial  
4 Brief and Arguments" as to the revocation of  
5 the Certificate of Occupancy, that is governed  
6 by DCMR section 12(a)-118.4, which shows that  
7 a revocation of a Certificate of Occupancy  
8 would actually need to deal with physical  
9 unsafety. That is not involved here. That  
10 was not presented in Judge McCoy's opinion.

11 As to the revocation of the  
12 mechanical amusement license --

13 VICE CHAIR MILLER: Excuse me, Mr.  
14 Katz. I'm sorry. Could you just clarify what  
15 provision you cited for that?

16 MR. KATZ: Oh, thank you. Yes,  
17 that's DCMR section 12(a)-118.4. That's the  
18 provision --

19 VICE CHAIR MILLER: Thank you.

20 MR. KATZ: -- under which the  
21 Certificate of Occupancy was revoked.  
22 However, that DCMR provision generally

1 addresses physical unsafety. Lack of physical  
2 safety. And lack of physical safety has  
3 nothing to do with this case, with this  
4 appeal, ALJ McCoy, and it has nothing to do  
5 with ALJ McCoy's opinion, which is in the  
6 record.

7 And finally, about the revocation  
8 of the mechanical amusement license that is  
9 governed by D.C. Code section 47-2844(a) and  
10 that code section provides for revocation of  
11 licenses to be put in the hands of the mayor.  
12 The mayor is not an Administrative Law Judge  
13 at the DCRA and we have a definition of Mayor  
14 under D.C. Code section 2-5021(a), which says  
15 "Mayor of the District of Columbia or his or  
16 her designated agent," clearly that is not  
17 what an Administrative Law Judge is.

18 And Administrative Law Judge is  
19 not a designated agent of the Mayor and  
20 clearly is not the Mayor.

21 VICE CHAIR MILLER: Could you  
22 repeat that authority again? I want to write

1 it down.

2 MR. KATZ: Thank you. It's two  
3 sections of the code. D.C. Code section 47-  
4 2844(a) as well as -- that's the provision  
5 that says it's only the Mayor that can revoke  
6 mechanical licenses, which would include  
7 mechanical booth licenses. And then we have  
8 the definition of Mayor which is a D.C. Code  
9 section 2-5021(a).

10 Now, I'm not going to give my  
11 entire closing argument in opening, of course,  
12 but I'm just giving an overview of our  
13 testimony, which is not expected to be very  
14 long. Then I just want to make sure having  
15 read -- it appears obvious having read the  
16 exhibit lot that everything is in evidence,  
17 sorry not in evidence, that everything is in  
18 the record that we need to -- but I offer the  
19 following provisions of the exhibit log.

20 Do I need to offer what's in the  
21 exhibit log and tabs or is it already in  
22 evidence?

1 CHAIRPERSON GRIFFIS: No, it's in.

2 MR. KATZ: Subject to objection.

3 CHAIRPERSON GRIFFIS: It's part of  
4 the record.

5 MR. KATZ: Okay. With that, I  
6 also would like to point out regarding  
7 evidence that although the DCMR Regulations in  
8 section 11-3100 that generally govern BZA  
9 hearings, although those say -- suggest that  
10 the appellant, us or whatever we're called,  
11 the respondent appellant has the burden of  
12 proof, because we have Constitutional  
13 arguments and I haven't found anything that  
14 says the BZA is not permitted to entertain  
15 Constitutional arguments.

16 The Supreme Court actually leaves  
17 the burden in the hands of the Government and  
18 I will tell you the authority for that for  
19 showing that these regulations governing  
20 sexually-oriented businesses and issuing  
21 Certificates of Occupancy for them requires  
22 the Government to justify their existence.

1           That case is the Hepps case from  
2 the Supreme Court. I will give you the  
3 citation, which is already cited, I believe,  
4 in my -- or what's called the initial brief.  
5 One moment, please. Here it is. In the  
6 initial brief at page 12, I have cited the  
7 Hepps case, which is near the bottom of the  
8 page. It's Philadelphia Newspapers  
9 Incorporated v. Hepps, et al, 475 U.S. 767 at  
10 page 777. It's a 1986 Supreme Court decision  
11 that says "In the context of governmental  
12 restriction of speech, it has long been  
13 established that the Government cannot limit  
14 speech protection by the First Amendment  
15 without bearing the burden of showing that its  
16 restriction is justified."

17           You will see, Board Members, that  
18 both Judges Simon, Administrative Law Judge  
19 Simon, Administrative Law Judge McCoy, both  
20 made it very clear on the record and in their  
21 written opinions that Constitutional arguments  
22 cannot be raised at the DCRA Administrative

1 Law Judge level.

2           Therefore, at least as to our  
3 First Amendment arguments, the hearing today  
4 should be a hearing de novo, a new hearing  
5 where no reliance is put whatsoever on the  
6 fact finding or legal decision making of  
7 Administrative Law Judge Simon or McCoy, since  
8 they refused to even address Constitutional  
9 issues, which for the reasons in my briefings  
10 and the reasons that I will discuss today are  
11 the major -- a major essence of why their  
12 opinions should be overturned and why it must  
13 rest in the District of Columbia Government's  
14 hands to pass sufficient legislation in part  
15 based on sufficient secondary effect studies  
16 showing negative secondary effects from adult  
17 entertainment in order to regulate adult-  
18 oriented businesses separately from all other  
19 businesses.

20           And I will bring out some of that  
21 information through Zoning Administrator Crews  
22 that the District of Columbia simply has

1 never, never relied on negative secondary  
2 effect studies in passing any regulations and  
3 there are no code sections regulating sexual-  
4 oriented business establishments.

5 I welcome, if there are, any  
6 questions or comments before I present  
7 evidence, otherwise I will now present  
8 evidence.

9 CHAIRPERSON GRIFFIS: Ms. Miller?

10 VICE CHAIR MILLER: Mr. Katz, I  
11 would like to bring your attention to a  
12 published court case entitled JMM Corporation  
13 v. District of Columbia, et al, Civ.8.02-  
14 0406(JR), dated March 31, 2003, in which it  
15 appears that you were counsel for the  
16 appellant in that case. Is that correct? Or  
17 the plaintiff in that case?

18 MR. KATZ: Which?

19 VICE CHAIR MILLER: District  
20 Court, United States District Court in the  
21 District of Columbia.

22 MR. KATZ: Yes, the U.S. District

1 Court said that it does not have jurisdiction  
2 over the case while the matter is pending in  
3 front of the administrative agencies and/or  
4 the courts.

5 VICE CHAIR MILLER: Correct. And  
6 the court says, I'm not sure if I have the  
7 page right, the last page of its decision,  
8 that even if plaintiffs were correct to assume  
9 that they will not be able to raise their  
10 Constitutional claims in their administrative  
11 appeals, "They can raise their Constitutional  
12 claims in the civil enforcement action in D.C.  
13 Superior Court, which will determine the  
14 validity of the administrative rulings that  
15 were made subsequent to and based on the June  
16 2000 DCRA decision at issue in District of  
17 Columbia v. JMM Corp., CV02-5670."

18 So my first question is did you  
19 argue in that case that you could not raise  
20 Constitutional claims in your administrative  
21 appeals?

22 MR. KATZ: Thank you. Yes, I was

1 counsel on that one. I was just -- it's  
2 easier for me to remember the name of the  
3 tribunal, the District Court, rather than the  
4 case number. I believe that I did bring that  
5 to the attention of the District Court Judge.  
6 Now, of course, the District Court Judge was  
7 saying, Judge Robertson, in the passage that  
8 you are reading from, Board Member Miller, is  
9 that because he felt that state -- well, D.C.  
10 is not exactly a state.

11 But D.C. level, nonfederal level  
12 tribunals at some point in time would be able  
13 to reach our Constitutional arguments. That  
14 we were what's called youngered out. Younger  
15 is, of course, the Supreme Court case that  
16 generally says that a Federal Court should not  
17 step in to adjudicate anything while matters  
18 are still pending at the state level.

19 So when they say that you assumed  
20 you would not be able to raise your  
21 constitutional claims in the administrative  
22 appeals, your assumption was based on the

1 absentia doctrine?

2 MR. KATZ: No, I did not say I  
3 assumed. What I argued was that seeing that  
4 the Administrative Law Judge was not even  
5 listening to Constitutional arguments, you  
6 know, this is the time that is right to have  
7 the jurisdiction in the Federal Court.

8 VICE CHAIR MILLER: Okay. And  
9 then my other question goes to were you making  
10 Constitutional arguments in the Superior Court  
11 or did you have that forum in which to make  
12 the Constitutional arguments?

13 MR. KATZ: Right.

14 VICE CHAIR MILLER: They make a  
15 reference to Superior Court and I'm not  
16 familiar with that.

17 MR. KATZ: Right. This is what  
18 the proceeding is in the Superior Court. And  
19 there has been -- yes, I have made  
20 Constitutional arguments, but the Superior  
21 Court, believe it or not, has stayed their  
22 proceedings pending what happens at the Board

1 of Zoning Adjustment.

2 What happened in the Superior  
3 Court was the D.C. Government, approximately,  
4 in 2002 or 2003 more or less went to the  
5 Superior Court seeking to enforce an earlier  
6 order by Judge Simon from around 2000 or 2001  
7 before I ever represented JMM and Fun Fair  
8 Video and before I ever met anybody involved  
9 with the store.

10 And if I'm remembering correctly,  
11 I don't know if the Court actually signed off  
12 on an order on that, but at some point I found  
13 out, I forget how, that there was this matter  
14 in the Superior Court, because I was never  
15 served notice of it. I got an agreement and  
16 confirmed this in writing to the Superior  
17 Court to not have any ruling by the Court  
18 until we had a hearing.

19 There was no notice to the parties  
20 to have any hearing in the Superior Court  
21 until around 2005, so many years, a  
22 substantial amount of time passed. Motions,

1 arguments have been filed, including  
2 Constitutional arguments. But of course,  
3 those Constitutional arguments are only  
4 limited to whether to enforce Administrative  
5 Law Judge Simon's order from around 2000 or  
6 2001 on another notice of infraction that said  
7 the same thing.

8 Judge Simon said in our 2002  
9 hearing about cease operations until you have  
10 a sufficient Certificate of Occupancy. So in  
11 other words, the Superior Court hasn't decided  
12 anything yet. It hasn't heard arguments. We  
13 have a status hearing in April to tell the  
14 Superior Court what has happened here. Even  
15 if it gets to the point where we're able to  
16 make arguments to the Superior Court, that's  
17 only going to be limited to arguments about  
18 whether the Superior Court would be enforcing  
19 Judge Simon's order, that we're not even here  
20 for today, to proceed with what we're here for  
21 today from 2000 or 2001.

22 VICE CHAIR MILLER: So but my

1 question is can you raise your Constitutional  
2 arguments or have you raised your  
3 Constitutional arguments in that forum?

4 MR. KATZ: Well, I can only raise  
5 certain constitutional arguments, because the  
6 matter in front of the Superior Court is  
7 different from what we are here for today.  
8 The Superior Court is not dealing with Judge  
9 McCoy's order to remove -- to revoke the  
10 mechanical booth license, licenses for  
11 instance.

12 The matter in the Superior Court  
13 does not address the revocation of the  
14 Certificate of Occupancy. The Superior Court  
15 matter exclusively deals with whether the  
16 Superior Court will grant the motion of the  
17 D.C. Government to enforce an order of  
18 Administrative Law Judge Simon from 2000 and  
19 2001, once again, that preceded anything that  
20 we're dealing with here today to cease  
21 operations until obtaining what Judge Simon  
22 called an appropriate, it's vague, an

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1 appropriate Certificate of Occupancy.

2 VICE CHAIR MILLER: So just so I  
3 understand, is it another order that is before  
4 the Superior Court related to the same subject  
5 matter, but it's a different order?

6 MR. KATZ: Yes, it's almost a  
7 subset of what we are dealing with today. The  
8 Superior Court is a smaller universe of the  
9 big universe we're dealing with today, because  
10 the Superior Court is only dealing with  
11 whether to enforce a previous order, that  
12 we're not here for today, by Judge Simon from  
13 around 2001, once again, on a notice of  
14 infraction to revoke -- I'm sorry, for JMM to  
15 cease and desist operations until obtaining  
16 what Judge Simon vaguely called an appropriate  
17 Certificate of Occupancy.

18 And our argument there in the  
19 Superior Court once again will be that the  
20 statute only allows on a notice of infraction  
21 to issue a fine and nothing else and that  
22 Judge Simon couldn't order them to stop

1 operating.

2 VICE CHAIR MILLER: I'll just get  
3 one more clarification.

4 MR. KATZ: That's right.

5 VICE CHAIR MILLER: I thought that  
6 you said that one of your arguments here,  
7 maybe it is the same, that the ALJ was not  
8 authorized to issue a cease and desist, but  
9 only to issue a fine.

10 MR. KATZ: That is one of the  
11 arguments here. That's why I tried saying  
12 that the Superior Court is dealing with a  
13 smaller universe of issues than we are dealing  
14 with here today. The notice of infraction  
15 issue is one of the three issues we are  
16 dealing with at this hearing today, whereas,  
17 the Superior Court is only dealing with a  
18 notice of infraction, a different notice of  
19 infraction than the two notices of infraction  
20 we're dealing with at today's hearing.

21 VICE CHAIR MILLER: Okay. One  
22 more question. What was the authority that

1 you cited for that proposition that he erred  
2 in issuing a cease and desist order, he only  
3 had authority to issue a fine?

4 MR. KATZ: Okay. Thank you. I'll  
5 pull that out in a moment. Pardon me for not  
6 having it at my immediate fingertips. I wish  
7 that I had it, but I think it's just about  
8 here. Okay. That is D.C. Code section 2-  
9 18.02.03(h), that's section 2 of the D.C.  
10 Code. Sorry, section 2-1802.03(h) which  
11 provides that a money penalty is the only  
12 sanction available for a notice of infraction,  
13 such as what we're dealing with today and such  
14 as what we're in front of the Superior Court  
15 for.

16 VICE CHAIR MILLER: Okay. I have  
17 one more question.

18 MR. KATZ: Absolutely.

19 VICE CHAIR MILLER: Do you allege  
20 a violation of a Zoning Regulation in Chapter  
21 11?

22 MR. KATZ: Yes.

1                   VICE CHAIR MILLER:    Are any of  
2 your arguments --

3                   MR. KATZ:    Yes.    The reason for  
4 that is at minimum, as you know from the  
5 record, I made a mistake that the Court of  
6 Appeals allowed me to correct, which is that  
7 after we lost at the ALJ level at the DCRA, my  
8 administrative appeal was filed with -- I  
9 forget what they were even called at that  
10 time.  Whatever it is.  The Office of Appeals,  
11 whether it's called that now, but you know  
12 what I'm talking about, instead of here.

13                   That was -- my appeal was  
14 dismissed saying I went to the wrong place.  
15 That I was supposed to go to the Board of  
16 Zoning Adjustment.  And so on appeal, and we  
17 have that appellant, the appellant number is  
18 in the record to the D.C. Court of Appeals.  
19 One of my arguments is, of course, we  
20 shouldn't be going in front of the Board of  
21 Zoning Adjustment.

22                   The Board of Zoning Adjustment

1 seems to deal mainly with issues of, you know,  
2 whether you go to Lot A or B and whether you  
3 are jutting out too far into the sidewalk.  
4 And since the Board of Zoning Adjustment  
5 charges \$800 for their appeal fee and the  
6 Office of Appeals charge only about \$80 or  
7 whatever, we clearly seem to be dealing with  
8 something where you're dealing with a more  
9 intense time by the Board of Zoning Adjustment  
10 looking at maps and everything.

11 So, of course, it's not the Board  
12 of Zoning Adjustment, but the Court of Appeals  
13 said no, look, you know, ding-a-ling or I  
14 shouldn't use such an informal word, but  
15 saying that to me this is what the regulations  
16 and/or code says. You go to the Board of  
17 Zoning Adjustment. You are appealing matters  
18 that are zoning matters and so, yes, since we  
19 were forced to come here for appeal, there is  
20 a violation of the Zoning Laws.

21 Not only in that term a violation  
22 of the Zoning Regulations, but --

1                   CHAIRPERSON GRIFFIS: Well, what  
2 is the term? What is the Zoning Regulations  
3 that you are alleging was violated?

4                   MR. KATZ: Okay. Well, I'm  
5 arguing both that there was a violation of the  
6 following Zoning Regulations, but also that  
7 those Zoning Regulations are unconstitutional  
8 in the first place. We have both the  
9 definition of a sexually-oriented business  
10 establishment.

11                   CHAIRPERSON GRIFFIS: 11 DCMR  
12 199.1?

13                   MR. KATZ: I believe so.

14                   CHAIRPERSON GRIFFIS: Okay.

15                   MR. KATZ: And we also have the  
16 provisions for even being able to get a  
17 sexual-oriented business enterprise  
18 Certificate of Occupancy being in reality  
19 unobtainable or even if you attain it, that  
20 you never know when it is going to be taken  
21 away, based on unbridled discretion of the  
22 Government.

1 CHAIRPERSON GRIFFIS: But what  
2 section of the regulations are you referring  
3 to when you talk about, one, obtaining and,  
4 two, the viability, if even you have a C of O.

5 MR. KATZ: I have that, yes.

6 CHAIRPERSON GRIFFIS: Okay.

7 MR. KATZ: Thank you. That's 11  
8 DCMR section 744, et seq, but, you know, just  
9 the one -- the section after that.

10 CHAIRPERSON GRIFFIS: So it's a  
11 Commercial Zone District.

12 MR. KATZ: Pardon?

13 CHAIRPERSON GRIFFIS: Okay. Go  
14 ahead.

15 MR. KATZ: As well as 11 DCMR  
16 section 754 et seq. When I say 754 and the  
17 provisions that follow that, they pretty much  
18 come close to mirroring each other, but what  
19 we have then is in section 744 point -- I'll  
20 tell you which one it is. We have a lot of  
21 provisions starting at 11 DCMR section 744.2  
22 and 754.2, for instance that says, you have to

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1 be within 600 feet of a Residential or Special  
2 Purpose District and that you have to be  
3 within 600 feet --

4 CHAIRPERSON GRIFFIS: Right. I  
5 mean, we're familiar with the regulations.

6 MR. KATZ: Okay. Well, aside from  
7 the Constitutional arguments that I can make  
8 any time, I have already made in writing,  
9 including that there are no secondary effect  
10 studies to allow that, those provisions. 600  
11 feet is -- that's 200 yards. That's two  
12 football fields. I can't expect that there is  
13 many, if any, parts of D.C. that are at least  
14 two football fields away from a church,  
15 school, library or playground or any -- they  
16 have also listed jurisdiction of the  
17 Commission of Fine Arts and Residential or  
18 Special Purpose use.

19 There is also this provision in  
20 section 744.4 and section 754.4 of Title 11  
21 that "No portion of the establishment shall be  
22 located within 300 feet of any other sexually-

1 oriented business establishment." As I  
2 expected, I'm going to have testimony elicited  
3 from Mr. Crews that there is more than one  
4 sexually-oriented business establishment in  
5 D.C. and that means that even if there is even  
6 one location in D.C. that's at least 600 feet  
7 from churches, schools --

8 CHAIRPERSON GRIFFIS: Okay. So  
9 you're asserting in your written and also  
10 today that there is, in my words, a failing of  
11 our Zoning Regulations in order to be precise  
12 on how a sexually-oriented business might be  
13 located in the C-3 or the C-4 Zone?

14 MR. KATZ: And defined.

15 CHAIRPERSON GRIFFIS: Okay. And  
16 defined.

17 MR. KATZ: Right.

18 CHAIRPERSON GRIFFIS: That's fine.  
19 That's a fundamental flaw that you are  
20 asserting with Title 11 DCMR our Zoning  
21 Regulations. But now, let's go back to the  
22 issue at hand.

1 MR. KATZ: But there is another  
2 provision as well.

3 CHAIRPERSON GRIFFIS: Okay. What  
4 is it?

5 MR. KATZ: Which is that even  
6 after you obtain -- in order to obtain and  
7 keep the sexually-oriented business  
8 establishment Certification of Occupancy under  
9 11 DCMR section 744.7 and 754.7, "The use  
10 shall not become objectable because of its  
11 effect on the character of the neighborhood or  
12 because of noise, traffic or other  
13 conditions."

14 So this means that this is another  
15 unconstitutional and unjustifiable hurdle.

16 CHAIRPERSON GRIFFIS: So if I was  
17 to go to your -- let me draw a couple of  
18 connections that you haven't yet and maybe  
19 won't.

20 MR. KATZ: Okay.

21 CHAIRPERSON GRIFFIS: But if you  
22 are finding that there is some failing of our

1 regulations --

2 MR. KATZ: Right.

3 CHAIRPERSON GRIFFIS: -- whether  
4 it be Constitutional that you have stated or  
5 whether it be something else of the physical  
6 location that may be an impossibility,  
7 whatever those are all together --

8 MR. KATZ: Right.

9 CHAIRPERSON GRIFFIS: -- we now  
10 have a failing of our regulations. Get me to  
11 the point of how was it that you were issued  
12 a Certificate of Occupancy and then what was  
13 the error that it was revoked? If there is a  
14 critical --

15 MR. KATZ: Right.

16 CHAIRPERSON GRIFFIS: -- feeling  
17 that you could never even issue a C of O, I'm  
18 already done with this case.

19 MR. KATZ: Right. Okay. I'll  
20 answer.

21 CHAIRPERSON GRIFFIS: Good.

22 MR. KATZ: Thank you. The

1 Certificate of Occupancy that JMM with the  
2 trade name of Fun Fair has is a non-sexually-  
3 oriented business establishment Certificate of  
4 Occupancy. It appears that there are no  
5 sexually-oriented business establishment  
6 Certificates of Occupancy in D.C.

7 And I expect that Mr. Crews is  
8 going to confirm that. Well, as long as we  
9 present evidence that we have numerous  
10 businesses, not just JMM, that sell erotic  
11 entertainment, including videos that show very  
12 explicit sexual activity, then we -- it  
13 appears that we have a system here where it's  
14 through -- if not as bad as a wink and a nod  
15 about, you know, kind of like, you know,  
16 either a store with sexually-explicit videos  
17 and books and magazines setting up on such and  
18 such a street corner hoping that the  
19 Government is not going to come in and say you  
20 can't be here or talking to, you know, the  
21 Zoning Office and saying if we locate here,  
22 are we okay?

1           We really seem to have a situation  
2           where every business that has a substantial  
3           amount of erotic entertainment in terms of  
4           videos, booze and magazines, for instance,  
5           that they are all in a precarious situation  
6           and they are all facing problems with the way  
7           they are permitted or not permitted to  
8           operate.

9           CHAIRPERSON GRIFFIS: I don't see  
10          how that addresses your specific circumstance.

11          MR. KATZ: Well, one of the  
12          arguments we have is that there is not  
13          sufficient evidence that Fun Fair Video can  
14          even be classified as a sexually-oriented  
15          business establishment.

16          CHAIRPERSON GRIFFIS: Okay.

17          MR. KATZ: In part because the  
18          definition is vague and over-broad and I think  
19          it was 11 DCMR, was it, section 199.1, and  
20          even though we don't concede that the Zoning  
21          Administrator's written interpretation of  
22          regulations solves such vagueness, it does set

1 a bar, you know, for a business to know that  
2 they have a safe harbor if they don't go below  
3 that.

4 In this instance, the last written  
5 opinion that I know of is by Gladys Hicks,  
6 which is in the record. It's in the appendix,  
7 sorry that I filed, that's in pages,  
8 handwritten pages, sorry for the handwriting,  
9 pages 78 through 87 are appendices where Ms.  
10 Hicks talks in terms of a 15 percent rule.

11 For instance, if not more than 15  
12 percent of your floor space is for sexually --  
13 you know, one thing they don't define it well  
14 for sexually-oriented material, then you are  
15 not adult. Well, we already presented  
16 evidence below in the previous proceedings  
17 that we were under 15 percent, even though I  
18 think Judge McCoy disagreed with the way we  
19 were calculating that.

20 But also, we had testimony. This  
21 is in the record and the transcript of the  
22 trial before Administrative Law Judge Simon

1 that Ms. Hicks then advised Fun Fair Video  
2 through his previous lawyer that he would be  
3 okay, should be okay with the booths, as long  
4 as he removes some booths. And we'll have  
5 testimony that he did remove those booths.

6 So, you know, that is one of the  
7 arguments, which is that they can't even prove  
8 that this is a sexually-oriented business  
9 enterprise.

10 CHAIRPERSON GRIFFIS: Okay.

11 MR. KATZ: Now, finally, there is  
12 11 DCMR section 744.8 and I think it's 754.8  
13 that says "The sexually-oriented business  
14 establishment should not have an adverse  
15 impact on religious, educational and  
16 Government facilities located in the area."

17 So once again, we're seeing a  
18 situation where even if you can meet that  
19 hurdle to obtain the SOBE Certificate of  
20 Occupancy, it can also be revoked at a  
21 moment's notice or something maybe a little  
22 not much longer than that.

1                   CHAIRPERSON GRIFFIS:    But let me  
2 understand.  You are arguing that this is not  
3 defined as a sexually-oriented business under  
4 DCMR Title 11 199, but in another point of  
5 argument you are saying but we are, but we  
6 can't even meet the test, because it's so  
7 vague in 744, 745 or the definition for that  
8 matter.

9                   MR. KATZ:  Well, I'm not trying to  
10 make a disingenuous argument.  What I'm saying  
11 is that my client does not qualify as a  
12 sexually-oriented business establishment, but  
13 since the Government is going to try to  
14 continue to classify them as such, that even  
15 if we accept for argument's sake the  
16 Government's argument this is a sexually-  
17 oriented business establishment, that these  
18 are unconstitutional rules and that even if  
19 they weren't unconstitutional, they can't be  
20 applied fairly.

21                   CHAIRPERSON GRIFFIS:  Okay.

22                   MR. KATZ:  Now, I think I also

1 might have another section from the 11 -- from  
2 Title 11.

3 VICE CHAIR MILLER: Mr. Katz, just  
4 while we're on that note.

5 MR. KATZ: Right.

6 VICE CHAIR MILLER: Do you have  
7 any authority for that proposition?

8 MR. KATZ: For what proposition?

9 VICE CHAIR MILLER: That the regs  
10 are so vague that they are unconstitutional  
11 and even if they're not unconstitutional, they  
12 can't be enforced clearly?

13 MR. KATZ: I do.

14 VICE CHAIR MILLER: Is it the  
15 Ashcroft case? Is that it or do you have  
16 another one?

17 MR. KATZ: No, I have another one.  
18 Ashcroft v. Free Speech Coalition does deal  
19 with vague and over-broad, it does confirm  
20 that laws need to not be vague and over-broad  
21 when they are governing adult entertainment,  
22 which is what we are dealing with here.

1           And then we have the case of Los  
2 Angeles v. Alamita Books, which I have cited,  
3 and I will give you the citation, Ms. Miller.  
4 It says that you've got to have -- you have to  
5 have sufficient reliance on studies, reliable  
6 studies showing negative secondary effects of  
7 adult entertainment in order to even issue  
8 such regulations. And the other one is the --

9           VICE CHAIR MILLER: Was that in  
10 the context of an enforcement action or what  
11 was the context? Was somebody challenging a  
12 reg or a statute or was it an enforcement  
13 case?

14           MR. KATZ: I don't remember.  
15 However, I don't -- for purposes of what the  
16 Supreme Court is saying, it doesn't matter.  
17 What the Supreme Court is saying in the case  
18 of Alamita Books, which I'm trying to get you  
19 the cite of, as well as Renton.

20           VICE CHAIR MILLER: I see the  
21 cite. It's in here.

22           MR. KATZ: Okay.

1                   VICE CHAIR MILLER: Okay. You can  
2 move on.

3                   MR. KATZ: So what the Supreme  
4 Court is getting at is that the municipality  
5 simply cannot enforce sexually-oriented  
6 business laws without reasonably relying on  
7 sufficient secondary effect studies showing  
8 negative secondary effects of adult  
9 entertainment. And we just don't have --  
10 there is nothing in the record, in the  
11 development, even beyond any testimony from  
12 Mr. Crews.

13                   I have already gone through the  
14 D.C. Register, there is simply nothing in the  
15 record of the D.C. Register or any preamble to  
16 the DCMR SOBE Regulations that say anything at  
17 all about negative secondary effect studies.  
18 At most, there might be one or more letters in  
19 there from members of the community saying  
20 well, you know, this is terrible. It's a  
21 blight on our community to have sexually-  
22 oriented businesses here, but that's not under

1 the Alamita Books decision from the Supreme  
2 Court, which came out around 2002 or 2003 and  
3 the Renton decision that came out around the  
4 1990s.

5 You have to have reasonable  
6 reliance on sufficient secondary effect  
7 studies and it's not a secondary effect study  
8 just to welcome letters from members of the  
9 public. You have to have some sort of  
10 scientific method there. And still there is  
11 no secondary effect studies backing up these  
12 SOBE Regulations.

13 CHAIRPERSON GRIFFIS: Okay.  
14 Anything else?

15 BOARD MEMBER ETHERLY: Mr. Chair,  
16 I might have just one question. I think I'm  
17 fairly clear as is possible with regard to the  
18 Constitutional arguments that have been  
19 levied. I would perhaps like to invite a  
20 little bit of discussion on a hypothetical  
21 question from Mr. Katz.

22 And that would be, let's assume

1 for the sake of discussion, that the Hicks'  
2 memorandum, if you will, or the Hicks opinion  
3 is valid.

4 MR. KATZ: Yes.

5 BOARD MEMBER ETHERLY: Is facially  
6 valid and is the law of the land, if you will.  
7 Is it your contention that your client's  
8 business would nevertheless, assuming that the  
9 Hicks opinion is valid --

10 MR. KATZ: Right.

11 BOARD MEMBER ETHERLY: -- would  
12 still not satisfy the standard that is laid  
13 out in the Hicks' opinion? Of course, as you  
14 discussed in your submissions, you have some  
15 questions about the 15 percent floor space  
16 inventory.

17 MR. KATZ: Right.

18 BOARD MEMBER ETHERLY: We don't  
19 know what it refers to.

20 MR. KATZ: Um-hum.

21 BOARD MEMBER ETHERLY: But let's  
22 say for the sake of discussion that it is

1       referencing inventory. Is it your argument  
2       that your client, even applying that standard,  
3       would not satisfy the definition of a  
4       sexually-oriented business enterprise?

5                   MR. KATZ: Okay. When you are  
6       talking about inventory, the Hicks' memo  
7       doesn't deal with inventory, from the way I  
8       read it. And we have not come here prepared,  
9       therefore, to argue inventory, because it's  
10      just not in her memo, that I can tell. Her  
11      memo is talking about floor space, from what  
12      I can tell.

13                   Now, Board Member Etherly, the  
14      problem we have with the Hicks' memorandum  
15      even if -- even for a hypothetical reason if  
16      the decision makers, such as the Board of  
17      Zoning Adjustment, said to us okay, right now  
18      we feel that Fun Fair fits within the Hicks'  
19      memorandum, that's still not enough for my  
20      client, because as I expect to develop through  
21      his testimony, he wants to return the booths  
22      to the store that he removed at the advice of

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1 Ms. Hicks after she left as the Zoning  
2 Administrator and advised his previous  
3 counsel.

4 He does not want to be limited  
5 with the amount of floor space he is using or  
6 inventory space or anything else he is using  
7 for, for lack of a better word, erotic  
8 entertainment. He does not want to be  
9 prevented, even though I don't think he has  
10 them now, to have, I'm trying to use a gentile  
11 word, sexual devices, which include -- well,  
12 they are sexual devices. The non-gentile word  
13 is things such as vibrators as well as in  
14 addition to condoms.

15 Because the Hicks' opinion, if I  
16 recall, actually does say if you have booths,  
17 you are a sexually-oriented business  
18 enterprise. I think it may have said if you  
19 do sell sexual devices, that you are a  
20 sexually-oriented business. So I do  
21 acknowledge that there is a tension between  
22 what Ms. Hicks says in her opinion and what

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1 was presented by Mr. Montiel's previous lawyer  
2 in his testimony in front of Judge McCoy that  
3 was -- sorry, Judge Simon presented by me  
4 where that -- Mr. Montiel's previous lawyer  
5 was actually saying that Ms. Hicks suggested  
6 that he should be okay, that Fun Fair Video  
7 should be okay having the number of booths  
8 that he has now.

9 BOARD MEMBER ETHERLY: Okay. And  
10 I appreciate that discussion, because I feel  
11 that when you look at portions of the Hicks'  
12 opinion, if you will, I felt that there were  
13 some quite clear enunciations of a standard,  
14 if you will. I'm not ready to necessarily say  
15 I think this is going to be very helpful when  
16 we get to the ZA's testimony to get a sense of  
17 what DCRA views as the applicable standard in  
18 this instance, but I wanted to just get a  
19 little bit of a reaction from you on where you  
20 felt your client fell within the Hicks'  
21 opinion.

22 MR. KATZ: Right.

1                   BOARD MEMBER ETHERLY:    Accepting  
2                   that you are challenging that opinion as being  
3                   clear, as being substantial and focused enough  
4                   to even offer a particular set of rules and  
5                   parameters --

6                   MR. KATZ:    Right.

7                   BOARD MEMBER ETHERLY:  -- that are  
8                   identifiable.    So you have answered my  
9                   question.

10                  MR. KATZ:    Okay.  Thank you.  Now,  
11                  I also -- there is one other provision of the  
12                  Title 11 of the DCMR that is problematic  
13                  Constitutionally and in practice which is 11  
14                  DCMR section 3108, which is referenced in 11  
15                  DCMR section 744 and 754.

16                  11   DCMR   section   744   and   754  
17                  provide for the BZA to follow 11 DCMR section  
18                  31(a) -- I'm sorry, 3108 in issuing any  
19                  sexually-oriented    business    enterprise  
20                  Certificates of Occupancy.  And the relevant  
21                  language there is not too long, so I'll read  
22                  it to you, which is that "The Board is

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1 authorized."

2 Well, actually, this is probably  
3 language that the Board already knows, but  
4 this is section 3108.1 of 11 DCMR, which is  
5 "The Board is authorized to grant special  
6 exceptions as provided in this title where in  
7 the judgement of the Board those special  
8 exceptions will be in harmony with the general  
9 purpose and intent of the Zoning Regulations  
10 and Maps and will not tend to affect adversely  
11 the use of neighboring property in accordance  
12 with the Zoning Regulations and Zoning Maps  
13 subject in each case to the special conditions  
14 specified in this title.

15 CHAIRPERSON GRIFFIS: Good. I  
16 think you meant 3104.1, not 3108.

17 MR. KATZ: If I did, I both  
18 apologize out of embarrassment.

19 CHAIRPERSON GRIFFIS: That's all  
20 right.

21 MR. KATZ: And also thank you for  
22 correcting me. I do have to admit that I have

1       been relying on what Lexus provides for the  
2       DCMR and I do notice that sometimes I'm sad to  
3       say if it was in this situation, has --

4                   CHAIRPERSON GRIFFIS:    It's okay.  
5       You can move on.    It's 3104.1, which is  
6       special exception provision, not 3108, which  
7       I believe is form and decorum.

8                   MR. KATZ:    It is our -- thank you.

9                   CHAIRPERSON GRIFFIS:    It's all  
10       right.

11                   MR. KATZ:    Well, it is our  
12       contention that that provision is just fine if  
13       it's a matter of putting up a pizza place or  
14       adding an addition to a house or putting up,  
15       you know, an extra upper floor on a building,  
16       but not for purposes of an adult business,  
17       because for purposes of adult businesses, we  
18       have the Supreme Court case of FWPBS which  
19       came out around 2000, I can give you that  
20       cite, that is cited in my initial brief, that  
21       confirms that unbridled discretion cannot be  
22       placed in the hands of the Government

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1 officials and Government bodies administering  
2 adult zoning laws.

3 That under FWPBS, which I'm still  
4 hunting for to give you the citation to, the  
5 Government officials and Government bodies  
6 administering the sexually-oriented business  
7 laws must just be administering the laws, not  
8 to be using discretion. But, you know, it  
9 would be an example, for instance, of that the  
10 administrative bodies -- the administering  
11 bodies, administrators would be permitted to  
12 say okay, we have an application. Is the  
13 application in good form? Is it properly  
14 filled out? Is it for the location allowed?  
15 That's it.

16 But that provision that we were  
17 just talking about from the DCMR provides for  
18 more discretion than that. And the BZA, the  
19 BZA is given unbridled discretion in  
20 determining -- giving variances, in my view.

21 CHAIRPERSON GRIFFIS: Okay.

22 MR. KATZ: In terms of the DCMR.

1 And the relevance of that is that I'm  
2 anticipating that if we don't win this matter  
3 hands down, and I don't see this as -- I mean,  
4 I have no reason to think that I've got a  
5 hands down win here or a hands down lose, I  
6 anticipate that it's possible that we might  
7 have an opinion just saying, you know, that  
8 just go over to a zone that has been zoned for  
9 sexually-oriented business enterprises, see if  
10 we give you the -- see if there is a C of O  
11 for a SOBE granted and/or to say if you want  
12 to stay where you are, and you don't want to  
13 be continually hassled by the Government, what  
14 you --

15 CHAIRPERSON GRIFFIS: We're not  
16 going to get into where you go, what happens.  
17 We're not going to have any jurisdictional  
18 basis to do that. And I'm actually --

19 MR. KATZ: Okay.

20 CHAIRPERSON GRIFFIS: I thought we  
21 were getting a little bit more focused and  
22 I've now lost total attention to it.

1 MR. KATZ: Okay.

2 CHAIRPERSON GRIFFIS: Because here  
3 we are talking about what you are bringing on  
4 these huge ideas of the legal analysis of why  
5 our regulations shouldn't be what they are or  
6 are actually not legal or whether there is an  
7 administration, the correct jurisdiction or  
8 authority, be it us, be it the Zoning  
9 Administrator. That's fine for understanding  
10 as we frame an issue.

11 MR. KATZ: Right.

12 CHAIRPERSON GRIFFIS: Is there  
13 anything more you need to address outside of  
14 what is in the written submission today  
15 regarding the Zoning Regulations? Title 11,  
16 199, 744, 754, you have raised. You touched  
17 on 734, I thought, and now you have brought up  
18 3104.

19 MR. KATZ: Okay. Yes. I at least  
20 want to give you the citations to the FWPBS  
21 case that even though it's in my submissions  
22 from the Supreme Court which deals with

1 unbridled discretion.

2 CHAIRPERSON GRIFFIS: But here is  
3 my fundamental problem with that argument.

4 MR. KATZ: Okay. All right.

5 CHAIRPERSON GRIFFIS: You can  
6 argue and let's say for, as Mr. Etherly always  
7 says, hypothetically.

8 MR. KATZ: Right.

9 CHAIRPERSON GRIFFIS: We grant you  
10 that you are absolutely correct FP1-223,  
11 whatever you are going to tell me.

12 MR. KATZ: Right.

13 CHAIRPERSON GRIFFIS: Shows us  
14 that we actually have written illegal  
15 regulations.

16 MR. KATZ: Okay.

17 CHAIRPERSON GRIFFIS: Okay. How  
18 does that help your cause that you have a  
19 standing C of O that is based on these  
20 regulations? You want to keep that C of O,  
21 don't you?

22 MR. KATZ: Right.

1 CHAIRPERSON GRIFFIS: Aren't you  
2 relying on the fact that you have a legal C of  
3 O, which is a basis on the Zoning Regulations.

4 MR. KATZ: Of course.

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. KATZ: I'm not here, Chair  
7 Griffis, saying that all the DCMR Regulations  
8 covering the Board of Zoning Adjustment are  
9 unconstitutional. I'm just saying that the  
10 SOBE Regulations --

11 CHAIRPERSON GRIFFIS: I  
12 understand.

13 MR. KATZ: -- are  
14 unconstitutional.

15 CHAIRPERSON GRIFFIS: I  
16 understand.

17 MR. KATZ: Okay.

18 CHAIRPERSON GRIFFIS: I  
19 understand. And I think you have hit those  
20 home.

21 MR. KATZ: Okay.

22 CHAIRPERSON GRIFFIS: But now, I

1 want to understand more fully.

2 MR. KATZ: Right.

3 CHAIRPERSON GRIFFIS: If it's not  
4 more -- if there is more to it than what you  
5 have submitted in here today, if not, I don't  
6 need to hear any more. But if there is more  
7 that you need to add to this of why it's an  
8 incorrect action, why you are operating within  
9 your C of O and it should not have been  
10 revoked or the actions that you are asserting  
11 are incorrect should not have happened.

12 MR. KATZ: Okay.

13 CHAIRPERSON GRIFFIS: What's the  
14 incorrectness?

15 MR. KATZ: All the arguments are  
16 in my written submission.

17 CHAIRPERSON GRIFFIS: Okay.

18 MR. KATZ: And I think that's what  
19 your argument -- what your question is going  
20 to. But since I did mention the FWPBS case,  
21 I want to make sure that's front and center.

22 CHAIRPERSON GRIFFIS: That's fine.

1           MR. KATZ: Which is FWPBS, Inc. v.  
2 Dallas, 493 U.S. 215, pages 225-226, from  
3 1990, which confirms that placing "unbridled  
4 discretion" in the hands of a Government  
5 official or agency constitutes a prior  
6 restraint and may result in censorship.

7           CHAIRPERSON GRIFFIS: Okay.

8           MR. KATZ: And the whole FWPBS is  
9 that that would be unconstitutional.

10          CHAIRPERSON GRIFFIS: Good.

11          BOARD MEMBER ETHERLY: But if I  
12 could, Mr. Katz, let me come back to the  
13 Chair's question.

14          MR. KATZ: Yes.

15          BOARD MEMBER ETHERLY: Because I  
16 think it is an important one. And that is and  
17 I would tend to agree with the Chair in that  
18 I think we have probably come to a fairly good  
19 stopping point for where you are in your  
20 argument.

21          MR. KATZ: Right.

22          BOARD MEMBER ETHERLY: Because I

1 think you walked through everything that you  
2 have laid out in your submission.

3 MR. KATZ: Yes.

4 BOARD MEMBER ETHERLY: But the  
5 Chair's question, let me put it very bluntly  
6 and unartfully, is what you have in your hand,  
7 you're saying it's not a duck.

8 MR. KATZ: Okay.

9 BOARD MEMBER ETHERLY: So if it's  
10 not a duck, what is it? What is your client  
11 operating if it's not a SOBE, if it's not a  
12 sexually-oriented business enterprise?

13 MR. KATZ: Right.

14 BOARD MEMBER ETHERLY: What should  
15 your Certificate of Occupancy say?

16 MR. KATZ: Okay. I'm only aware  
17 of two types of Certificates of Occupancy in  
18 D.C., an adult Certificate of Occupancy and a  
19 non-adult Certificate or a SOBE, S-O-B-E,  
20 Certificate of Occupancy and a non-SOBE  
21 Certificate of Occupancy. He has got a non-  
22 SOBE Certificate of Occupancy. He just wants

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1 to continue with a non-SOBE Certificate of  
2 Occupancy just like any other business in D.C.  
3 has that sells erotic entertainment.

4 BOARD MEMBER ETHERLY: Okay. And  
5 that would be without any attention to  
6 percentage of inventory or floor space. There  
7 would be essentially an unfettered ability to  
8 vend and sell goods of the nature that your  
9 client is currently selling.

10 MR. KATZ: Right. We're asking  
11 for that until the time comes that --

12 BOARD MEMBER ETHERLY: Sufficient  
13 clarity is brought to the regime, if you will.

14 MR. KATZ: Right. The properly  
15 issued laws relying on sufficient --

16 BOARD MEMBER ETHERLY: I  
17 understand.

18 MR. KATZ: -- secondary effect  
19 studies are issued.

20 BOARD MEMBER ETHERLY: Thank you.

21 MR. KATZ: And, you know, of  
22 course, one of the reasons why I'm concerned

1 about this is that if there is some decision  
2 that the BZA should not be deciding certain or  
3 any Constitutional issues, of course, then if  
4 we have an adverse opinion, one of the things  
5 I'll be coming to you about, we'll be asking  
6 for you to stay enforcement of what happened  
7 below and what happens here, so we can go to  
8 the Board of Appeals.

9 CHAIRPERSON GRIFFIS: Okay. Let's  
10 not project out what might or might not  
11 happen. Excellent. Thank you, Mr. Etherly,  
12 for that clarity. Anything else then that we  
13 have?

14 VICE CHAIR MILLER: I just have a  
15 couple of follow-up questions. I want to make  
16 sure I heard you correctly. Did you say that  
17 the BZA's authority to grant special  
18 exceptions and variances is unbridled?

19 MR. KATZ: It's unbridled for  
20 purposes of adult businesses.

21 VICE CHAIR MILLER: Only for those  
22 businesses?

1 MR. KATZ: I mean, I --

2 VICE CHAIR MILLER: What do you  
3 mean by unbridled?

4 MR. KATZ: Unbridled in terms of  
5 it has been made clear by the Supreme Court in  
6 the FWPBS case that an administrative agency  
7 or an administrative or a Government employee  
8 needs to be doing administrative tasks, not a  
9 discretionary task in deciding whether to  
10 issue a license or permission for a sexually-  
11 oriented business enterprise to operate. I  
12 mean, that's what --

13 VICE CHAIR MILLER: That's an  
14 issue of the license.

15 MR. KATZ: I apologize. Okay.  
16 For purposes of issuing a C of O, for purposes  
17 of issuing a variance.

18 VICE CHAIR MILLER: You mean, for  
19 purposes of issuing a special exception?

20 MR. KATZ: Right. For any of  
21 that.

22 VICE CHAIR MILLER: Okay.

1           MR. KATZ:    The Supreme Court is  
2           making clear that once the administrative  
3           agency goes beyond acting in an administrative  
4           function and is using discretion, that that's  
5           unconstitutional.  And clearly, that provision  
6           for variances for the BZA gives discretion to  
7           the BZA, which is just fine, according to the  
8           Supreme Court, for non-sexually-oriented  
9           businesses.

10           VICE CHAIR MILLER:  Okay.

11           MR. KATZ:  But it is not fine for  
12           sexually-oriented businesses.

13           VICE CHAIR MILLER:  And finally,  
14           what's the current status?  Is the business  
15           operating?

16           MR. KATZ:  It's operating.  I  
17           understand it has a current non-sexually-  
18           oriented business enterprise Certificate of  
19           Occupancy.  In some respects, we would have  
20           been more than happy if this issue had just  
21           laid dormant, even though it's a lot nicer to  
22           have clarity that the store can operate

1 without being afraid that someone is going to  
2 try to shut their doors. But yes, they are  
3 operating.

4 VICE CHAIR MILLER: Thank you.

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. KATZ: I'm ready to present  
7 evidence at the appropriate time.

8 CHAIRPERSON GRIFFIS: I think  
9 we're ready to hear that now.

10 MR. KATZ: Thank you. I call Jose  
11 Montiel.

12 DIRECT EXAMINATION

13 BY MR. KATZ:

14 Q You have already been sworn in.  
15 Jose, what is your full name?

16 A Jose Montiel.

17 Q And okay, now, Mr. Montiel, you  
18 speak --

19 MR. GREEN: Excuse me, Mr.  
20 Chairman, pardon me. Not to kind of belabor  
21 the point, but we can't hear him on this end.

22 CHAIRPERSON GRIFFIS: He hasn't

1 said much.

2 MR. GREEN: We didn't even hear  
3 his name.

4 CHAIRPERSON GRIFFIS: Okay. We'll  
5 make sure you can hear him.

6 MR. KATZ: Could you move the mike  
7 closer, sir?

8 CHAIRPERSON GRIFFIS: Okay.

9 BY MR. KATZ:

10 Q What is your name?

11 CHAIRPERSON GRIFFIS: That's  
12 right. Let's keep going.

13 THE WITNESS: Jose Montiel.

14 CHAIRPERSON GRIFFIS: Excellent.

15 BY MR. KATZ:

16 Q Are you the sole owner of Fun Fair  
17 Video?

18 A Yes.

19 Q Do you speak some English, but you  
20 still need an interpreter?

21 A Yes, I need an interpreter.

22 Q How long have you been the sole

1 owner of Fun Fair Video?

2 A Since 1996.

3 Q Have you ever had any partners in  
4 running that business?

5 A No.

6 Q Were you present at the hearings  
7 with me before Judge Simon in March of 2002  
8 and before Judge McCoy in the summer of 2002?

9 INTERPRETER FUXMAN: I'm sorry, I  
10 need the Judge again.

11 BY MR. KATZ:

12 Q Judge Simon in February of 2000 --  
13 sorry, in March of 2002 and Judge McCoy in the  
14 summer of 2002.

15 A Yes, I was there with Mr. Katz.

16 Q And at both of those hearings you  
17 had an interpreter that you were able to  
18 understand?

19 A Yes.

20 Q Now, because the transcript could  
21 not be made from the second hearing, because  
22 of an audio tape with interference, was the

1 testimony and evidence at the hearing in front  
2 of Judge McCoy similar to the evidence and  
3 testimony at the hearing before Judge Simon?

4 A I don't remember.

5 Q Well, for instance, do you  
6 remember that we had an investigator named  
7 William Vain testify at the hearing in front  
8 of Judge Simon?

9 CHAIRPERSON GRIFFIS: Let me just  
10 ask you, why are we trying to establish  
11 similarities between the last two cases?

12 MR. KATZ: Because the -- we were  
13 able to provide a transcript to the Board of  
14 the hearing in front of Judge Simon, but as I  
15 said in my filings, the audio tape of the  
16 hearing in front of Judge McCoy was totally  
17 inaudible and it was impossible to present a  
18 transcript of what happened.

19 MR. GREEN: Mr. Chairman, if I  
20 might be heard, I think you indicated that,  
21 and perhaps Mr. Katz also stated, the  
22 proceedings in this body are de novo. So if

1 that be the case and if he is considering it  
2 a de novo hearing, it would appear then that  
3 whatever he wants to establish now, he should  
4 just go on and just do it.

5 CHAIRPERSON GRIFFIS: I don't  
6 disagree. However, I want to rather than  
7 going through all of the proceedings to get  
8 into the record, I was trying to more  
9 streamline if there was a quicker way to  
10 establish, but, at this point, we're just --

11 MR. KATZ: I have a suggested way.

12 CHAIRPERSON GRIFFIS: Let's move  
13 ahead.

14 MR. KATZ: Since Mr. Green was  
15 present at both those hearings before Judge  
16 McCoy and Judge Simon, I would either ask on  
17 the record or else if I could be permitted or  
18 given permission to speak privately to Mr.  
19 Green just to see if he will stipulate the  
20 evidence in both proceedings were similar.

21 CHAIRPERSON GRIFFIS: Would you  
22 stipulate the similarities between the two?

1 MR. GREEN: I would like to confer  
2 with my client first, please.

3 CHAIRPERSON GRIFFIS: Yes, sure.  
4 let's take a minute.

5 (Whereupon, at 2:26 p.m. a recess  
6 until 2:37 p.m.)

7 CHAIRPERSON GRIFFIS: Very well.  
8 Let's resume. Whenever you are ready. I'll  
9 pour the martinis.

10 MR. KATZ: We have a stipulation.

11 CHAIRPERSON GRIFFIS: A mike.

12 MR. KATZ: We have a stipulation  
13 that hopefully will move things along more  
14 quickly. If Mr. Green will tell me if he  
15 agrees to the following wording, which is that  
16 all the evidence that was provided at the  
17 hearing before Judge McCoy -- sorry, Judge  
18 Simon in March of 2002 was the same for  
19 purposes of these proceedings as the evidence,  
20 including testimony and documents, that was  
21 presented to Judge McCoy in the summer of  
22 2002.

1 CHAIRPERSON GRIFFIS: Excellent.

2 Are we on board with that?

3 MR. GREEN: That's my  
4 understanding, Mr. Chairman.

5 CHAIRPERSON GRIFFIS: Excellent.

6 All right. Let's proceed.

7 MR. KATZ: Excellent. Thank you.

8 BY MR. KATZ:

9 Q Mr. Montiel, does your store have  
10 the same number of booths today as it did at  
11 the time you had the hearings before Judge  
12 McCoy and Judge Simon in 2002?

13 A Yes, yes, the same.

14 Q Is your store -- okay. Your store  
15 is at 919 5<sup>th</sup> Street. We have already  
16 established that, right?

17 A Yes.

18 Q And does the store look  
19 substantially the same today as it did in  
20 2002, including where the booths are, where  
21 the shelves are and what types of products are  
22 being sold there?

1           A       Yes, everything is the same, the  
2 same regulations, then as now.

3           Q       This includes the percentage of  
4 videos that you have that have erotic content  
5 and that don't have erotic content?

6           A       The same.

7           Q       And this includes the percentage  
8 of erotic material that his homosexual-  
9 oriented?

10           MR. GREEN: We have an objection,  
11 Your Honor. What difference does it make?

12           MR. KATZ: Between heterosexual  
13 and homosexual, what difference does it make?

14           CHAIRPERSON GRIFFIS: Oh, yes, I  
15 don't --

16           MR. GREEN: Yes, I mean --

17           CHAIRPERSON GRIFFIS: I don't  
18 know. It was quicker to let it go and keep  
19 moving.

20           MR. GREEN: Oh.

21           CHAIRPERSON GRIFFIS: Go ahead.

22           MR. KATZ: There is a substantial,

1 Chair Griffis, amount of homosexual-oriented  
2 erotic product there among the erotic products  
3 and a substantial number of homosexual  
4 customers that go in there.

5 CHAIRPERSON GRIFFIS: I mean, the  
6 question is what relevancy does it have to us  
7 with DCMR Title 11?

8 MR. KATZ: Well, seeing that I  
9 expect to be making an argument that my client  
10 is being targeted more than other stores for  
11 selling a substantial amount of erotic-  
12 oriented material that there are violations  
13 here under D.C. laws to protect rights of  
14 gays, because we're not dealing  
15 here --

16 CHAIRPERSON GRIFFIS: But would we  
17 have any jurisdictional idea of what those  
18 laws would be?

19 MR. KATZ: Well, I have to protect  
20 not only the record and arguments for the  
21 Board of Zoning Adjustment, but also for the  
22 D.C. Court of Appeals, which I understand is

1 the next level where we would go where we  
2 wouldn't be able to put anything in the  
3 record. There are D.C. laws that heavily  
4 protect the rights of gays.

5 CHAIRPERSON GRIFFIS: Okay. I  
6 understand that.

7 MR. KATZ: And I -- one of my  
8 arguments that is not covered in the  
9 submissions and I apologize is that gay rights  
10 are being violated here, because we're not  
11 only talking about --

12 MR. GREEN: Mr. Chairman?

13 CHAIRPERSON GRIFFIS: All right.  
14 I understand.

15 MR. GREEN: Mr. Chairman? I mean,  
16 the D.C. Office of Human Rights is the  
17 appropriate forum for that, not the BZA.

18 CHAIRPERSON GRIFFIS: I  
19 understand. Ms. Miller?

20 VICE CHAIR MILLER: Well, is this  
21 really -- did you bring this up at the  
22 previous hearing? Because this proceeding is

1 de novo, but it's based on the error that you  
2 are alleging the ZA made initially.

3 MR. KATZ: Because the -- I didn't  
4 raise it below, but, of course, I had barrages  
5 of reminders from Judge McCoy and Judge Simon  
6 below that that was not the proper place,  
7 number one, to make Constitutional arguments  
8 and not the proper place to challenge the  
9 validity of the governing regulations and law.

10 And my argument is since the law  
11 doesn't make any protections, since the laws  
12 we are arguing about today don't make any  
13 protections for gays rights to access to  
14 erotic entertainment, that this is not a far-  
15 fetched argument, that their rights are  
16 violated if they are going to be prevented  
17 from having this product available in the  
18 neighborhood where the Fun Fair is currently  
19 operating.

20 MR. GREEN: Mr. Chairman, I would  
21 simply ask how has the Zoning Administrator,  
22 both present and past, acted in a manner that

1 he describes? I don't think the record  
2 reflects that. And as a result, it's an  
3 irrelevant argument.

4 CHAIRPERSON GRIFFIS: We'll take  
5 it as a rhetorical question, because I'm not--

6 MR. GREEN: All right.

7 CHAIRPERSON GRIFFIS: -- going to  
8 hear rebuttal or evidence on that.

9 MR. GREEN: Yes. We understand,  
10 Mr. Chairman.

11 CHAIRPERSON GRIFFIS: That moves  
12 it so far afield of what was first ever below  
13 what was in the record to date and I'm not  
14 sure where the relevancy is at all for us.  
15 And frankly, maybe I shouldn't say it, but  
16 even the Court next, because we can't just  
17 open up the world and establish anything that  
18 you may think you may need to argue on appeal  
19 at any other situation. It's so far beyond  
20 the jurisdiction of what we are looking at.

21 MR. KATZ: For practical purposes,  
22 Chair Griffis, I'm not opening up a world or

1 a book. I'm only opening up two or three  
2 questions. And we don't have a full record  
3 yet. We're making a record here. So if I  
4 would be permitted to ask the one or two  
5 questions about who his clientele is on the  
6 bottom.

7 CHAIRPERSON GRIFFIS: One or two  
8 more questions and then let's move on.

9 MR. KATZ: I appreciate that.  
10 Thank you.

11 BY MR. KATZ:

12 Q Mr. Montiel, what, approximately,  
13 percentage of the erotic material sold at your  
14 store and available in the video viewing  
15 booths is homosexual-oriented?

16 MR. GREEN: Objection. Relevance.

17 CHAIRPERSON GRIFFIS: Noted.

18 THE WITNESS: About 15 percent.

19 BY MR. KATZ:

20 Q And about what percentage of your  
21 clientele, if you know, purchases homosexual-  
22 oriented material and/or watches homosexual

1 material in the video viewing booths?

2 INTERPRETER FUXMAN: He doesn't  
3 understand. I'll repeat.

4 MR. KATZ: Okay. I'll break it  
5 down.

6 MR. GREEN: I have a continuing  
7 objection, Mr. Chairman.

8 CHAIRPERSON GRIFFIS: Understood.

9 BY MR. KATZ:

10 Q What percentage of your clientele  
11 views homosexual-oriented videos versus  
12 heterosexual-oriented videos in the booths?

13 A He says I don't know, because when  
14 the client arrives, he closes himself off in  
15 the booth and I don't know what he watches.

16 Q Okay. To move along then. At all  
17 times, what is the minimum number of employees  
18 in the store?

19 A Two.

20 Q What are the operating hours of  
21 the store?

22 A From Monday to Thursday, 9:00 to

1 1:00, Friday and Saturday, 24 hours.

2 Q Does Fun Fair Video have a current  
3 Certificate of Occupancy?

4 A Yes.

5 Q And that Certificate of Occupancy  
6 is not for sexually-oriented business  
7 establishments, right?

8 A That's right.

9 Q And Fun Fair Video still has a  
10 current license for mechanical amusements,  
11 also known as video viewing booths, right?

12 A Yes.

13 Q What type of monitoring is done at  
14 the booths in terms of cameras, watching  
15 what's in the booth viewing area and in terms  
16 of employees watching the area?

17 A Yes, there are two sets of  
18 cameras.

19 Q And to what extent do the  
20 employees go into the booth viewing areas and  
21 into the booths?

22 A One passes through the back and

1 one passes through the front at the stand.

2 Q Does an employee always go into  
3 the booth after each customer leaves?

4 MR. GREEN: Mr. Chairman, again I  
5 object. I question the relevance. The  
6 materiality of this line of questioning.

7 CHAIRPERSON GRIFFIS: Okay.  
8 Relevancy? Where are we going with this?

9 MR. KATZ: This goes to both  
10 credibility of the witness to confirm that  
11 everything is the same today as it was through  
12 the testimony in 2002, as well as that --

13 CHAIRPERSON GRIFFIS: Why is that  
14 a critical date?

15 MR. GREEN: Mr. Chairman, I  
16 thought we just stipulated to this? What's  
17 the problem?

18 MR. KATZ: Okay. Okay. I'll  
19 accept that stipulation, too. Our stipulation  
20 before was that the evidence at the Judge  
21 McCoy hearing was the same as the evidence  
22 presented at the Judge Simon hearing.

1 CHAIRPERSON GRIFFIS: Right.

2 MR. KATZ: I would entertain --

3 CHAIRPERSON GRIFFIS: You're  
4 asking questions in order to establish that  
5 the retail area is the same as it was in 2002?

6 MR. KATZ: Okay. So I would  
7 welcome if I could stipulate --

8 CHAIRPERSON GRIFFIS: Is that  
9 correct?

10 MR. KATZ: Sorry?

11 CHAIRPERSON GRIFFIS: Is that  
12 correct? These questions are trying to  
13 establish the similarity of the retail  
14 situation?

15 MR. KATZ: Well, it's two things.  
16 I would welcome a stipulation.

17 CHAIRPERSON GRIFFIS: No, forget  
18 the stipulation.

19 MR. KATZ: Okay. Fine.

20 CHAIRPERSON GRIFFIS: What are you  
21 trying to establish with these questions?

22 MR. KATZ: Okay. Number one, that

1 the situation today is, in fact, the same as  
2 it was in 2002.

3 CHAIRPERSON GRIFFIS: Okay. And  
4 what's the milestone importance of 2002?

5 MR. KATZ: The milestone of 2002  
6 is that's when we had the hearing in front of  
7 Judge Simon.

8 CHAIRPERSON GRIFFIS: And why is  
9 the hearing an important milestone for this  
10 case?

11 MR. KATZ: Because the hearing  
12 record for Judge --

13 CHAIRPERSON GRIFFIS: But aren't  
14 we here about --

15 MR. KATZ: -- Simon --

16 CHAIRPERSON GRIFFIS: -- a  
17 Certificate of Occupancy that is or isn't  
18 valid? Is the action taken tied to 2002 or  
19 are we just trying to get back to only as far  
20 as the administrative law hearing.

21 MR. KATZ: One of the arguments  
22 I'm making is that Judge McCoy used

1 unreasonable discretion as -- and not just  
2 unbridled discretion based on the facts to  
3 revoke the Certificate of Occupancy, because  
4 he had unlimited discretion whether to revoke  
5 the Certificate of Occupancy. Unbridled  
6 discretion about whether to revoke the booth  
7 license.

8 Therefore, an essential  
9 consideration here is the extent to which  
10 these booths are operated in a responsible  
11 manner, which they are, which is that there is  
12 an employee going into each booth after each  
13 customer is there and sweeping it out. And  
14 there is monitoring of the booth there.

15 CHAIRPERSON GRIFFIS: Okay. Ms.  
16 Miller?

17 VICE CHAIR MILLER: Is your appeal  
18 alleging that the ALJ erred or that the ZA  
19 erred or both?

20 MR. KATZ: Both.

21 VICE CHAIR MILLER: Okay. Either  
22 way, the error was committed in 2002, so I

1 don't see any relevance to facts going to what  
2 exists today.

3 MR. KATZ: Okay. I'll ask in  
4 terms of 2002.

5 VICE CHAIR MILLER: Okay.

6 MR. KATZ: Okay.

7 VICE CHAIR MILLER: Let me ask you  
8 this though. And I don't want to cut into  
9 your evidence.

10 MR. KATZ: Okay.

11 VICE CHAIR MILLER: But if there  
12 was evidence put in the record already --

13 MR. KATZ: Right.

14 VICE CHAIR MILLER: -- as to what  
15 the facts were in 2002 --

16 MR. KATZ: Right.

17 VICE CHAIR MILLER: -- why do you  
18 need to repeat that, unless there is something  
19 new that you are going to add?

20 MR. KATZ: Because I think that we  
21 may not have that in the transcript that was  
22 in front of Judge Simon and I think it was

1 added in front of Judge McCoy where we don't  
2 have a transcript that was able to be made in  
3 front of Judge McCoy, because of the inaudible  
4 tape. I don't have much more than one more  
5 question.

6 VICE CHAIR MILLER: Okay. All  
7 right. Just so I understand though.

8 MR. KATZ: Right.

9 VICE CHAIR MILLER: But I thought  
10 that also that DCRA stipulated that the facts  
11 were the same in both those proceedings, so it  
12 doesn't matter that you didn't have the  
13 transcript for one of them.

14 MR. KATZ: Okay. Then I apologize  
15 if I made the intellectual error. Okay. What  
16 I meant to say was that everything that was  
17 put in front of Judge McCoy was also put in  
18 front of Judge Simon, but I don't -- sorry.  
19 Everything that was put in front of Judge  
20 Simon was also put in front of Judge McCoy,  
21 but what I'm also recalling, and I apologize  
22 to everybody, is I don't think these

1 particular two or three questions that I'm  
2 asking now are on the record in front of the--  
3 in the earlier hearing in front of Judge  
4 Simon. And I apologize for not making that  
5 clear. It's only one or two more questions.

6 BOARD MEMBER ETHERLY: But I would  
7 say that I think we are nearing a point where  
8 it will be very critical to start to focus  
9 this a little bit, Mr. Katz, because I'm  
10 worried that we are getting a little too far  
11 afield here.

12 MR. KATZ: Right.

13 BOARD MEMBER ETHERLY: Of course,  
14 there are arguments on both sides as to what  
15 is the appropriate evidence, if you will, that  
16 we need to hear.

17 MR. KATZ: Right.

18 BOARD MEMBER ETHERLY: From one  
19 Board Member's perspective, my own, I would  
20 definitely like to be sure I have a clear  
21 sense of what exactly is happening in terms of  
22 the operations and the inventory, in

1 particular, of Fun Fair Video. And I was  
2 hopeful that that was where you were heading  
3 in terms of indicating, as you noted in your  
4 written submittals, you discussed the types of  
5 videos that are sold, in addition to those  
6 that have erotic content and there are family  
7 videos.

8 MR. KATZ: Right.

9 BOARD MEMBER ETHERLY: There are  
10 Spanish language videos, martial arts videos.

11 MR. KATZ: Right.

12 BOARD MEMBER ETHERLY: And what  
13 have you. That for me would be helpful in  
14 addition to getting a sense of the layout --

15 MR. KATZ: Okay.

16 BOARD MEMBER ETHERLY: -- of the  
17 operation. But I think kind of, you know,  
18 really piecemealing it out probably is not  
19 going to be as productive for us, and I don't  
20 want to speak for my colleagues, as I think  
21 you might think it would be.

22 MR. KATZ: Well, I -- that's great

1 for me to hear, because I need to know what's  
2 on everyone's mind.

3 VICE CHAIR MILLER: Could I? I  
4 just wanted to --

5 MR. KATZ: I only had about five--

6 VICE CHAIR MILLER: I'm sorry.

7 MR. KATZ: -- more minutes of  
8 questions.

9 VICE CHAIR MILLER: I just want to  
10 interrupt here, because I want to make sure  
11 that you don't think what Mr. Etherly and what  
12 I said is contradictory.

13 BOARD MEMBER ETHERLY: Yes.

14 VICE CHAIR MILLER: Because it  
15 could be interpreted as that.

16 MR. KATZ: Okay.

17 VICE CHAIR MILLER: I'm assuming  
18 Mr. Etherly was asking you about how it's laid  
19 out like today.

20 MR. KATZ: Okay.

21 VICE CHAIR MILLER: And I was  
22 saying well, why do we care about today,

1 because the error committed was committed  
2 years ago.

3 MR. KATZ: Right.

4 VICE CHAIR MILLER: I would just  
5 say that I think it would be relevant, today's  
6 evidence would only be relevant, if it is the  
7 same as what existed years ago.

8 MR. KATZ: Okay. I will tie that  
9 up, since Mr. Montiel earlier did say  
10 everything is the same today with operations  
11 and what is there as 2002. I do, as far as  
12 focus, have my list of general questions.  
13 They do only take about five minutes without  
14 objection or whatever. I welcome all  
15 interrupts and everything, but I am letting  
16 you know that I have done my homework.

17 CHAIRPERSON GRIFFIS: Let's do it.

18 MR. KATZ: With focus. Thank you.

19 BY MR. KATZ:

20 Q Mr. Montiel, are the operations at  
21 your store the same, essentially, as they were  
22 in 2002?

1           A       Yes, they are the same.

2           Q       And does that include the  
3 percentage of videos and other products that  
4 do not have any erotic or sexual content?

5           A       Yes.

6           Q       And does that include the  
7 categories of products that don't have sexual  
8 or erotic content, including action movies or  
9 products that are not in English?

10          A       Yes, the same.

11          Q       And does that include the numbers  
12 of cameras that are in the video viewing booth  
13 areas and the frequency that employees check  
14 what the cameras are showing and the employees  
15 check the video viewing area?

16          A       Correct, the same.

17          Q       And does that include employees  
18 making sure that they are cleaning out the  
19 video viewing booth, including sweeping them  
20 out after each --

21                   MR. GREEN: Objection. Asked and  
22 answered.

1 CHAIRPERSON GRIFFIS: Move on.

2 MR. KATZ: Okay.

3 BY MR. KATZ:

4 Q And does that include that there  
5 are no holes between each video viewing booth?

6 MR. GREEN: Objection again.  
7 Asked and answered.

8 MR. KATZ: No, it wasn't answered.

9 CHAIRPERSON GRIFFIS: I didn't get  
10 the answer to it. I don't know.

11 THE WITNESS: No, there are no  
12 holes or nothing like that.

13 BY MR. KATZ:

14 Q And does that include that you  
15 make sure that not more than one person is in  
16 the video viewing booth at one time?

17 A Correct. That's true.

18 Q And that there is no physical or  
19 sexual contact between customers inside or  
20 outside the video viewing booths?

21 A No, there is not.

22 Q Has there been a change in the

1 crime rate in your neighborhood between 2002  
2 and now?

3 MR. GREEN: We have objection to  
4 this, Mr. Chairman.

5 CHAIRPERSON GRIFFIS: What's the  
6 objection?

7 MR. GREEN: Well, you know, what  
8 is the basis upon which this question is  
9 asked? We haven't heard any foundation laid  
10 or demonstrated as it relates to the crime  
11 rate in this -- but that's all right. I'll  
12 withdraw my objection.

13 CHAIRPERSON GRIFFIS: Okay.

14 MR. GREEN: I'll let him talk.

15 CHAIRPERSON GRIFFIS: And you can  
16 cross him, of course.

17 MR. GREEN: Sure. I understand,  
18 Mr. Chairman. Thank you.

19 CHAIRPERSON GRIFFIS: Okay.

20 BY MR. KATZ:

21 Q Please, answer.

22 A Yes, there has been a change.

1 Q In what way?

2 A There are less people walking in  
3 the street.

4 Q Anything else?

5 A No.

6 Q Is there any other information,  
7 anything, any other reason that you say the  
8 crime rate has changed or dropped?

9 A Yes, because before 2000 that  
10 whole area was much worse.

11 Q In what way?

12 A A lot of vandalism and things like  
13 that.

14 Q What about prostitution?

15 A Yes, and prostitution.

16 Q And what's the situation in the  
17 area of your store with prostitution now?

18 A There is more control. The  
19 authorities maintain everything cleaner,  
20 better.

21 Q And, please, confirm what the  
22 Members of the Board may already know, aren't

1 there a lot of expensive buildings that are up  
2 there now and that are being constructed now?

3 A Yes, that's true.

4 Q Okay. And there is a -- your  
5 store is on 5<sup>th</sup> Street between K and Mass  
6 Ave.?

7 A Yes.

8 Q And at the northeast corner of K  
9 and 5<sup>th</sup> Street, N.W., on K Street, is there a  
10 strip club called Louis' Rogue?

11 CHAIRPERSON GRIFFIS: Why are we  
12 establishing the perimeter area?

13 MR. KATZ: There was a -- my  
14 argument is that there was a faulty conclusion  
15 by the two ALJs below that somehow there were  
16 problems in the neighborhood or at least Judge  
17 McCoy seems to be saying there are problems in  
18 the neighborhood based on his store alone.  
19 Well, there is a strip club around the corner.  
20 It's not like there is just one store there  
21 that sells adult entertainment.

22 VICE CHAIR MILLER: And weren't

1 you talking about the buildings that have been  
2 built now? I mean, that evidence wasn't  
3 before the Judge four years ago. So I don't  
4 see how that is relevant at all.

5 BOARD MEMBER ETHERLY: I would  
6 agree, Mr. Chair. I would agree.

7 MR. KATZ: Okay. Fine. I  
8 understand. I only think -- I only have one  
9 or two questions about the strip club, which  
10 was there, at the time.

11 CHAIRPERSON GRIFFIS: Let's do it.

12 MR. KATZ: Shall I proceed?

13 CHAIRPERSON GRIFFIS: Yes.

14 MR. KATZ: Okay. Okay.

15 BY MR. KATZ:

16 Q Do you remember the question? If  
17 so, please, answer.

18 A Yes, I remember.

19 Q Okay. And so there is a strip  
20 club? Sorry, in 2002 there was a strip club  
21 called Louis' Rogue at the north -- sorry,  
22 southeast corner of K and 5<sup>th</sup> Street, N.W., on

1 K Street?

2 A Correct.

3 Q And in 2002 that club served  
4 liquor and the dancers went to full nudity?

5 MR. GREEN: Objection. Objection,  
6 Mr. Chairman. Again, relevance, probative  
7 value, materiality, they are not with us with  
8 that question, nor that line of questioning.

9 CHAIRPERSON GRIFFIS: Okay.

10 MR. GREEN: And I would ask it to  
11 be stricken.

12 CHAIRPERSON GRIFFIS: Well, as you  
13 all know, we can't strike it from the record.  
14 However, let's move onto a new subject. I  
15 think we have established that there is a  
16 strip club there.

17 MR. KATZ: Yes, I just ask for  
18 permission to have that answered. There is  
19 full nudity and liquor served there and I'm  
20 ready to go to the next line of questioning.  
21 I ask for permission for that answer.

22 CHAIRPERSON GRIFFIS: Yes or no?

1 THE WITNESS: Yes.

2 BY MR. KATZ:

3 Q And that's the way it was in 2002  
4 at Louis' Rogue?

5 A Yes, until now.

6 MR. KATZ: I handed earlier to Mr.  
7 -- just a few moments ago to Mr. Green the  
8 exhibits we filed with the notice of filing in  
9 November of 2007. It is the diagram, two  
10 diagrams of the store and several pictures of  
11 the interior and the exterior. I ask if I  
12 could have a stipulation that those are true  
13 and authentic, otherwise I will need to ask  
14 questions of Mr. Montiel about that. That was  
15 already presented at the previous hearing, so  
16 I would hope we could get a stipulation on  
17 that.

18 I'll tell your Chairperson -- Mr.  
19 Griffis, I'll tell you which --

20 CHAIRPERSON GRIFFIS: No, I  
21 understand. I have them in front of me. I  
22 don't think we need stipulation to this. It's

1 in the record. Unless on cross they want to  
2 somehow determine that this isn't the store.

3 MR. KATZ: Okay.

4 CHAIRPERSON GRIFFIS: I think you  
5 can continue with your questions.

6 MR. KATZ: Okay. That's fine.  
7 We're near the end and we might actually need  
8 one moment, please.

9 BY MR. KATZ:

10 Q Is it true that before I became  
11 your lawyer Fun Fair Video removed six video  
12 viewing booths?

13 A Yes.

14 Q And was that because of the  
15 understanding that Gladys Hicks, after she  
16 stopped being the Zoning Administrator,  
17 advised your previous lawyer to do so?

18 A Yes.

19 Q And that was in order for your  
20 store to satisfy the -- what would not be a  
21 sexually-oriented business enterprise in D.C.?

22 A Correct, yes.

1           Q     Is it your preference, if there  
2 were not any regulations against it, to have  
3 more video viewing booths and perhaps add more  
4 erotic products at your store?

5           A     Yes, then I can have a complete  
6 business then.

7           Q     And the reason you are keeping the  
8 store today the way it was in 2002 is to try  
9 to meet that 15 percent standard?

10          A     Yes, of course.

11               MR. KATZ:     I have no further  
12 questions.

13               MR. GREEN:     One moment, Your  
14 Honor. Mr. Chairman, may I inquire briefly?

15                       CHAIRPERSON GRIFFIS:     Yes.

16                       MR. GREEN:     Thank you.

17                               DIRECT EXAMINATION

18                               BY MR. GREEN:

19           Q     Mr. Montiel, what is the number on  
20 your Certificate of Occupancy? You indicated  
21 that you have one. What is its number?

22           A     I have a Certificate of

1 Occupation, but I don't remember the number.

2 Q Would its number be --

3 CHAIRPERSON GRIFFIS: No, don't.

4 If he doesn't know the number, why are you  
5 going to read it to him?

6 MR. GREEN: Well, all right.

7 MR. KATZ: I object.

8 CHAIRPERSON GRIFFIS: You're going  
9 to show him that? Is that it?

10 MR. GREEN: No.

11 MR. KATZ: Then I object.

12 CHAIRPERSON GRIFFIS: Well,  
13 there's no question to object to.

14 MR. GREEN: I mean, I just simply  
15 asked him what the number was and if he had it  
16 in his records, he could certainly tell us  
17 what it is. He says he has got one and I just  
18 wanted to know what the number was. I mean,  
19 you know, you have indicated, I guess, that he  
20 doesn't know.

21 CHAIRPERSON GRIFFIS: The question  
22 is not unclear. I understand that.

1 MR. GREEN: All right.

2 CHAIRPERSON GRIFFIS: He doesn't--  
3 you asked him if he knew his number and he  
4 said he didn't remember the number.

5 MR. GREEN: Does he have the  
6 number before him?

7 CHAIRPERSON GRIFFIS: Do you have  
8 the Certificate of Occupancy here in your  
9 records?

10 MR. KATZ: And it would take more  
11 time than you would want --

12 CHAIRPERSON GRIFFIS: Do you have  
13 it?

14 MR. GREEN: I'll --

15 MR. KATZ: -- to look for it,  
16 because I don't know if it here or at my  
17 office. Literally, I have at least 2,000 to  
18 3,000 pages related to this store.

19 CHAIRPERSON GRIFFIS: Okay.

20 MR. KATZ: I mean, I'll start  
21 looking until you tell me to stop, but I don't  
22 know if I have it here.

1 MR. GREEN: Mr. Chairman, I'm  
2 going to do this for the sake of moving this  
3 thing along. I'm going to withdraw it, but I  
4 want to make one comment. We are here dealing  
5 with a Certificate of Occupancy.

6 MR. KATZ: I object to the  
7 question.

8 MR. GREEN: And it would seem to  
9 me that if you are trying to get --

10 CHAIRPERSON GRIFFIS: Right.

11 MR. GREEN: -- a Certificate of  
12 Occupancy --

13 CHAIRPERSON GRIFFIS: Let's get  
14 the questions.

15 MR. GREEN: All right.

16 CHAIRPERSON GRIFFIS: Otherwise,  
17 we'll lose total control of this.

18 MR. GREEN: Yes.

19 BY MR. GREEN:

20 Q Sir, you indicated that you have  
21 got mechanical amusement. Do you have the  
22 number?

1 MR. KATZ: Objection to vagueness.

2 CHAIRPERSON GRIFFIS: Well, it's--  
3 go ahead. Just rephrase the question of the  
4 witness.

5 MR. GREEN: All right.

6 CHAIRPERSON GRIFFIS: In a little  
7 bit more detail.

8 MR. GREEN: He indicated that he  
9 had a mechanical amusement license.

10 CHAIRPERSON GRIFFIS: License.  
11 You want the license number?

12 MR. GREEN: Yes. What is the  
13 license number?

14 CHAIRPERSON GRIFFIS: Okay. Good.

15 THE WITNESS: I have a license,  
16 but I don't know the number either. I don't  
17 have it here.

18 MR. KATZ: I think this is an  
19 improper line of questioning, Members of the  
20 Board. If Mr. Green is contending that there  
21 is no current Certificate of Occupancy --

22 CHAIRPERSON GRIFFIS: I don't know

1 what he is contending. He is just asking  
2 questions.

3 MR. KATZ: Well, then these are  
4 improper questions then.

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. GREEN: I don't know.

7 CHAIRPERSON GRIFFIS: Mr. Green,  
8 other cross?

9 BY MR. GREEN:

10 Q Mr. Montiel, how many booths to  
11 you have in your store at 919 5<sup>th</sup> Street,  
12 N.W.?

13 A I have 10.

14 Q You have 10. Okay. Mr. Montiel,  
15 what is the square footage of your business,  
16 total square footage?

17 A I don't remember that very well.

18 Q All right. You say you have been  
19 in business since 1990, what now, sir?

20 A '96.

21 MR. KATZ: Are you asking more  
22 questions?

1 MR. GLASGOW: Mr. Chairman, I  
2 don't have any other questions of this  
3 witness.

4 MR. KATZ: Nor do I.

5 CHAIRPERSON GRIFFIS: Does the ANC  
6 have any cross? Any questions?

7 MR. DIXON: Not right now.

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

10 MR. KATZ: I have one more  
11 witness.

12 CHAIRPERSON GRIFFIS: Okay.

13 MR. KATZ: Mr. Crews.

14 MR. GREEN: Oh, great.

15 MR. KATZ: I already notified him  
16 and Mr. Green that he would be a witness  
17 today.

18 CHAIRPERSON GRIFFIS: Mr. Crews,  
19 are you amenable to being a witness?

20 ZONING ADMIN. CREWS: Sure.

21 CHAIRPERSON GRIFFIS: Let's go.

22 MR. KATZ: Thank you.

1 DIRECT EXAMINATION

2 BY MR. KATZ:

3 Q Mr. Crews, what is your full name  
4 and business address?

5 CHAIRPERSON GRIFFIS: We got that.  
6 He did state it.

7 MR. KATZ: Okay.

8 CHAIRPERSON GRIFFIS: Go.

9 THE WITNESS: My name is Bill  
10 Crews. I'm the Zoning Administrator for the  
11 District of Columbia and my office is located  
12 at 941 North Capitol Street, N.E., Washington,  
13 D.C.

14 BY MR. KATZ:

15 Q Mr. Crews, how long have you been  
16 in that position?

17 A Almost 17 months.

18 Q What were you doing before then?

19 A I was an attorney advisor for the  
20 Environmental Protection Agency.

21 Q Okay. Do you agree with me that  
22 there are no sexually-oriented business

1 enterprise Certificates of Occupancy currently  
2 in existence in the District of Columbia?

3 A I would answer that question that  
4 I am not personally familiar with any  
5 particular Certificate of Occupancy that says  
6 that it is a sexually-oriented business  
7 establishment.

8 Q Okay. And are you aware whether  
9 any such Certificate of Occupancy for  
10 sexually-oriented business enterprises has  
11 ever been issued in the District of Columbia?

12 A I don't know that.

13 Q Are you aware of whether any  
14 secondary effect studies were ever performed  
15 or relied upon or submitted before the  
16 Sexually-Oriented Business Enterprise  
17 Regulations were passed in the District of  
18 Columbia?

19 MR. GREEN: Your Honor, I'm going  
20 to ask that he define this term for the sake  
21 of the record, please.

22 CHAIRPERSON GRIFFIS: Which,

1 secondary effects?

2 MR. GREEN: Yes.

3 CHAIRPERSON GRIFFIS: Is there a  
4 definition in utilization of that?

5 MR. KATZ: I'll be happy to  
6 define.

7 BY MR. KATZ:

8 Q Do you know what a secondary  
9 effect study is, Mr. Crews?

10 A I could -- not specifically, no.

11 Q Okay. For purposes of my  
12 question, a secondary effect study is a study  
13 showing negative secondary effects of adult  
14 businesses. Would that be sufficient for you  
15 as my definition of secondary -- of a  
16 secondary effect study?

17 A Okay.

18 Q Okay. Are you aware of any  
19 secondary effect studies having been performed  
20 or relied upon in issuing the Sexually-  
21 Oriented Business Enterprise Regulations in  
22 the District of Columbia?

1           A       I personally am not aware of any  
2 of the circumstances around the Zoning  
3 Commission's adoption of this particular  
4 portion of the Zoning Regulations.

5           Q       Okay. But certainly, you know  
6 that when I'm talking about the Sexually-  
7 Oriented Business Establishment Regulations,  
8 I'm talking about those sections of 11 DCMR  
9 that we were just discussing with the Board.

10          A       Right.

11                   CHAIRPERSON GRIFFIS: Yes, he is.

12                   THE WITNESS: Right. I just don't  
13 know anything about the adoption of those by  
14 the Zoning Commission.

15                   BY MR. KATZ:

16          Q       I understand. Do you agree that  
17 Fun Fair Video is not the only business in the  
18 District of Columbia that sells erotic  
19 entertainment?

20          A       I don't know that for a fact that  
21 it -- I mean, I just don't know.

22          Q       You don't know either way?

1           A       I know that there were some that  
2 did, but that are no longer there.

3           Q       And, of course, your agency  
4 doesn't deal with strip clubs, right?

5           A       We deal with every use of property  
6 other than a single-family dwelling in that  
7 and if you are going to build one, we deal  
8 with that.

9           Q       Okay.

10          A       So, right. So I am familiar with  
11 strip clubs.

12          Q       And you would agree --

13          A       From a professional standpoint.

14          Q       And you would agree that the  
15 District of Columbia has at least two or more  
16 strip clubs, right?

17          A       You know, I don't have personal  
18 knowledge of that. I have seen a list  
19 previously of ABRA licenses for nude dancing  
20 that contained more than two on that list, but  
21 I have no personal knowledge of whether or not  
22 they are all still operating or if those

1 licenses are still active.

2 Q I understand. Thank you for being  
3 here today.

4 MR. KATZ: I have no further  
5 questions.

6 CHAIRPERSON GRIFFIS: Okay. Do  
7 you have any cross? Mr. Green, do you have  
8 any cross for Mr. Crews?

9 MR. GREEN: Certainly not.

10 CHAIRPERSON GRIFFIS: Okay.  
11 Excellent. Any other witnesses?

12 ZONING ADMIN. CREWS: Thank you  
13 very much.

14 MR. KATZ: We rest.

15 CHAIRPERSON GRIFFIS: Excellent.  
16 Thank you very much. Let's move ahead then.  
17 Mr. Green, are you ready?

18 MR. GREEN: Yes. One moment,  
19 please.

20 CHAIRPERSON GRIFFIS: Sure.

21 MR. GREEN: Mr. Chairman, Members  
22 of the Board, I'll start off by just simply,

1 my opening, by saying that sex sells. And  
2 what this case is all about is the fact that  
3 there is an attempt by the respondent to sell  
4 sex in an area where sex sales are  
5 impermissible.

6 The statutes are very clear. That  
7 you cannot have a sexually-oriented business  
8 enterprise located in a C-2-C area, zoned  
9 area. That's what this case is all about. As  
10 a matter of fact, going back into history just  
11 briefly, we had three rulings by  
12 Administrative Law Judges, June 20, 2000, July  
13 2002, December 6, 2002, and they all said that  
14 it is impermissible activity to have a  
15 sexually-oriented business in an area zoned  
16 not for sexually-oriented business enterprises  
17 and that's what is going on here.

18 We intend to show through our  
19 witnesses that there has been a clear cut  
20 violation of that statute and those decisions  
21 and orders issued by the Administrative Law  
22 Judges. We intend to again show that a

1 revocation was issued for a Certificate of  
2 Occupancy because it violated those specific  
3 orders of the Administrative Law Judge.

4 With regard to the Administrative  
5 Law Judge's authority to issue any orders,  
6 other than fines, I would direct the Board's  
7 attention to D.C. Code section 2-1801.03,  
8 specifically (b)(4), where it talks about  
9 suspending permits or licenses for the purpose  
10 of enforcing the fines, payment of fines, the  
11 issuance of penalties.

12 I would also point out that within  
13 the powers of the Administrative Law Judge,  
14 also referred to sometimes as an Attorney  
15 Examiner, that there is no limitation on what  
16 he can do. I would point out that with regard  
17 to Judge Simon and McCoy when they were a part  
18 of the Office of Adjudication, which was a  
19 part of the Department of Consumer and  
20 Regulatory Affairs, they were acting to carry  
21 out the responsibilities and instruction of  
22 the Director of the Agency, who in turn was

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1 carrying out the Mayor's authority.

2 So by logical extension, the  
3 Administrative Law Judges, the Director were  
4 carrying out the Mayor's order. That's what  
5 we have here. And I would also point out, and  
6 I would be happy to bring it to your  
7 attention, I was not aware that this matter  
8 was going to come up, but there are various  
9 Mayor orders that authorize the Mayor's Agent,  
10 in this case, the Directors and the  
11 Administrative Law Judges, to carry out his  
12 authority, which is to do what?

13 To do, to impose fines, to revoke  
14 licenses, to suspend licenses and any other  
15 appropriate legal remedies that the Mayor may  
16 have his agent certainly have. Without  
17 further ado, I would also direct the Board's  
18 attention to the two decisions of Judge Simon  
19 and Judge McCoy. They are very specific.

20 They incorporate and discuss the  
21 Zoning Administrator's opinion as it relates  
22 to what constitutes sexually-oriented. It's

1 our contention that the respondent falls  
2 within the scope of this. It has certainly,  
3 beyond the 15 percent allowable limits, if you  
4 will, booths, it sells sex toys, all of these  
5 things are discussed, not only in this  
6 decision, but in 11 DCMR 199 in terms of  
7 definition.

8 I would point out to you very  
9 clearly that the respondent meets this  
10 criteria and we intend to show that again  
11 through witnesses.

12 Now, I question that the Board has  
13 read in detail the decisions and orders issued  
14 by Judge Simon and Judge McCoy. I'm not going  
15 to go into any long discourse of that, but I  
16 will say that these decisions and orders are  
17 instructive of what constitutes sexually-  
18 oriented business enterprises that are what?  
19 Impermissible.

20 And without further ado, I call my  
21 first witness, and that person is Mr. Bill  
22 Crews, the Zoning Administrator. May I

1 proceed, Your Honor?

2 CHAIRPERSON GRIFFIS: Yes.

3 MR. GREEN: Thank you.

4 DIRECT EXAMINATION

5 BY MR. GREEN:

6 Q Mr. Crews, for the record again,  
7 state who you are.

8 A I'm Bill Crews. I'm the Zoning  
9 Administrator for the District of Columbia.

10 Q Mr. Crews, are you familiar with  
11 JMM Corporation t/a Fun Fair?

12 A Yes.

13 Q And can you tell us how you are  
14 familiar?

15 A I'm familiar with the -- in the  
16 course of my work as Zoning Administrator  
17 knowing about the history of this case and I  
18 have done an inspection at the location.

19 Q Can you tell us, approximately,  
20 when you made this inspection?

21 A It was the Sunday afternoon before  
22 the previously scheduled hearing on December

1 5<sup>th</sup>, so that would be, to the best of my  
2 recollection, December 3<sup>rd</sup>.

3 Q And when you made this inspection,  
4 sir, what, if anything, did you see?

5 MR. KATZ: Objection.

6 CHAIRPERSON GRIFFIS: What's the  
7 objection?

8 MR. KATZ: Well, unless I was  
9 getting the wrong signal, I thought that I was  
10 being limited on what I could ask about today.  
11 I thought we were dealing with 2002.

12 CHAIRPERSON GRIFFIS: I don't  
13 disagree.

14 MR. KATZ: This question has  
15 nothing to do with that.

16 VICE CHAIR MILLER: Wait, okay.  
17 I'm the one that brought this up and I thought  
18 that your answer was things are the same now  
19 as they were then. So, therefore, what Mr.  
20 Crews might have seen now would be relevant.

21 CHAIRPERSON GRIFFIS: If it's  
22 going to that case of establishing whether it

1 is different than it was back at the time of  
2 the ALJ or before. Is that the intent of the  
3 question?

4 MR. GREEN: The intent, of course.

5 VICE CHAIR MILLER: Yes, I think  
6 we don't know what your next question is. I  
7 mean, what's the point of what he sees?

8 MR. GREEN: Well, for one thing,  
9 there has been some question as to whether or  
10 not the situation that exists there is the  
11 same. Mr. Crews has gone and I'll proffer  
12 this. Mr. Crews has gone to this place and he  
13 has seen what is basically described, since we  
14 say it's the same, in Judge Simon and Judge  
15 McCoy's orders.

16 And he is going to testify that he  
17 sees exactly what was seen in '02. He saw the  
18 same thing in '06, that there are booths, that  
19 there is a place in which sex toys are sold.  
20 He is going to say all of these things.

21 CHAIRPERSON GRIFFIS: But can we  
22 ask it a different way then? Could we ask

1 that -- Mr. Crews, on his visual or whatever  
2 it is, was it correct in what has been  
3 submitted in terms of the plan layout and the  
4 photographs? I mean, is that what your  
5 question is going to?

6 MR. GREEN: My question is going  
7 to the plans that with regard to photographs  
8 I have some of my own which I guess you could  
9 say further enhance the photographs that you  
10 have before you right now.

11 CHAIRPERSON GRIFFIS: Okay. Well,  
12 without getting too detailed, let's take the  
13 photographs in a block, if there is no  
14 difficulty in establishing Mr. Crews'  
15 understanding that nothing has changed in the  
16 plan or that's represented in those plans and  
17 these photographs.

18 MR. KATZ: I have an additional  
19 objection to Mr. Crews going to this, since he  
20 already testified that he has had nothing to  
21 do with the zoning in D.C. since over 17  
22 months ago. There is just no proper

1 foundation for this last question of Mr. Crews  
2 about what is going on in the store in 2007.

3 CHAIRPERSON GRIFFIS: Okay.  
4 That's your objection for his question on  
5 that.

6 MR. KATZ: That's my initial --

7 CHAIRPERSON GRIFFIS: Yes.  
8 Actually, I well overruled that objection and  
9 based on the fact that he is the Zoning  
10 Administrator. He is now the official body  
11 and agency head in that capacity. So whether  
12 it be Mr. Johnson, Mr. Bello or Mr. Crews,  
13 it's all one in the same. So not to allow the  
14 question based on the fact that he wasn't  
15 there is not --

16 BOARD MEMBER ETHERLY: I would  
17 say, Mr. Chair, I mean, I think there are some  
18 probative value here, but I would perhaps  
19 agree with, I think, the direction Mrs.  
20 Miller's question perhaps was going in in  
21 terms of establishing when Mr. Crews observed  
22 the space in question. Mr. Crews' visit would

1 have taken place in what time frame or what  
2 period of time?

3 Because my concern would be, and  
4 believe you me, I'm very interested in hearing  
5 precisely about the space that we are talking  
6 about, but I want to be sure that what we hear  
7 from a timing standpoint is still close enough  
8 or reflective of the time in question, i.e.,  
9 that 2002 period.

10 I believe Mrs. Miller's question  
11 was correct in that the whole stipulation  
12 discussion probably resolved that issue, but  
13 I just want to be sure I'm clear that what Mr.  
14 Crews saw is an accurate reflection of what  
15 was in place at the time of 2002 or somewhere  
16 thereabouts.

17 MR. GREEN: Maybe I'm  
18 misunderstanding here, but what was viewed or  
19 stated in the record as the condition in 2002?  
20 I was under the impression that in '06 the  
21 situation was --

22 BOARD MEMBER ETHERLY: Was still

1 the same.

2 MR. GREEN: -- still the same.

3 BOARD MEMBER ETHERLY: And '06 was  
4 the period in which Mr. Crews observed the  
5 space.

6 MR. GREEN: That's right.

7 BOARD MEMBER ETHERLY: Okay.

8 MR. GREEN: Mr. Crews made his  
9 observations in '06.

10 BOARD MEMBER ETHERLY: Okay.  
11 Okay. With that understanding, Mr. Chair, I  
12 would agree with, not that it's required of  
13 course, but I would agree with your response  
14 to the objection that was stated by the  
15 appellant here. I think the testimony would  
16 be appropriate.

17 CHAIRPERSON GRIFFIS: Okay.

18 BOARD MEMBER ETHERLY: Again, but  
19 my ruling is not required.

20 CHAIRPERSON GRIFFIS: Move ahead.

21 MR. GREEN: Thank you.

22 CHAIRPERSON GRIFFIS: We have

1 established Mr. Crews that you looked at these  
2 photographs and the plans and then on your  
3 2006 visit you would concur that this is  
4 substantially the same. Is that right?

5 THE WITNESS: Yes.

6 CHAIRPERSON GRIFFIS: Okay.

7 THE WITNESS: Although the  
8 pictures look a lot cleaner.

9 CHAIRPERSON GRIFFIS: Okay.

10 BOARD MEMBER ETHERLY: But if I  
11 may, Mr. Chair, let me just be direct here,  
12 because I think we can save a lot of time  
13 here. And what I'm -- the payoff here and I'm  
14 not -- I definitely don't want to railroad Mr.  
15 Green's presentation or that of DCRA here, but  
16 I think the payoff here is really getting to  
17 when you look at an establishment of this  
18 nature, how do you go about assessing or  
19 determining whether or not it is a sexually-  
20 oriented business enterprise.

21 The beginning of your  
22 presentation, I think, grounded us in the

1 appropriate place. Here is the definition and  
2 the definition has some very clear language,  
3 if you will. So perhaps as you walk through  
4 this, maybe this is a way that I'm trying to  
5 suggest we proceed.

6 As you walk through this, really  
7 help, at least, me understand what are you  
8 looking for? What determines whether or not  
9 something crosses the threshold? We have  
10 heard a little bit that there is martial arts  
11 videos. There is Spanish language videos. At  
12 what point does a video store stop being just  
13 a video store and becomes a sexually-oriented  
14 business enterprise? That's what I'm trying  
15 to kind of really get my hands around here.

16 MR. GREEN: Yes, that's fine.

17 BOARD MEMBER ETHERLY: And talk  
18 about what Mr. Crews saw.

19 MR. GREEN: Mr. Etherly, may I  
20 also make a suggestion and it's simply this,  
21 that since we have several other individuals  
22 that made determinations that Mr. Crews state

1 as the new 2006/2007 Zoning Administrator if  
2 in his professional opinion the previous  
3 zoning and other determinations were proper or  
4 improper. Would that help?

5 BOARD MEMBER ETHERLY: Yes, sir.

6 MR. GREEN: All right.

7 MR. KATZ: I object.

8 MR. GREEN: Okay.

9 CHAIRPERSON GRIFFIS: What's the  
10 objection?

11 MR. KATZ: Well, the gravamen of  
12 my argument here is that not only is the  
13 definition of a sexually-oriented business  
14 enterprise unconstitutional because it was  
15 without secondary effect studies, but that any  
16 interpretation of Zoning Administrators of  
17 that definition is already in the DCMR is  
18 without force and effect. And therefore,  
19 irrelevant here except to the extent that it  
20 creates any safe harbor for businesses to know  
21 that they can't pass a certain threshold  
22 before being enforced against by the

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1 Government.

2 BOARD MEMBER ETHERLY: And I would  
3 -- again, my response as a Member is not meant  
4 to -- pardon me, Mr. Chair, I understand the  
5 objection, but I simply think we have heard  
6 your argument and now we're hearing the other  
7 side of the boat. That's all. That's how I  
8 see it.

9 Obviously, the issue for this  
10 Board is going to be determining how those two  
11 arguments balance out and how we resolve those  
12 issues. But I don't see Mr. Crews' testimony  
13 in any way being prejudicial or far afield  
14 from what is a very essential inquiry here.

15 CHAIRPERSON GRIFFIS: Right.  
16 Understood.

17 MR. GREEN: Mr. Chairman, if I  
18 might make one additional comment. I think  
19 this particular body, in a case I believe it  
20 is Kuri Brothers or something of that sort,  
21 made the point that there is a great deal of  
22 latitude in a Zoning Administrator's

1 discretion.

2 CHAIRPERSON GRIFFIS: Right.

3 MR. GREEN: And I think that if we  
4 took that into consideration, we would  
5 certainly understand that is proper for Mr.  
6 Crews to comment.

7 CHAIRPERSON GRIFFIS: Okay. It's  
8 somewhat two different arguments that are  
9 being posed in that situation, but I  
10 absolutely agree with Mr. Etherly the fact of  
11 not allowing the questioning or a direction of  
12 a witness on the opposite side of a case,  
13 based on the fact of an assertion of legal  
14 analysis or legal case finding, it wouldn't be  
15 appropriate.

16 So let's move ahead, Mr. Crews,  
17 and you can go in that direction if you would.

18 ZONING ADMIN. CREWS: Thank you,  
19 Mr. Chairman. Just in summary, to begin with,  
20 the purpose that I felt that I was here today  
21 for was to defend the revocation of a  
22 Certificate of Occupancy for Fun Fair Video at

1 919 5<sup>th</sup> Street, N.W., for operating outside  
2 the scope of the Certificate of Occupancy.

3 The Certificate of Occupancy was  
4 for a video membership store which would be  
5 similar to --

6 MR. KATZ: That is not responsive  
7 to the question of what basis is --

8 CHAIRPERSON GRIFFIS: That's their  
9 case presentation though. He has put a  
10 witness on to speak.

11 MR. KATZ: But the answer is not  
12 responsive to the question about what does he  
13 rely upon for defining a sexually-oriented  
14 business enterprise.

15 CHAIRPERSON GRIFFIS: I know, but  
16 I'm not going to interrupt --

17 MR. KATZ: I thought that's what  
18 the question was.

19 CHAIRPERSON GRIFFIS: -- his case  
20 presentation as he's going. He'll get there  
21 and if not, we'll elicit it from questions.  
22 Let's move ahead.

1                   ZONING ADMIN. CREWS:    Okay.    So  
2                   again, the C of O was issued for a video  
3                   membership --

4                   MR. KATZ:    Objection.

5                   ZONING ADMIN. CREWS:    -- store  
6                   which would be --

7                   MR. KATZ:    The witness is reading  
8                   the -- the witness is reading from a document.  
9                   Even at this stage, I don't think that the  
10                  witness is permitted to reading from a  
11                  document.

12                  ZONING ADMIN. CREWS:    Okay.

13                  MR. KATZ:    Without that being put  
14                  into evidence.

15                  CHAIRPERSON GRIFFIS:   Why wouldn't  
16                  he be permitted.

17                  MR. KATZ:    Without permission for  
18                  that and without me even knowing what's in the  
19                  document.

20                  MR. GREEN:   Mr. Chairman?

21                  CHAIRPERSON GRIFFIS:   But he is  
22                  putting on evidence today.  There is nothing

1 that would prohibit him from reading his notes  
2 or anything else for that matter.

3 MR. KATZ: Yes, my argument is  
4 that even with relaxed rules of evidence, it  
5 is totally against due process for this  
6 witness to be reading from a document,  
7 especially if I'm not permitted to see that  
8 document in advance.

9 MR. GREEN: Mr. Chair?

10 CHAIRPERSON GRIFFIS: In advance?  
11 I disagree. He is presenting his testimony  
12 now. He is availing himself for cross  
13 examination. I have never ever been faced  
14 with the fact that a witness would not be able  
15 to come prepared with their own notes or  
16 anything else for that matter. We can make a  
17 copy for you right now, if you would like, but  
18 I think for expedition, we can move on. I  
19 don't want to know what it is.

20 MR. GREEN: Mr. Crews own personal  
21 notes.

22 CHAIRPERSON GRIFFIS: I don't want

1 to know what it is, Mr. Green.

2 MR. GREEN: All right.

3 CHAIRPERSON GRIFFIS: That's not  
4 the point. Let's move ahead.

5 ZONING ADMIN. CREWS: Okay.

6 Again, there was a C of O issued for a video  
7 membership store which even though it did not  
8 have on the face of the Certificate of  
9 Occupancy, but would be similar to a bookstore  
10 allowed in that District under section  
11 701.4(f), but it was operating as a sexually-  
12 oriented business establishment under the  
13 previous Zoning Administrator Gladys Hicks'  
14 interpretation that has been offered into the  
15 record here and has been cited by the  
16 appellant and it has been uncontested by the  
17 appellant that there are booths with video  
18 arcades that show, I believe their term is,  
19 erotic, but I believe they would fit the  
20 definition of a sexually-oriented business in  
21 that they show specific anatomical areas  
22 included in the definition and specific sexual

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1 activities as listed in the definition.

2 MR. KATZ: I apologize for  
3 interrupting. I also object as there being  
4 insufficient foundation for this testimony.  
5 There are apparent levels of hearsay without  
6 sufficient foundation for why that should be  
7 admitted here, even with relaxed rules of  
8 hearsay. We have a witness here who  
9 apparently --

10 CHAIRPERSON GRIFFIS: I don't  
11 understand. What's the hearsay? He's looking  
12 at the definition and he is basing it on  
13 actually the evidence that you presented in  
14 the record. What's the hearsay?

15 MR. KATZ: That is not clear  
16 whatsoever. This witness seems -- appears to  
17 be relying on information beyond what has been  
18 presented at the hearing today. He seems to  
19 be relying perhaps on orders from Judge McCoy  
20 and Judge Simon, which gives us circular  
21 reasoning then.

22 CHAIRPERSON GRIFFIS: All right.

1 MR. KATZ: We are here today --

2 CHAIRPERSON GRIFFIS: I wasn't  
3 caught with that appearance. I'm not sure  
4 what you are pointing to.

5 MR. KATZ: Well, since Mr. Green  
6 has not provided a foundation through his  
7 questions for this witness to testify here, we  
8 don't know if there is a sufficient foundation  
9 for this witness to be testifying about this.

10 CHAIRPERSON GRIFFIS: But just  
11 what you presented today, I understood what  
12 Mr. Crews was talking about.

13 MR. KATZ: If that's what is  
14 established is what his testimony is limited  
15 to, that's one thing. But that's not what I'm  
16 hearing from his testimony.

17 VICE CHAIR MILLER: I understood  
18 that Mr. Crews visited the store and I am  
19 understanding his testimony to reflect what he  
20 saw and that your testimony or your client's  
21 testimony was that things are the same now as  
22 they were then. So as far as I can see, there

1 is foundation. And it's totally relevant. He  
2 is addressing the definition of a sexually-  
3 oriented business and how the store fits into  
4 that definition.

5 CHAIRPERSON GRIFFIS: I agree.  
6 Let's continue.

7 MR. KATZ: I have a continuing  
8 objection.

9 CHAIRPERSON GRIFFIS: Go ahead.

10 ZONING ADMIN. CREWS: Okay. Thank  
11 you.

12 CHAIRPERSON GRIFFIS: Oh, I'm  
13 sorry. Good.

14 ZONING ADMIN. CREWS: So right.  
15 Both -- all of that is true. I was there.  
16 You know, I paid my money. I saw the videos  
17 and they are just as the appellant has  
18 described them. In terms of erotic, they are  
19 also -- in terms of the definition, they show  
20 acts of human masturbation, sexual  
21 intercourse, sexual stimulation and arousal.

22 They show fondling of other erotic

1 touching of human genitalia and so forth,  
2 which under the definition, under the Zoning  
3 Regulations established this as a sexually-  
4 oriented business. Under Gladys Hicks'  
5 interpretation of this that has been entered  
6 into the record, that videos showing this type  
7 of films are a sexually-oriented business.  
8 The C of O was not for a sexually-oriented  
9 business and the definition makes it clear  
10 that if establishment is a sexually-oriented  
11 business, it shall not be deemed to constitute  
12 any other use permitted under the authority of  
13 the act.

14 And it would be my interpretation  
15 and I have asked the Board to support that  
16 that the opposite would be true. That if it  
17 was not a sexually-oriented business, it  
18 should not be doing activities that get under  
19 the definition of sexually-oriented business.

20 BOARD MEMBER ETHERLY: So if I  
21 could, Mr. Crews, my apologies for the  
22 interruption.

1                   ZONING ADMIN. CREWS:    Sure.

2                   BOARD MEMBER ETHERLY:    But we're  
3 moving at a nice clip now.  Help me understand  
4 then is it your testimony that the Hicks'  
5 opinion that we have discussed, is that relied  
6 upon in some fashion to help further  
7 illuminate the definition that is provided in  
8 Title 11?

9                   ZONING ADMIN. CREWS:    Right.  I  
10 think it goes against the accusation that it  
11 is unbridled discretion that, in effect, the  
12 previous Zoning Administrator tried to pin  
13 this down and put some more --

14                  BOARD MEMBER ETHERLY:        Some  
15 specificity?

16                  ZONING ADMIN. CREWS:        --  
17 specificity, exactly, into this definition.  
18 But it's also clear to me that this is a  
19 substantial and significant portion of the  
20 stock and trade, because as I looked in the  
21 general video/DVD area of the store that has  
22 been described on the floor plan that those

1 videos looked like they had been there an  
2 awful long time, which leads me to believe  
3 that they don't do much business in actually  
4 selling or renting videos of a general  
5 audience category, but that they make their  
6 money on the video arcade.

7           So it does appear based on the  
8 fact that they are saying they are operating  
9 it now as it was when the determination was  
10 made that they were operating outside of the  
11 scope and the certificate was revoked, but  
12 it's very similar and that it is a substantial  
13 and significant portion of its stock and  
14 trade.

15           And I believe actually the  
16 appellant has even testified today that he  
17 would like to do more of this.

18           BOARD MEMBER ETHERLY: Can you  
19 offer, perhaps that's not the proper way to  
20 phrase it, are you aware of any analyses or  
21 assessments of the appellant's inventory that  
22 have attempted to put a quantity or a number

1 to the inventory that is skewed or that is  
2 deemed to be erotic or sexual in nature? Did  
3 you conduct any type of assessment or study in  
4 that regard?

5 ZONING ADMIN. CREWS: I did not  
6 conduct that type of analysis. I know that  
7 there was talk about percentages, but I also  
8 know that the interpretation is besides that  
9 that if you have arcade, a video arcade  
10 showing erotic specific sexual activities,  
11 that under the previous Zoning Administrator's  
12 interpretation, that that is a sexually-  
13 oriented business establishment.

14 And so you don't need to reach the  
15 percentage of videos, erotic or not erotic,  
16 you only need to know that there are video  
17 arcades present.

18 CHAIRPERSON GRIFFIS: Where is  
19 that from?

20 ZONING ADMIN. CREWS: From Gladys  
21 Hicks.

22 CHAIRPERSON GRIFFIS: Okay.

1 You're talking about Hicks' interpretation.

2 ZONING ADMIN. CREWS: Yes.

3 CHAIRPERSON GRIFFIS: Okay.

4 BOARD MEMBER ETHERLY: It's noted  
5 at page 8 of the Hicks' opinion, referring to  
6 it. So would it be your understanding, Mr.  
7 Crews, that if there is more than one booth,  
8 because as I look at the Hicks' memorandum, it  
9 reads "The presence or operation of booths or  
10 other apparatus through which sexually-  
11 oriented video tapes may be viewed," so would  
12 it be your interpretation that,  
13 hypothetically, as the Chair said I like  
14 hypotheticals, it's just the lawyer part of  
15 me, if the appellant had simply one booth that  
16 showed a video of a sexual nature, but  
17 everything else was BlockBuster video, would  
18 that put it into the ambit of being a  
19 sexually-oriented business?

20 ZONING ADMIN. CREWS: Well, that  
21 may be taking it a little bit to a finer point  
22 than need be, only because section 199.2 of

1 the regs talk about words in the singular  
2 number shall include the plural and words in  
3 the plural number shall include the singular.

4 BOARD MEMBER ETHERLY: I see.

5 ZONING ADMIN. CREWS: So now they  
6 have testified that they have 10 booths, so  
7 it's somewhat of a moot point.

8 BOARD MEMBER ETHERLY: It's a  
9 hypothetical.

10 ZONING ADMIN. CREWS: Yes.

11 BOARD MEMBER ETHERLY: They have  
12 more than one booth.

13 ZONING ADMIN. CREWS: Right.

14 BOARD MEMBER ETHERLY: Okay.

15 ZONING ADMIN. CREWS: And one  
16 booth, you know, is not what we are looking at  
17 today.

18 BOARD MEMBER ETHERLY: Is it --

19 CHAIRPERSON GRIFFIS: But --

20 BOARD MEMBER ETHERLY: -- your --

21 I'm sorry.

22 CHAIRPERSON GRIFFIS: Can I

1 interject on that?

2 BOARD MEMBER ETHERLY: Sure.

3 CHAIRPERSON GRIFFIS: Because  
4 before we go too far into the Hicks, I'm a  
5 little unclear, because it seems, my  
6 recollection in reviewing the record and Mr.  
7 Johnson's testimony, I believe it was, said  
8 that it was a reference of which he used this  
9 Hicks' paper, but it was never posed to me as  
10 a definitive --

11 BOARD MEMBER ETHERLY: Guideline.

12 CHAIRPERSON GRIFFIS: Right. It's  
13 not a regulation, but a definitive or  
14 determinative factor in his revoking the C of  
15 O. So I guess my question to you is are you  
16 relying solely on the interpretation of the  
17 regulations with the defining elements of the  
18 Hicks' interpretation?

19 ZONING ADMIN. CREWS: Well, I  
20 think it has an awful big weight on the -- on  
21 my determination. Again, I'm here defending  
22 a previous action.

1 CHAIRPERSON GRIFFIS: Right.

2 ZONING ADMIN. CREWS: But it would  
3 certainly seem to me from, you know, without  
4 making any admissions, but with just kind of  
5 a general -- you know, sometimes people know  
6 about things. Sometimes people don't know.  
7 I personally don't know about Jiffy Lube or  
8 Midas Mufflers in the District of Columbia,  
9 but I am familiar with video arcades, not  
10 necessarily in the District of Columbia, but  
11 in other places throughout the country, and  
12 understand that from my visit at this location  
13 at Fun Fair Video, when I saw the general  
14 video merchandise looking like it had been  
15 there an awful long time, faded from the  
16 lighting, the marketing boxes faded and dusty,  
17 that it seemed to me that this was a typical  
18 XXX arcade where the vast majority, the  
19 substantial and significant portion of the  
20 business is on folks coming in and watching  
21 videos in these booths.

22 And I'm not making a moral

1 judgment on that at all. I'm just saying  
2 that, you know, it takes a little common sense  
3 and knowledge of the world, I think, to do an  
4 accurate interpretation of what we do and  
5 that's my interpretation that the previous  
6 administrator was correct in revoking this  
7 permit, because it was operating outside the  
8 scope of a video membership store, like  
9 BlockBusters, which I'm also very familiar  
10 with. And that, therefore, the revocation was  
11 proper and I would ask that the Board uphold  
12 that.

13 BOARD MEMBER ETHERLY: But you  
14 understand the struggle, if you will, in part  
15 raised by some of the arguments on behalf of  
16 the appellant.

17 ZONING ADMIN. CREWS: Um-hum.

18 BOARD MEMBER ETHERLY: The  
19 struggle here is trying to parse out the  
20 elements that go into that analysis, that  
21 calculus that gets you from this is not a  
22 sexually-oriented business establishment to it

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1 is a sexually-oriented business establishment.

2 And my question and I think the  
3 question that the Chair just offered was  
4 trying to really ferret out what role does the  
5 Hicks' memorandum or policy, if you will, how  
6 extensive a role does that play? Now, perhaps  
7 as we move forward, we may perhaps get  
8 testimony from others, maybe some of your  
9 inspectors or other persons who are familiar  
10 with being out in the trade looking at these  
11 types of establishments, but that's what I'm  
12 still struggling with a little bit.

13 ZONING ADMIN. CREWS: Um-hum.

14 BOARD MEMBER ETHERLY: So to an  
15 extent, I'm playing devil's advocate now and  
16 I'm saying well, Mr. Crews, I understand that  
17 based on your observation, hypothetically  
18 speaking, the Little Mermaid looks a little  
19 worn and tattered and no one rented it in  
20 about three or four decades, but you don't  
21 know that for sure. It's just based on the  
22 way it looks.

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1           That's fine. I can put that  
2           aside. The bigger question is again and I  
3           think I understand your testimony, based on  
4           your familiarity with zoning law here in the  
5           District and practice, custom to an extent, it  
6           would be your testimony that past  
7           administrators or, you know, typically the  
8           policy does look, to some extent, to the  
9           Hicks' memorandum as guidance for interpreting  
10          the definition that is provided in the Zoning  
11          Regs of sexually-oriented business  
12          enterprises.

13                 The Hicks' memorandum might not  
14          necessarily be treated as the gospel concrete  
15          truth, but it is used as a guidepost. Would  
16          that be a fair and accurate statement?

17                         ZONING ADMIN. CREWS: I think from  
18          my understanding of it that it is a reasonable  
19          interpretation of the Zoning Regs, especially  
20          when it comes to the comment about the  
21          presence of video arcades.

22                         BOARD MEMBER ETHERLY: Okay.

1                   ZONING ADMIN. CREWS:    That that  
2                   does seem reasonable.  And then, based again  
3                   on my own inspection, that I think it's  
4                   reasonable to declare that this is a sexually-  
5                   oriented business establishment.

6                   BOARD MEMBER ETHERLY:    Is the  
7                   memorandum or its contents in any way utilized  
8                   in training or presentations with your  
9                   inspectors or other personnel who may from  
10                  time to time visit establishments of this type  
11                  to sort out the type of operation that is  
12                  going on?

13                 ZONING ADMIN. CREWS:    I don't  
14                 know.  We haven't specifically used it yet, we  
15                 are still awaiting to get to this type of use.

16                 MR. KATZ:    I have an objection.

17                 CHAIRPERSON GRIFFIS:   We have got  
18                 an objection.  Hold on a second.  What is it?

19                 MR. KATZ:    It appears to me that  
20                 before answering the last question that Mr.  
21                 Crews consulted with Mr. Green.  Now, the  
22                 audio record doesn't pick that up.  Now,

1 unless Mr. Crews or Mr. Green is contesting  
2 that, that is completely improper. There is  
3 nothing that should allow that at a fair  
4 hearing. That makes it as if there is no  
5 clear testimony from Mr. Crews. It is being  
6 coached by Mr. Green under those  
7 circumstances. I move for an appropriate  
8 relief on that.

9 CHAIRPERSON GRIFFIS: Well, I  
10 don't know what would preclude Mr. Green, his  
11 attorney, from giving him guidance in a  
12 question from the Board.

13 MR. KATZ: Well, I know it's not a  
14 court of law, but we have -- we do have  
15 instruction from the court of law about, you  
16 know, ways to look at a fair hearing or fair  
17 trial. This is a trial. In a court of law,  
18 the witness is not even sitting next to his  
19 lawyer and if a lawyer tried to coach a  
20 witness there, there would be a severe  
21 sanction.

22 Now, we're not in a court of law,

1 but by the same token, this is a violation of  
2 my client's due process rights, at minimum,  
3 for that to happen, that I have to be zeroing  
4 in and looking at this witness to see if he is  
5 consulting with Mr. Green, because otherwise  
6 the record is not showing.

7 Unless this video is preserved,  
8 which I don't think it is, the record is not  
9 showing the extent to which this testimony is  
10 coming from Mr. Crews or whether it is coming  
11 from Mr. Crews consulting with Mr. Green.  
12 Because if we lose here, which I don't want  
13 to, I need to preserve this record for the  
14 Court of Appeals to know this.

15 CHAIRPERSON GRIFFIS: Interesting.

16 VICE CHAIR MILLER: I was just  
17 going to say that we don't adhere to the  
18 strict evidentiary and civil procedures, but  
19 we do step in when we think there has been  
20 something egregious that has occurred. And it  
21 didn't look that way to us. But I would also  
22 say that, I mean, I was under the impression

1 that you were giving your witness leading  
2 questions and we didn't stop that, because  
3 we're not subject to the same strict  
4 procedures and it didn't seem to be causing  
5 any prejudice in the case.

6 So that's all I have to say on  
7 that.

8 CHAIRPERSON GRIFFIS: Excellent.  
9 Let's go on forward. Just to keep appearances  
10 clear, Mr. Green, if you have redirection, we  
11 can have that on the record, if you would.  
12 Mr. Crews, you were in the middle of  
13 answering, I believe, some questions from Mr.  
14 Etherly.

15 BOARD MEMBER ETHERLY: Mr. Chair,  
16 that concludes my questions. Again, I  
17 apologize for the interruption, because it was  
18 during the proceeding of the appellee's case,  
19 but I just felt that there were some real  
20 critical questions that I just wanted us to  
21 really kind of get to and ferret out early in  
22 the process.

1 CHAIRPERSON GRIFFIS: Okay.

2 BOARD MEMBER ETHERLY: So thank  
3 you, Mr. Chair.

4 CHAIRPERSON GRIFFIS: Good.  
5 Anything else, Mr. Crews?

6 ZONING ADMIN. CREWS: No.

7 MR. GREEN: I have no redirect,  
8 Mr. Chairman.

9 CHAIRPERSON GRIFFIS: Okay. Why  
10 don't we take cross on Mr. Crews, at this  
11 point?

12 MR. KATZ: I have no cross.

13 CHAIRPERSON GRIFFIS: Okay. Does  
14 the ANC have any cross? Very well.

15 VICE CHAIR MILLER: I have a  
16 question.

17 CHAIRPERSON GRIFFIS: You have a  
18 question?

19 VICE CHAIR MILLER: I just want to  
20 address the Hicks' memo, how that is used or  
21 how we should look at it. I'm under the  
22 impression that part of your testimony is that

1 it was a reasonable way of evaluating in the  
2 context of the definition whether there was a  
3 substantial or significant portion and whether  
4 it fit within the definition, okay, in  
5 general.

6           Were you to look at the same  
7 establishment today, I understand you are not  
8 necessarily bound by the Hicks' memo, how  
9 would you use it in general as a guide or also  
10 just how would you look at substantial or  
11 significant as it is used in the definition?

12           ZONING ADMIN. CREWS: Well, again,  
13 in this particular case where you have video  
14 arcades and you have the rest of the store, as  
15 I viewed it, it seems to me to be very  
16 reasonable to say that the video arcades were  
17 the substantial and significant portion of the  
18 business. And therefore, you know, I think  
19 that the previous ZA was reasonable in her  
20 guidance or her interpretation in using that.

21           Now, you know, the other part that  
22 I don't think is in play here, because we --

1 it's an either or or an and, it's not an and,  
2 but, you know, this 15 percent thing, you  
3 know, no one has ever said anything about if  
4 you talk about 15 percent of inventory, but  
5 what about 15 percent of sales?

6           You know, I mean, is Bambi  
7 getting, you know, 80 percent of the sales or  
8 is Bambi's Mom Does Dallas getting the  
9 significant portion of the sales? So I would  
10 have to look at that part. But again, the  
11 presence of this amount of video arcade  
12 showing erotic movies that fit the definition  
13 of sexually-oriented business establishment,  
14 to me, makes it clear and I would hope that it  
15 would be reasonable to the Board that this was  
16 a sexually-oriented business and is a  
17 sexually-oriented business and it did not have  
18 a Certificate of Occupancy for that and that  
19 we were correct to revoke the Certificate of  
20 Occupancy, because they were operating outside  
21 the scope.

22           VICE CHAIR MILLER: So when you

1 say this amount of video arcade, what do you  
2 mean this amount? How do you quantify that?

3 ZONING ADMIN. CREWS: Well, I  
4 think they were talking 8 to 6 or 10.

5 VICE CHAIR MILLER: Booths?

6 ZONING ADMIN. CREWS: Booths.  
7 Yes, the number of booths.

8 VICE CHAIR MILLER: The number,  
9 okay. Thank you.

10 CHAIRPERSON GRIFFIS: Okay.

11 VICE CHAIR MILLER: So you would  
12 think it significant whether it be 6 or 10?

13 ZONING ADMIN. CREWS: Right. In  
14 this particular store, it would, yes, 6 or 10  
15 would not -- they would still be significant.

16 VICE CHAIR MILLER: Either way.  
17 Okay.

18 CHAIRPERSON GRIFFIS: Good. Let's  
19 move ahead.

20 MR. GREEN: I call as my next  
21 witness, Mr. Stokes.

22 DIRECT EXAMINATION

1 BY MR. GREEN:

2 Q For the record, sir, will you  
3 state your full name, please?

4 A My full name is Clement Stokes,  
5 III.

6 Q And by whom are you employed?

7 A By the District of Columbia  
8 Department of Consumer and Regulatory Affairs,  
9 Office of Investigations.

10 Q In what capacity, sir?

11 A I'm an investigator.

12 Q Are you familiar with JMM  
13 Corporation t/a Fun Fair Video?

14 A That is correct.

15 Q Can you tell us how you are  
16 familiar with them, please?

17 A I'm familiar with that business  
18 because my office has been conducting random  
19 spot checks in official investigative capacity  
20 and in an undercover way, covert capacity for  
21 many years.

22 MR. KATZ: Objection.

1                   CHAIRPERSON GRIFFIS:   What's the  
2                   objection.

3                   MR. KATZ:        I know hearsay is  
4                   allowed.     I mean, if you don't have a  
5                   sufficient foundation for it, for how this man  
6                   knows about it, it's irrelevant and more  
7                   prejudicial than probative.

8                   CHAIRPERSON GRIFFIS:    I don't  
9                   understand. He works there, doesn't he? He's  
10                  an investigator.

11                  MR. KATZ:        We haven't heard  
12                  testimony how long he has been there and to  
13                  what extent and why it is he knows this  
14                  information, whether it is secondhand,  
15                  thirdhand, fifthhand, firsthand or sixthhand.  
16                  And without knowing that, it's more  
17                  prejudicial than probative to allow this  
18                  answer.

19                  CHAIRPERSON GRIFFIS:    I see your  
20                  point. Mr. Green, do you want to establish  
21                  Mr. Stokes' knowledge of this ongoing  
22                  investigation?

1 BY MR. GREEN:

2 Q Mr. Stokes, you have indicated  
3 that this thing has been -- that the Agency  
4 has had an ongoing investigation as it relates  
5 to this enterprise at 919 5<sup>th</sup> Street, N.W.,  
6 over a period of years. Is that right?

7 A That is correct.

8 Q And are you or were you involved  
9 in any of these investigations?

10 A That is correct.

11 Q And can you tell us when you were  
12 involved in these investigations?

13 A Back in 2001, 2002 and my latest  
14 visit was December 6, 2006, at the request of  
15 the Metropolitan Police Department.

16 MR. KATZ: Objection.

17 CHAIRPERSON GRIFFIS: What's the  
18 objection?

19 MR. KATZ: At whose request? It  
20 has -- we're going far afield and it's more  
21 prejudicial than probative. There have to be  
22 limits to fairness as hearsay comes in.

1 That's unfair hearsay about who requested any  
2 visit.

3 MR. GREEN: The only --

4 CHAIRPERSON GRIFFIS: Well, how  
5 could hearsay --

6 MR. GREEN: Please.

7 CHAIRPERSON GRIFFIS: We're  
8 talking about who was requesting him to be  
9 there.

10 MR. KATZ: It's hearsay. That's  
11 is hearsay for the police to request it. The  
12 definition of hearsay is an extrajudicial  
13 statement offered in evidence to prove the  
14 truth of the matter that they are in. The  
15 only purpose of having testimony about what  
16 the police asked or didn't ask is a suggestion  
17 the police are saying something happened. And  
18 so therefore it is hearsay. It is more  
19 prejudicial than probative.

20 MR. GREEN: But, Mr. Chairman, he  
21 asked for the foundation be laid. He asked us  
22 to put Mr. Stokes in the picture. He asked us

1 to do these things. Mr. Stokes has put  
2 himself certainly in the picture. Mr. Stokes  
3 has described how he came in contact with this  
4 enterprise. We think this is certainly a  
5 proper series of questions and certainly his  
6 response is a proper response to a series of  
7 questions that were generated by an objection  
8 on the part of the respondent to lay the  
9 foundation and we certainly have laid that  
10 foundation.

11 CHAIRPERSON GRIFFIS: Okay. Let's  
12 move back into your substance and another  
13 question or a direction that the witness is  
14 going.

15 BY MR. GREEN:

16 Q Mr. Stokes, you indicated that you  
17 went to this establishment in December of  
18 2006. Is that not right, sir?

19 A That is correct.

20 Q And when you went there, can you  
21 tell us what you saw?

22 MR. KATZ: Objection.

1                   CHAIRPERSON GRIFFIS:   What's the  
2                   objection?

3                   MR. KATZ:   Well, this appeal deals  
4                   with issues that were going on in 2002.  I did  
5                   think that I was being -- that it was stressed  
6                   to me to limit what I was talking about with  
7                   evidence in terms of beyond 2002.  It appears  
8                   this is a hearing, this is testimony not only  
9                   about what is happening later on, but still we  
10                  still don't have a sufficient foundation about  
11                  what the relevance of this witness is to  
12                  anything that happened in 2002.

13                  CHAIRPERSON GRIFFIS:   Well, he is  
14                  going to have to answer and talk a little bit  
15                  before we figure out how it connects up to  
16                  2002.  And let me just step back a little bit,  
17                  because I'm having a difficult time finding  
18                  answer in a lot of the objections in terms of  
19                  the relevancy of a DCRA employee, an inspector  
20                  that was part of any of the actions that took  
21                  place that have led us to today.

22                  So I think it is important for my

1 own understanding to hear what the evidence is  
2 or what his testimony is. So I think we  
3 should allow a little bit more latitude, a  
4 little bit more time to get to the basis of  
5 some of these questions. If at the end we  
6 find that it wasn't relevant or  
7 jurisdictional, we can hear those questions  
8 and we can deliberate and decide based on  
9 that.

10 But until then, I would rather  
11 hear some substance and move ahead.

12 BY MR. GREEN:

13 Q Mr. Stokes, you indicated that you  
14 had been involved in investigating this  
15 enterprise since 2001 and continuing. Is that  
16 not right, sir?

17 A Yes, on several occasions, that's  
18 correct.

19 Q And you said that the last time  
20 you conducted an investigation was 2006.

21 A That is correct.

22 Q In December?

1           A       That's correct.

2           Q       Can you tell me then what was the  
3 result of this investigation? Why did you go  
4 there?

5           A       Okay. I was called while I was in  
6 the field. And the office manager called and  
7 requested my assistance through the  
8 Metropolitan Police Department's request about  
9 the execution of a search warrant.

10           MR. KATZ: Objection.

11           MR. GREEN: All right.

12           MR. KATZ: All right. If we're  
13 talking about a search warrant --

14           CHAIRPERSON GRIFFIS: Right.

15           MR. KATZ: I have to object to  
16 this.

17           CHAIRPERSON GRIFFIS: I totally  
18 agree. I'm not sure why we need to know about  
19 specific circumstances.

20           MR. GREEN: All right.

21           CHAIRPERSON GRIFFIS: Of calling  
22 on the 2006, because in some respects what Ms.

1 Miller was saying was look, we have already  
2 stipulated it's the same. So if an inspector  
3 is called in and he has seen what is in 2006,  
4 2001, there is similarity. That's okay for me  
5 if we can for the purposes of that, of the  
6 record, act as if it is 2001. I don't know  
7 how to say it otherwise.

8 MR. GREEN: All right.

9 CHAIRPERSON GRIFFIS: But tell me  
10 what and just go to the similarity.

11 MR. GREEN: All right.

12 CHAIRPERSON GRIFFIS: Don't give  
13 me any other of these --

14 MR. GREEN: All right. I'll tell  
15 you what I'll do.

16 CHAIRPERSON GRIFFIS: It's going  
17 to open us all up to difficulty.

18 MR. GREEN: All right.

19 CHAIRPERSON GRIFFIS: And I  
20 totally agree.

21 MR. GREEN: If you will allow me?

22 CHAIRPERSON GRIFFIS: Go.

1 MR. GREEN: Mr. Chairman, I'll  
2 rephrase my questions.

3 BY MR. GREEN:

4 Q Mr. Stokes, have you been present  
5 in today's proceedings since the beginning?

6 A Yes.

7 Q And were you present during the  
8 testimony of Mr. Bill Crews?

9 A That's correct.

10 Q Do you adopt any or all of his  
11 testimony as your's?

12 A That is correct. I'll adopt it.

13 Q And with regard to your adoption  
14 of it, he outlined that certain conditions  
15 existed prior to 2007, '06, that go back to  
16 2002. Are you familiar with those particular  
17 circumstances that he described?

18 A That is correct.

19 Q Are you familiar with the  
20 circumstances described in the decision and  
21 order rendered by Administrative Law Judge Mr.  
22 McCoy and Mr. --

1 CHAIRPERSON GRIFFIS: Simon.

2 BY MR. GREEN:

3 Q -- Simon?

4 A That's correct.

5 Q Were you present during the  
6 investigations that led to the decisions  
7 rendered by Mr. Simon and Mr. McCoy?

8 MR. KATZ: Objection. The  
9 decisions of ALJ Simon and McCoy speak for  
10 themselves. There is no foundation that this  
11 witness has any idea that went into the heads.  
12 The decisions speak for themselves.

13 CHAIRPERSON GRIFFIS: Right. I  
14 don't disagree. I don't understand the  
15 relevancy.

16 MR. GREEN: Well --

17 CHAIRPERSON GRIFFIS: Having him  
18 answer the question.

19 MR. GREEN: All right, all right.

20 CHAIRPERSON GRIFFIS: Let's move  
21 ahead.

22 MR. GREEN: Okay.

1 BY MR. GREEN:

2 Q What you saw in '06 in December,  
3 was it the same thing that you saw in 2002 and  
4 2001 when you conducted your investigations?

5 A That's correct.

6 Q And then, at that time, what did  
7 you see, that is in 2001 and 2002?

8 A I saw 10 booths that were  
9 connected with monitors on the inside of the  
10 booths and saw patrons would pay their money  
11 up front or were putting money into the  
12 mechanical music machine where sexually-  
13 oriented activity would display on a 13 inch  
14 monitors.

15 Q How do you know that the sexual  
16 activity was displayed on a monitor? How do  
17 you know?

18 A Because they have a selection on--  
19 once you come in -- once you go -- once you  
20 pay the attendant at the front desk, you go in  
21 the back.

22 MR. KATZ: I'm going to move it

1 faster and stipulate. Yes, they have those  
2 monitors.

3 CHAIRPERSON GRIFFIS: Okay. Good.  
4 Next question.

5 MR. GREEN: Okay.

6 BY MR. GREEN:

7 Q When you went there in '06, did  
8 you see the same thing?

9 A That is correct.

10 MR. KATZ: I will stipulate to the  
11 same.

12 CHAIRPERSON GRIFFIS: Right.  
13 We're done. What else?

14 BY MR. GREEN:

15 Q Did you see anything different in  
16 '06 than you saw in '02?

17 CHAIRPERSON GRIFFIS: Same  
18 question, isn't it?

19 MR. GREEN: No, it's not.

20 CHAIRPERSON GRIFFIS: Is anything  
21 different?

22 THE WITNESS: No, sir.

1 CHAIRPERSON GRIFFIS: Okay.

2 BY MR. GREEN:

3 Q Did you take pictures in '06?

4 A That is correct.

5 MR. KATZ: Object, because I  
6 haven't been provided any pictures.

7 CHAIRPERSON GRIFFIS: Right.

8 MR. KATZ: And none have been  
9 filed with the BZA.

10 CHAIRPERSON GRIFFIS: Oh, dear,  
11 here they are.

12 MR. GREEN: I'll be happy to give  
13 them to him.

14 MR. KATZ: I object. My reading  
15 of the regulations is that if there is any  
16 documents or pictures that are going to be  
17 offered, they should have been offered at  
18 least 14 days before.

19 CHAIRPERSON GRIFFIS: They go to  
20 Ms. Bailey first, but I don't disagree. Why  
21 are we having pictures put into the record  
22 today?

1           MR. GREEN: I'm concerned as a  
2 result of the discussion, Mr. Chairman. I  
3 want the Board to know that the situation in  
4 '06 and '02 and '01 are the same. And I want  
5 to demonstrate this through pictorial  
6 information, which I have just acquired.

7           CHAIRPERSON GRIFFIS: But there is  
8 no disagreement anywhere, so I don't think we  
9 need it to do that.

10          MR. GREEN: All right.

11          CHAIRPERSON GRIFFIS: Ms. Miller?

12          VICE CHAIR MILLER: I'm just  
13 wondering if the reason you are putting it in  
14 is so that we can see more graphically how  
15 it's a substantial portion of the business or  
16 the things that they are talking about?

17          MR. GREEN: That was my original  
18 intent.

19          MR. KATZ: I still think there is  
20 a 14 day rule that there is no reason why Mr.  
21 Green couldn't have provided at least 14 days  
22 before or at least before this hearing started

1 to me, so I could go over it with my client  
2 and provide rebuttal evidence in terms of our  
3 own photos, for instance.

4 VICE CHAIR MILLER: Have you had a  
5 chance to look at the photos?

6 MR. KATZ: And do my own  
7 investigation.

8 VICE CHAIR MILLER: Have you had a  
9 chance to look at the photos?

10 MR. KATZ: Barely. I mean, this  
11 is the problem. My client has to see it. My  
12 Spanish is intermediate. It's going to slow  
13 down the process. But the thing is there is  
14 a rule that I came here relying on that the  
15 parties have 14 days to submit documents to  
16 the Board and to opposing counsel. These  
17 photos fit within the definition of documents.  
18 And even if --

19 BOARD MEMBER ETHERLY: I would  
20 perhaps suggest, Mr. Chair, I think perhaps  
21 just to be on the safe side, I'm comfortable  
22 not allowing it in, but I think there are

1 alternative ways in which we can get at the  
2 information. If I understand the direction of  
3 the testimony with Mr. Stokes, I think what's  
4 perhaps critical here is that based on your  
5 testimony, Mr. Stokes, you have experience  
6 with being on the premises in question in  
7 2002. Would that be an accurate statement?

8 THE WITNESS: Yes, sir.

9 BOARD MEMBER ETHERLY: And with  
10 respect to your experience on the premises in  
11 question in 2002, again, recognizing that you  
12 are not a Zoning Administrator, you are not  
13 vested with being familiar with the Zoning  
14 Regulations from A to Z, it would be your  
15 testimony that there is a significant and  
16 substantial portion of the business that is  
17 sexually-oriented based on your observations.  
18 Would that be an accurate statement?

19 THE WITNESS: Yes, and based on  
20 everybody knows for zoning, too.

21 BOARD MEMBER ETHERLY: Okay. Let  
22 me perhaps ask just a broad question just to

1 kind of get at this foundation issue a little  
2 more frequently. How long have you been  
3 employed as an investigator with DCRA?

4 THE WITNESS: Since 2001.

5 BOARD MEMBER ETHERLY: And in that  
6 capacity, have you always dealt in this  
7 particular area of business operations?

8 THE WITNESS: This is one of my  
9 little pet peeves that they give me to go out  
10 and snoop around and do that.

11 BOARD MEMBER ETHERLY: So you have  
12 experience?

13 THE WITNESS: Yes.

14 BOARD MEMBER ETHERLY: With  
15 sexually-oriented businesses that operate  
16 elsewhere in the city?

17 THE WITNESS: That is correct.

18 BOARD MEMBER ETHERLY: Okay. And  
19 as a result of that experience, you are  
20 familiar and acquainted with the types of  
21 products and goods that are conveyed in these  
22 types of establishments?

1 THE WITNESS: I would agree.

2 BOARD MEMBER ETHERLY: Okay. And  
3 so it's your testimony that the operation as  
4 you observed it when you had an opportunity to  
5 visit the premises in question here in 2002  
6 was, indeed, consistent with what you would  
7 describe as a sexually-oriented business  
8 enterprise?

9 THE WITNESS: That is correct.  
10 That is correct.

11 BOARD MEMBER ETHERLY: Okay.  
12 Thank you. I think that covers my questions,  
13 Mr. Chair.

14 MR. KATZ: I apologize for  
15 objecting to questions coming from a Board  
16 Member, but I do object to those questions for  
17 two reasons. Number one, it just goes to what  
18 I have been saying all along that the  
19 definition of sexually-oriented business  
20 enterprise is vague and over-broad and 11 DCMR  
21 section 199.1, for instance, and in Hicks' --  
22 the Hicks' opinion is too vague. It still was

1 considered non-binding by her successor Mr.  
2 Johnson as what's in the record. And it is of  
3 no magnitude or effect that this employee of  
4 the DCRA is giving his own spin on it.

5 BOARD MEMBER ETHERLY: I would  
6 again say, Mr. Chair, that I think what I  
7 would invite the counsel for the appellant to  
8 recognize is that in the process of  
9 argumentation here, if you will, I think there  
10 is a certain point at which there has to be --  
11 your arguments are well-taken.

12 Well, let me just say that, but I  
13 think it's probative and important for this  
14 Board to also explore the flip side of the  
15 coin, if you will, not presuming that his  
16 responses are accurate and true. As finders  
17 of fact here, you know, we have to, you know,  
18 obviously, deal with the testimony that we are  
19 getting on both sides of the coin.

20 But that's the way in which I  
21 would encourage counsel to take those  
22 questions. Your arguments have been made and

1 have been put forward, but can't simply be  
2 accepted as true. And then by virtue of that  
3 preclude questioning on any other aspect of  
4 the case.

5 MR. KATZ: Thank you, Board Member  
6 Etherly. I also ask, I know Board Member  
7 Etherly recommended that the pictures that  
8 were offered by Mr. Green not come into  
9 evidence and I just have argument if that  
10 hasn't been accepted in full by the Board.

11 CHAIRPERSON GRIFFIS: No, I don't  
12 disagree. I don't think we need them, at his  
13 time.

14 MR. KATZ: Thank you.

15 CHAIRPERSON GRIFFIS: Let's move  
16 ahead.

17 BOARD MEMBER ETHERLY: Thank you,  
18 Mr. Chair, that concluded my questions.

19 CHAIRPERSON GRIFFIS: Good.

20 VICE CHAIR MILLER: I have a  
21 question for Mr. Stokes or Mr. Crews. I just  
22 want to understand the process of the two of

1 you looking at an establishment.

2 Mr. Stokes, when you go in and  
3 inspect, you make an assessment. You know,  
4 you say, for instance, oh, there are 10  
5 booths. I think this is a sexually-oriented  
6 business or whatever. How does that relate to  
7 when the Zoning Administrator makes his  
8 determination?

9 THE WITNESS: Well, how I  
10 calculate my assessment, ma'am, is not only --  
11 oh, okay. Not only just looking at the booth,  
12 I look at the number of movies. When you go  
13 to an establishment and you see hundreds of  
14 movies and you can look at the type of people  
15 that frequent these locations and when you see  
16 them, when you -- when I'm working covert or  
17 undercover, some of the same stragglers you  
18 will see that hang around the area.

19 The female impersonators that is  
20 in and out of the establishment. You just see  
21 the -- you know, you don't take your common  
22 sense away. You see the continuity or the

1 flow of the individuals that is coming and  
2 going and the exchange of money at the booth.  
3 You can see where the bulk of the money is  
4 coming from. And it's not coming from the  
5 regular video sales.

6 MR. KATZ: Objection.

7 VICE CHAIR MILLER: So my question  
8 though is and then that helps me anyway in how  
9 you evaluate, but how does your evaluation  
10 relate to the Zoning Administrator's  
11 evaluation?

12 THE WITNESS: Well, I --

13 VICE CHAIR MILLER: Do you provide  
14 a report to the ZA or is it totally separate?

15 THE WITNESS: We do write reports,  
16 ma'am, and we do have authority to write  
17 zoning notice of infractions. We do have some  
18 training in that. And I have wrote a number  
19 of operating out of the scope of the  
20 Certificate of Occupancy many times, so, you  
21 know, we are one Government body and we work  
22 hand in hand.

1           And like I say from experience and  
2           from the exchange of money, the type of people  
3           that frequents the area, you put all that  
4           combination together, you know, with the  
5           experience and you can come up with your  
6           formula.

7           MR. KATZ:    Objection.

8           CHAIRPERSON GRIFFIS:   Go ahead.

9           MR. KATZ:    The problem is here the  
10          reason why those last two answers are more  
11          prejudicial than probative and not relevant is  
12          what we really have here is the only thing  
13          that's law is section 199.1 of 11 DCMR.  
14          What's in the head of Zoning Administrator  
15          Crews, for instance, about how he will apply  
16          Gladys Hicks --

17          CHAIRPERSON GRIFFIS:   Okay.

18          MR.    KATZ:            Yes,    the    Acting  
19          Administrator.

20          CHAIRPERSON GRIFFIS:   You can take  
21          it up on cross then.

22          MR. KATZ:    All right.

1 CHAIRPERSON GRIFFIS: I understand  
2 you have difficulty with the substance.

3 MR. KATZ: All right.

4 CHAIRPERSON GRIFFIS: Let's move  
5 ahead. Did you have further questions? Okay.  
6 Anything else?

7 MR. GREEN: Anything else? Mr.  
8 Stokes, I don't have any other questions.

9 CHAIRPERSON GRIFFIS: Okay. Mr.  
10 Stokes, let me just get to the bottom of this.  
11 When you are out in the field, this other --  
12 is going over a sexually-oriented business  
13 establishment a different procedure in your  
14 review than any other compliance to the Zoning  
15 Regulations?

16 INVESTIGATOR STOKES: No, we treat  
17 -- we are not biased.

18 CHAIRPERSON GRIFFIS: It's not  
19 what I'm asking though actually. Is your  
20 procedure when you go out to inspect an  
21 operation that is functioning within its scope  
22 of its Certificate of Occupancy, do you have

1 procedural steps that you take that are  
2 similar?

3 INVESTIGATOR STOKES: Do you mean  
4 -- what do you mean by going in and looking at  
5 the business or looking at the Certificate of  
6 Occupancy and the business license?

7 CHAIRPERSON GRIFFIS: Right.

8 INVESTIGATOR STOKES: Before hand.  
9 I'm just trying to understand you.

10 CHAIRPERSON GRIFFIS: Yes, that's  
11 exactly right.

12 INVESTIGATOR STOKES: It's  
13 primarily the same or some time there we're  
14 looking if there is allegations then we would  
15 go in covert.

16 CHAIRPERSON GRIFFIS: Okay. So if  
17 there are specific infractions that are  
18 asserted, you would go in and look  
19 specifically at those. I understand that.  
20 But so in your evaluation of any establishment  
21 working within the Certificate of Occupancy,  
22 you have certain standard procedures that you

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1 would follow.

2 One would be to go to a site  
3 visit, to actually physically go and inspect  
4 it. Is that right?

5 INVESTIGATOR STOKES: That is  
6 correct.

7 CHAIRPERSON GRIFFIS: Okay. Would  
8 you then make -- is there a standard report  
9 that you will out or is there a standard  
10 process for you, as an inspector, that you  
11 fill out?

12 INVESTIGATOR STOKES: It all  
13 depends. Sometimes it might be a version. It  
14 might be just where you would just take notes  
15 or sometimes it will be on official capacity  
16 where we would go there and then come back and  
17 generate a report. It all depends on the  
18 nature of the allegation or the scope of the  
19 inspection.

20 CHAIRPERSON GRIFFIS: Okay. And  
21 you have said today that you have the  
22 authority to write infraction and that would

1 be a fine or would it be a notice of an  
2 infraction?

3 INVESTIGATOR STOKES: Yes, the --  
4 you know, notice of infraction, yes, a fine.

5 CHAIRPERSON GRIFFIS: Okay. And  
6 you can do that on-site right away?

7 INVESTIGATOR STOKES: We can do it  
8 on-site, but a lot of times it's best to come  
9 back and get all the documents, because  
10 sometimes, you know, the owners may not have  
11 the Certificate of Occupancy on-site.

12 CHAIRPERSON GRIFFIS: I see. I  
13 see. Okay. At that point, whether you do  
14 that or not, you have facts that you gathered  
15 at the site. What happens? Are there others  
16 that you provide that to back at DCRA?

17 INVESTIGATOR STOKES: Or once I  
18 get the facts in the office or I have a -- do  
19 a computer search.

20 CHAIRPERSON GRIFFIS: Right.

21 INVESTIGATOR STOKES: Of the  
22 records, the records.

1 CHAIRPERSON GRIFFIS: Right.

2 INVESTIGATOR STOKES: Then I will  
3 prepare a report and issue a notice of  
4 infraction and my supervisor will review the  
5 report and then he will sign off on it. Then  
6 once that review process is complete, then the  
7 notice of infraction is sent over to the  
8 Office of Civil Infraction for mailing.

9 CHAIRPERSON GRIFFIS: Okay. And  
10 at any time if there is a zoning element, is  
11 it referred to the Zoning Administrator?

12 INVESTIGATOR STOKES: It can be,  
13 but we can issue the notice of infraction as  
14 well.

15 CHAIRPERSON GRIFFIS: Okay. Okay.

16 VICE CHAIR MILLER: So the result  
17 of your inspections in this case were some  
18 notice of infractions?

19 INVESTIGATOR STOKES: I didn't  
20 issue any of them.

21 VICE CHAIR MILLER: Oh.

22 INVESTIGATOR STOKES: The Zoning

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1 Inspector did. We just work hand-in-hand with  
2 them and reported that.

3 VICE CHAIR MILLER: Did you write  
4 reports?

5 INVESTIGATOR STOKES: I have wrote  
6 some reports in the past, yes.

7 VICE CHAIR MILLER: Of the --

8 CHAIRPERSON GRIFFIS: Did you  
9 inspect this site for zoning violations?

10 INVESTIGATOR STOKES: I looked at  
11 it in reference to operating out of the scope  
12 of the Certificate of Occupancy in the past,  
13 yes.

14 CHAIRPERSON GRIFFIS: Okay.

15 VICE CHAIR MILLER: So and did you  
16 write a report on that?

17 INVESTIGATOR STOKES: Yes, I think  
18 I have wrote one or two. It has been some  
19 years, but I wrote one or two, but like I said  
20 my last inspection with them was on December  
21 6, '06.

22 VICE CHAIR MILLER: Okay.

1                   INVESTIGATOR STOKES: But I didn't  
2 write a report. I took some pictures.

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

5                   CHAIRPERSON GRIFFIS: Do you have  
6 your reports that could be provided for the  
7 record based on that inspection?

8                   INVESTIGATOR STOKES: I don't have  
9 the ones that I wrote maybe several years,  
10 about two or three years, about three years  
11 ago and I didn't write a report on December  
12 the 6<sup>th</sup>. I just relied on information that  
13 was provided to me by another -- I mean,  
14 provided -- was just riding on the coattail of  
15 other D.C. Government agencies doing their  
16 investigations.

17                   CHAIRPERSON GRIFFIS: Okay. But  
18 there was a similar situation on all those  
19 times, all the different dates? Is that what  
20 you said?

21                   INVESTIGATOR STOKES: I'm trying  
22 to understand. Say that again, Chairman.

1 CHAIRPERSON GRIFFIS: In your  
2 view, did any of the situation at Fun Fair  
3 Video change, layout, number of booths,  
4 anything like that?

5 INVESTIGATOR STOKES: No, sir.

6 CHAIRPERSON GRIFFIS: Okay. How  
7 many videos of a sexual nature do you think  
8 there might, approximately, have been?

9 INVESTIGATOR STOKES: Chairman, I  
10 think you -- it had to be in the hundreds.

11 CHAIRPERSON GRIFFIS: Okay.

12 INVESTIGATOR STOKES: Especially  
13 what was in the back, in the back office that  
14 wasn't really on display.

15 MR. KATZ: Objection to the  
16 testimony about the back office. There is no  
17 sufficient base about how he even got  
18 legitimately back there. There was testimony  
19 he made earlier about showing up, about some  
20 search and seizure warrant or whatever, that  
21 was sustained. So unless at least there is  
22 some distinction that that's not when he went,

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1 that's particularly inadmissible.

2 CHAIRPERSON GRIFFIS: Okay. All  
3 right. I don't disagree. I'm not sure what  
4 the back office is anyway. So all right.  
5 Let's move ahead. Anything else?

6 BOARD MEMBER ETHERLY: Very  
7 briefly, Mr. Chair. Mr. Stokes, let's step  
8 away from Fun Fair for a moment. I would like  
9 to just get a sense generally based on your  
10 experience in dealing with establishments of  
11 the nature that we're discussing.

12 INVESTIGATOR STOKES: Um-hum.

13 BOARD MEMBER ETHERLY: Not noting,  
14 not taking a position on, obviously, the  
15 question here. But just generally your  
16 experience with respect to establishments of  
17 a sexually-oriented business nature. I just  
18 need to get a sense of -- and this could be a  
19 long answer, but I don't need it to be long.

20 INVESTIGATOR STOKES: Okay.

21 BOARD MEMBER ETHERLY: What do you  
22 tend to look for when you are investigating

1 sexually-oriented businesses?

2 INVESTIGATOR STOKES: Usually,  
3 like I said, I look at the people, their  
4 frequency there. Like I have done many types  
5 from laying on tables and getting massages  
6 before at massage establishments, other  
7 establishments that involve booths, what they  
8 call with the buddy holes. If you've ever  
9 heard of a buddy hole, what that is.

10 BOARD MEMBER ETHERLY: Okay.

11 INVESTIGATOR STOKES: Where they  
12 solicit sex by the use of finger gesture using  
13 the buddy hole system. I've been to sexually-  
14 oriented what they call go-go dancing. I've  
15 been to those establishments as well. So I  
16 have been to a number of sexually-oriented  
17 places from southeast to northwest.

18 BOARD MEMBER ETHERLY: Okay. And  
19 in terms of looking at those types of things,  
20 is there any type of or have you been exposed  
21 to any type of shall we say standard  
22 operations manual or any type of written

1 guideline from DCRA that identifies certain  
2 factors or certain elements that you need to  
3 look at or are these things based on the  
4 experience that you gleaned in your role over  
5 the years?

6 INVESTIGATOR STOKES: It's both.

7 BOARD MEMBER ETHERLY: Okay.

8 INVESTIGATOR STOKES: Experience  
9 and like the number counts of movies, a  
10 certain percentage, things of that nature.

11 BOARD MEMBER ETHERLY: Okay.

12 INVESTIGATOR STOKES: Watching the  
13 transaction of sales and things of that  
14 nature.

15 BOARD MEMBER ETHERLY: Okay.

16 Thank you. Thank you, Mr. Chair.

17 CHAIRPERSON GRIFFIS: Anything  
18 else?

19 MR. GREEN: I don't have any other  
20 questions of this witness, Mr. Chairman.

21 CHAIRPERSON GRIFFIS: Cross?

22 MR. KATZ: Thank you.

1 CROSS EXAMINATION

2 BY MR. KATZ:

3 Q Good afternoon, Mr. Stokes.

4 A Good afternoon, sir.

5 INTERPRETER FUXMAN: I'm sorry,  
6 could I request a break, please?

7 CHAIRPERSON GRIFFIS: Oh, yes,  
8 absolutely. I'm sorry about that. Let's do.  
9 Let's take 15 minutes.

10 INTERPRETER FUXMAN: I'm sorry.

11 (Whereupon, at 4:26 p.m. a recess  
12 until 4:51 p.m.)

13 CHAIRPERSON GRIFFIS: Okay. Let's  
14 resume. Your mike needs to be on.

15 MR. KATZ: Okay.

16 BY MR. KATZ:

17 Q Mr. Stokes, you have been to  
18 businesses other than Fun Fair Video that sell  
19 erotic material?

20 A I have been in the past, yes.

21 Q Including DVDs and videos?

22 A More so of the DVDs.

1 Q Okay.

2 A Because, you know, videos, the VHS  
3 is more obsolete now.

4 Q And have you visited such  
5 businesses other than Fun Fair Video during  
6 the last -- since 2002? Starting 2002 to  
7 present.

8 A Can you repeat the question again?

9 Q I'm going to ask a different  
10 question. Have you been to other -- have you  
11 been to such businesses during the last 12  
12 months?

13 A No.

14 Q During the last 24 months?

15 A The last 24 months, I'm sorry, any  
16 other business?

17 Q Other than the Fun Fair Video.

18 A No.

19 Q The last 36 months?

20 A That's kind of a gray area there.  
21 I can't remember. I'm quite sure I have.

22 Q The last 48 months?

1           A     I'm quite sure I have, yes, no  
2 question, sure.

3           Q     But you would agree with me that  
4 Fun Fair Video is not the only business in  
5 Washington, D.C. that sells such DVDs, right?

6           A     That's correct, to the best of my  
7 knowledge.

8           Q     Now, when you have been to Fun  
9 Fair Video, did you buy any of the videos or  
10 DVDs or magazines that were being sold there?

11          A     No.

12          Q     So therefore, you saw the --  
13 therefore, you didn't view any of the videos  
14 or DVDs that were being sold there other than  
15 what was in the video viewing booths, right?

16          A     That's correct, to the best of my  
17 knowledge.

18          Q     Now, you have also mentioned --

19                   MR. KATZ: We'll strike.

20                   BY MR. KATZ:

21          Q     Whether or not you mentioned it,  
22 there are -- yes, you mentioned go-go clubs

1 before, right?

2 A That's correct.

3 Q That's the same as a strip club?

4 A Yes, yes.

5 Q Okay. And there are strip clubs  
6 in Washington, right?

7 A That's correct.

8 Q And they have their own licensing  
9 scheme, right?

10 A That's correct.

11 Q Right. And so there are at least  
12 several strip clubs in Washington, D.C.,  
13 right?

14 A That's correct.

15 Q And each of those strip clubs you  
16 have gone to have full nudity, right?

17 A Yes.

18 Q And each of those strip clubs you  
19 have gone to have served liquor, right?

20 A That's correct.

21 MR. KATZ: No further questions.

22 CHAIRPERSON GRIFFIS: Thank you.

1 Anything else for this witness?

2 MR. GREEN: I don't have any other  
3 questions for this witness.

4 CHAIRPERSON GRIFFIS: Okay. Any  
5 other witnesses?

6 MR. GREEN: Yes. Let me ask you  
7 this question before I call my next witness,  
8 if I do.

9 CHAIRPERSON GRIFFIS: Sure.

10 MR. GREEN: Is the Board going to  
11 give any import to the issue of secondary  
12 effects? If that is the case, I have another  
13 witness that can address the question of  
14 secondary effects, if that's what the Board  
15 wants to deal with.

16 MR. KATZ: I have to object to a  
17 response to that. That would be to judge the  
18 case before the hearing is finished for the  
19 Board to give that answer.

20 MR. GREEN: And I would submit  
21 though that counsel has asked that the Board  
22 consider this and the Board certainly has it

1 within its purview to decide if it wants to go  
2 in that direction or not. And if it does, I'm  
3 prepared to put on such a witness.

4 CHAIRPERSON GRIFFIS: Sure, sure.  
5 Understood.

6 MR. KATZ: But for there to be  
7 such an answer would call for more  
8 deliberation than could fairly be given just  
9 by a quick answer at this point.

10 CHAIRPERSON GRIFFIS: Thank you.

11 MR. KATZ: Pardon, Board Members,  
12 if I could just make one brief additional  
13 point?

14 CHAIRPERSON GRIFFIS: Sure.

15 MR. KATZ: If a decision is going  
16 to be made on secondary effects right now,  
17 unless it's favorable to me, that would  
18 suggest that the Board is giving shorter  
19 shrift to that argument than my others. The  
20 Supreme Court has issued --

21 CHAIRPERSON GRIFFIS: Okay. First  
22 of all, I think it's an excellent point to

1 bring up. The Board is not making any  
2 decisions right now. And actually what we are  
3 discussing and with the counsel of the  
4 Attorney General also just discussing of the  
5 legal process of which we need to proceed in.

6 And what we have is Mr. Green is  
7 proffering a witness or about to call a  
8 witness that goes into an area that we have  
9 not made a basis of whether we, one, have  
10 jurisdiction, two, will make a decision on or  
11 not. However, one thing is very clear in our  
12 proceedings today and that is we have allowed  
13 all of the facts and evidence to come in on  
14 all of those elements, frankly, without giving  
15 much direction to what comes in or what does  
16 not.

17 (Whereupon, at 5:00 p.m. the  
18 Public Hearing continued into the evening  
19 session.)  
20  
21  
22

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

2 5:00 p.m.

3 CHAIRPERSON GRIFFIS: So with that  
4 and with that basis, I wanted just to touch my  
5 Members and make sure that they understood and  
6 we were in a consensus of which way to  
7 continue and that is that Mr. Green should  
8 call his witness and give his direction to the  
9 witness and we'll take that into the record  
10 and we will move on from there.

11 MR. KATZ: Well, based on just two  
12 other separate, but related things. One is  
13 that since the case law, particularly in Los  
14 Angeles v. Alamita Books, which is already  
15 cited in my written submission from around  
16 2003, and the Renton decision that preceded  
17 it, since those provide that regulated -- the  
18 laws regulating adult entertainment have to be  
19 based on sufficient secondary effect studies,  
20 any testimony from this witness about  
21 secondary effects that don't deal with  
22 secondary effect studies that were relied upon

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1 to issue the SOBE Regulations are irrelevant.

2 CHAIRPERSON GRIFFIS: Okay.  
3 That's good direction for Mr. Green for his  
4 witnesses.

5 MR. KATZ: Number two, perhaps I  
6 was misreading the regulations that govern the  
7 Board of Zoning Administration, I was not  
8 aware that the -- that it's proper for a  
9 member of the Attorney General's office to be  
10 conferring with the Board on such things.

11 CHAIRPERSON GRIFFIS: Okay.  
12 That's fine. And I appreciate you bringing  
13 that to our attention. We're fine to hear  
14 submissions or briefs if we get to the end of  
15 this on the appropriateness or not.

16 MR. KATZ: Okay.

17 CHAIRPERSON GRIFFIS: But I can  
18 tell you that the Attorney General represents  
19 this Board and is our counsel and so I have  
20 never known it not to be, but happy to find  
21 out I'm right or wrong on that. That being  
22 said, Mr. Green, why don't we continue?

1 MR. GREEN: Thank you, Mr.  
2 Chairman. I call as my next witness Mr. James  
3 Leonard.

4 DIRECT EXAMINATION

5 BY MR. GREEN:

6 Q Sir, can you tell us for the  
7 record your full name, please?

8 A James Leonard.

9 Q And by whom are you employed?

10 A Metropolitan Police Department.

11 Q And in what capacity are you  
12 there, sir?

13 A I'm an officer with the Career  
14 Criminal Unit.

15 Q Have you been present in today's  
16 proceedings?

17 A Yes.

18 Q And have you heard discussion  
19 about a JMM Corporation t/a Fun Fair Video?

20 A Yes.

21 Q Do you have any independent  
22 contact or have you had any independent

1 contact with JMM Corporation t/a Fun Fair  
2 Video?

3 A Yes.

4 Q Can you tell us when that took  
5 place?

6 A Yes, back in November 2006.  
7 Members of the Career Criminal Unit had  
8 information that employees inside of --

9 MR. KATZ: Objection.

10 CHAIRPERSON GRIFFIS: What's the  
11 objection?

12 MR. KATZ: Okay. Once again, I  
13 think the parties -- you know, I think this is  
14 going far afield what happened in 2002. There  
15 is insufficient basis for what the relevance  
16 is of this witness and if he is going to start  
17 talking about what the last witness was trying  
18 to talk about, which is a search and seizure  
19 warrant, I haven't seen the warrant and that's  
20 totally prejudicial for there to be any such  
21 discussion about any unlawful searches that  
22 went on.

1           And without me seeing the warrant,  
2           I can't contest whether it was unlawfully  
3           issued or executed or not. And there is  
4           multiple levels of hearsay coming with this  
5           man talking about other people doing some  
6           investigation aside from just him.

7           CHAIRPERSON GRIFFIS: Okay. Mr.  
8           Green, what are we going to establish here?  
9           What are we going to cover with the officer?

10          MR. GREEN: Well, the officer is  
11          going to indicate that he had ample reason,  
12          number one, to be at this place. Number two,  
13          that because of the, I guess you could say for  
14          want of a better word, I guess you could say,  
15          reputation of the establishment in the  
16          community caused him along with other officers  
17          of the MPD to be there.

18          And in addition to the criminal  
19          activity that they investigated, he made  
20          certain other observations, which are the  
21          observations that have been discussed by both  
22          Mr. Stokes and Mr. Crews.

1 CHAIRPERSON GRIFFIS: Okay. And  
2 it's going to what merit in this case? what  
3 are we establishing with this witness?

4 MR. GREEN: Number one, that we  
5 have an establishment that engages in the sale  
6 of sex in a zoned area that -- where it is  
7 impermissible. He is going to give testimony  
8 related to that. I mean, I could ask him a  
9 simple question, a simple question would be do  
10 you adopt the testimony of the two preceding  
11 witnesses?

12 MR. KATZ: Objection.

13 CHAIRPERSON GRIFFIS: Yes, I would  
14 agree. I don't think he needs to adopt it,  
15 but somehow establishing some different aspect  
16 to it would probably be productive.

17 MR. GREEN: Well, if he gives a  
18 different aspect of it, then he will get into  
19 the area of criminality that was involved.

20 CHAIRPERSON GRIFFIS: Yes, I guess  
21 I'm just a little confused of how the  
22 officer's testimony would begin to address

1 materially what we are looking at here.

2 MR. GREEN: Well, if I may proffer  
3 a portion of it, he is going to simply  
4 indicate that he saw exactly what Mr. Stokes  
5 and Crews saw, that the information that he  
6 got as it related to what he saw, he was  
7 brought there because of certain other alleged  
8 criminal activity and that he conducted an  
9 investigation that resulted in certain actions  
10 being taken by the Metropolitan Police. In  
11 other words, he is saying that this is a bad  
12 place.

13 CHAIRPERSON GRIFFIS: Okay.

14 MR. KATZ: So my objection --

15 MR. GREEN: That it has an adverse  
16 impact on the community.

17 CHAIRPERSON GRIFFIS: Right.

18 MR. GREEN: That the community --  
19 and, you know, again, that's what he is going  
20 to talk about.

21 CHAIRPERSON GRIFFIS: Right,  
22 right. Which moves us, even that statement

1 seems to, far afield from the appeal that we  
2 are in and I guess that was some of my  
3 concern. If we were brought up in terms of  
4 the secondary effects and it would some how  
5 establish that, I think that was far-fetched,  
6 too, however, I wasn't -- we're not  
7 presupposing or putting a judgment on any of  
8 the evidence that's coming in.

9 But I'm not so sure I see  
10 continuing too far down with the relevancy of  
11 this, unless others see any reason to.

12 VICE CHAIR MILLER: Well, I don't  
13 think it's appropriate to get off the path  
14 into some criminal activity that is probably  
15 not related to whether or not it's a sexually-  
16 oriented business, but I mean he could say in  
17 one line that he visited the premises and he  
18 saw those things. I mean, if your point is to  
19 prove that there really are 10 booths in that  
20 store or whatever.

21 MR. GREEN: Sure.

22 CHAIRPERSON GRIFFIS: Yes, I think

1 that's exactly one question to talk about.

2 MR. GREEN: All right.

3 CHAIRPERSON GRIFFIS: The  
4 description of the circumstance and the  
5 operation circumstance of the site.

6 MR. GREEN: May I inquire then?

7 CHAIRPERSON GRIFFIS: Yes.

8 MR. GREEN: Thank you.

9 BY MR. GREEN:

10 Q You indicated that you went to  
11 this establishment in '06. Is that right,  
12 sir?

13 A Yes.

14 Q And what did you see?

15 MR. KATZ: Objection.

16 MR. GREEN: Well --

17 MR. KATZ: If --

18 MR. GREEN: Excuse me. Without  
19 going into leading questions, I mean, this is  
20 direct.

21 CHAIRPERSON GRIFFIS: Right.

22 MR. GREEN: And I'm asking the man

1 what he saw. Now, if you want me to preface  
2 it with what, if any, booths did you see?

3 MR. KATZ: That's not the basis of  
4 my objection. Both of us are permitted to  
5 make objections. I ask that I be permitted to  
6 state the reason, brief reason for my  
7 objection.

8 CHAIRPERSON GRIFFIS: Okay. What  
9 is it?

10 MR. KATZ: Which is once again,  
11 there was a suggestion earlier by Mr. Stokes  
12 that there was a search and seizure warrant  
13 executed to the store. It has not been ruled  
14 out that this witness is testifying on that  
15 basis and I strenuously object to any  
16 testimony relating to any execution of a  
17 search and seizure warrant without me at least  
18 seeing the warrant and being able to challenge  
19 the validity of that warrant and the validity  
20 of the execution of the warrant.

21 MR. GREEN: This body instructed  
22 us not to get into that and I wasn't getting

1 into it.

2 CHAIRPERSON GRIFFIS: Right.

3 MR. GREEN: I was getting into  
4 sex. That's what this case is all about.

5 CHAIRPERSON GRIFFIS: Interesting.

6 MR. GREEN: Sex in the wrong  
7 place.

8 CHAIRPERSON GRIFFIS: Yes, I don't  
9 disagree. I think the question was very  
10 straightforward and general enough not to put  
11 him on site for any specific reasons, but put  
12 him there. Let's just get through this.  
13 Please, proceed.

14 MR. KATZ: I apologize, Chair  
15 Griffis, unfortunately, my understanding is  
16 that members of the Government went into areas  
17 of the store that they would not have been  
18 permitted to go into, unless they had a search  
19 and seizure warrant. And unless this question  
20 is limited to what this person saw in areas  
21 that regular clients and customers are allowed  
22 to see, I strenuously object.

1                   CHAIRPERSON GRIFFIS:     Okay.     I  
2     understand that.     But let me just say, first  
3     of all, this isn't a criminal proceeding.  
4     Secondly, even if he says something about  
5     areas which the normal customer wouldn't have  
6     seen, our jurisdiction will lapse at zoning.  
7     And so I don't see any real danger in moving  
8     ahead with the observations of the officer on  
9     what he saw at this site.     And let's move on.  
10    Sir?

11                   BY MR. GREEN:

12                   Q     Officer Leonard, again, when you  
13     were present, did you have occasion to go into  
14     the back of the store?

15                   A     Yes.

16                   Q     And what did you see, sir?

17                   A     Booths in the back where you can  
18     see x-rated videos.

19                   Q     And what else did you see?

20                   A     Different types of lubrication for  
21     sale, sex toys in the back, condoms.

22                   MR. KATZ:    Objection to what's in

1 the back. There was already a sustaining  
2 about the back office. This witness is  
3 talking about areas of the store the customers  
4 are not allowed to go.

5 CHAIRPERSON GRIFFIS: Is that  
6 right? What is the back of the store when you  
7 say the back?

8 THE WITNESS: The customers do  
9 have to walk through that area to get to the  
10 booth area that I'm talking about.

11 CHAIRPERSON GRIFFIS: Okay. So  
12 it's an area --

13 BOARD MEMBER ETHERLY: The  
14 materials in question that you are --

15 THE WITNESS: Yes.

16 BOARD MEMBER ETHERLY: --  
17 referencing, well, I won't even ask the  
18 question, because it might be getting a little  
19 too deeply into this. I'll leave it at that,  
20 Mr. Chair.

21 CHAIRPERSON GRIFFIS: Fine.

22 MR. GREEN: Mr. Chairman, I would

1 just like to make one point, so that this  
2 doesn't float in the air here. Government  
3 officials can go into any enterprise where  
4 they issue a license or a Certificate --

5 CHAIRPERSON GRIFFIS: Right. But  
6 let's not talk about that.

7 MR. GREEN: -- of Occupancy.

8 CHAIRPERSON GRIFFIS: That's not  
9 his objection. His objection is on what basis  
10 were the Metropolitan Police or the inspectors  
11 back there. And I don't want to get into  
12 that.

13 MR. GREEN: All right.

14 CHAIRPERSON GRIFFIS: I understand  
15 the objection, but we're allowing. So when  
16 you describe the back of the store, you're  
17 still talking about an area that can be  
18 accessed by the customers of the retail  
19 establishment?

20 THE WITNESS: Yes.

21 CHAIRPERSON GRIFFIS: Okay. So  
22 let's get through this now. What else did you

1 see?

2 THE WITNESS: The x-rated videos  
3 that were for sale, condoms, used and unused,  
4 sex toys, drug paraphernalia and that's it.

5 CHAIRPERSON GRIFFIS: Okay. What  
6 else?

7 MR. GREEN: I don't have any other  
8 questions.

9 CHAIRPERSON GRIFFIS: Good  
10 anything else? Very well. Any cross?

11 MR. KATZ: No.

12 CHAIRPERSON GRIFFIS: Cross from  
13 the ANC?

14 MR. DIXON: Not at this time. I  
15 have nothing.

16 CHAIRPERSON GRIFFIS: Okay.  
17 Excellent. Mr. Green?

18 MR. GREEN: I don't have any other  
19 witnesses, Mr. Chairman, Members of the Board,  
20 and I thank Officer Leonard.

21 CHAIRPERSON GRIFFIS: Very well.  
22 Thank you very much, Officer. Mr. Green,

1 would you like to summarize and close and we  
2 can move on to the ANC?

3 MR. GREEN: Yes, I'll be brief.  
4 First of all, I don't want us to get too far  
5 afield on what this case is all about. This  
6 case is again about sex selling. This case is  
7 about sex being in the wrong place, i.e., the  
8 C-2-C. This case is about a standard and the  
9 standard or the criteria upon which the  
10 determination was made that this was a  
11 sexually-oriented enterprise was based on the  
12 observations of Gladys Hicks in her opinion,  
13 where she talks about a 15 percent rule, where  
14 she talks about the utilization of booths and  
15 sex toys and other merchandise that depicts  
16 human genitalia and other specific anatomical  
17 references. That's what we are talking about.

18 We're saying that this particular  
19 enterprise operated as a sexually-oriented  
20 enterprise when, in fact, it was impermissible  
21 in this zoned area. We're saying that in this  
22 particular area, there was a flagrant attempt

1 at violating the statutes from 2001 forward.  
2 We're saying that there have been three  
3 Administrative Law Judges who have made  
4 determinations that the Certificate of  
5 Occupancy should be revoked, because this  
6 particular establishment, in their opinion,  
7 operated outside the scope of the Certificate  
8 of Occupancy issued.

9 We're saying that based on that,  
10 that the determination of the Zoning  
11 Administrators going back from 2001 coming  
12 forward have been that this establishment's  
13 Certificate of Occupancy should be revoked.  
14 Our current Zoning Administrator has taken  
15 that position. Our current Zoning  
16 Administrator abides by that opinion of the  
17 prior Zoning Administrator and he also abides  
18 by the opinion of the Administrative Law  
19 Judges, the three Administrative Law Judges  
20 who have spoken to this issue.

21 This is a very straightforward  
22 case. This is not a case about Constitutional

1 rights. That should be decided by the  
2 District of Columbia Court of Appeals and  
3 other entities. This Board does not have it  
4 within its purview to decide such matters.

5 Base on the above, I would ask  
6 that the opinions and the actions of the  
7 Zoning Administrator be sustained. Thank you.

8 CHAIRPERSON GRIFFIS: Thank you  
9 very much.

10 MR. KATZ: Thank you. I'll be  
11 brief.

12 CHAIRPERSON GRIFFIS: Oh,  
13 actually, I'm sorry, I'm going to go to the  
14 ANC and then we'll go to your close.

15 MR. KATZ: And I will enter an  
16 objection at the appropriate time about having  
17 a statement from the ANC Member and about any  
18 giving great weight to what the ANC person  
19 says under the Supreme Court case that I have  
20 cited in writing and orally today. That is  
21 totally improper to take anything into  
22 consideration of what he is saying.

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1 MR. GREEN: Mr. --

2 CHAIRPERSON GRIFFIS: Okay.

3 MR. GREEN: May I be heard on  
4 that?

5 CHAIRPERSON GRIFFIS: In a second.  
6 What's the case?

7 MR. KATZ: I will answer the  
8 question. Alamita Books, City of Los Angeles  
9 v. Alamita Books. I'll give you the exact  
10 citations if you want.

11 CHAIRPERSON GRIFFIS: Yes, go  
12 ahead. Do you have it?

13 MR. KATZ: They are already in my  
14 writings, but I'll be happy to --

15 VICE CHAIR MILLER: It's in the  
16 filings.

17 MR. KATZ: -- to do that.

18 CHAIRPERSON GRIFFIS: Right.

19 MR. KATZ: Pardon?

20 VICE CHAIR MILLER: It's in your  
21 filings.

22 MR. KATZ: Yes, from around 2003,

1     City of Renton, which is from around the  
2     1990s, which essentially make very clear that  
3     adult entertainment is permitted. The  
4     Governments are permitted to regulate it, but  
5     they have to do it through the road map  
6     presented in those two cases, which includes  
7     in issuing laws regulating adult businesses,  
8     it must reasonably rely on sufficient  
9     secondary effect studies.

10                   CHAIRPERSON    GRIFFIS:        Okay.  
11     Excellent.

12                   MR. KATZ:    It says nothing about  
13     being able to give any great weight to some  
14     representative of some community, because that  
15     can't replace those secondary effect studies.  
16     And furthermore, what he has to say is of no  
17     value, since he was not presented by me as a  
18     witness. He was not presented by Mr. Green as  
19     a witness.

20                   CHAIRPERSON GRIFFIS:    We'll look  
21     at the case.

22                   MR. KATZ:    So his presence here is

1 of no merit.

2 CHAIRPERSON GRIFFIS: I  
3 understand.

4 MR. KATZ: Since he wasn't  
5 presented as a witness.

6 CHAIRPERSON GRIFFIS: I  
7 understand.

8 MR. GREEN: May I be heard on  
9 that, Mr. Chairman?

10 CHAIRPERSON GRIFFIS: Briefly,  
11 briefly, yes.

12 MR. GREEN: Yes, Mr. Chairman, he  
13 cuts at the heart of the whole ANC process and  
14 the whole representative process in the  
15 District of Columbia unlike other  
16 jurisdictions you've established, an area  
17 neighborhood commission, Advisory Neighborhood  
18 Commission. And this Board gives them  
19 certainly an opportunity to be heard.

20 Now, whether they are right,  
21 whether they are wrong, whether they are  
22 smart, whether they are loony-toons, it

1 doesn't matter. He cuts at the heart if you  
2 cut them out of this discussion.

3 CHAIRPERSON GRIFFIS: Okay. We  
4 don't have any intention to, but we can leave  
5 the record open and we can receive your  
6 briefing on the court case that he has cited.  
7 Let's go to the ANC.

8 MR. DIXON: It's been a long day.

9 CHAIRPERSON GRIFFIS: Indeed it  
10 has.

11 MR. DIXON: My name is Mark Dixon.  
12 I'm the Chairman of ANC-6C. I serve as the  
13 Chairman of the Safety Committee of my ANC.  
14 We have community meetings once a month. We  
15 have a PSA meeting, which is another meeting,  
16 twice a month. And during these different  
17 meetings issues come up at my meetings about  
18 Fun Fair, about K Street and the traffic.

19 The community really has a problem  
20 with the trash and what the movie is bringing  
21 to the community. And we have some letters  
22 from the community, but I didn't know to bring

1       them today, but I will have them forwarded to  
2       your office.

3                   And what the problem is is just  
4       the traffic that comes up and down that  
5       community, stands around all night long and  
6       we're having new condominiums being built  
7       right on the corner there and the complaint  
8       from them is it's hard to try to sell one of  
9       them units when you've got the people standing  
10      out front of your units.

11                   And just, you know, the complaints  
12      I'm getting are not with just Fun Fair, but  
13      I've also got some trailers now that popped up  
14      in my community that I'm trying to deal with  
15      them too. The trailers are for the homeless  
16      people who if it gets too cold outside, that  
17      they can have them for to go into get warm and  
18      to take -- we went along with that. That's  
19      supposed to be removed by April, April 30<sup>th</sup>  
20      I'm hearing that they are supposed to be  
21      removed.

22                   Fun Fair, I don't never hear about

1 when that is going to be removed. So, you  
2 know, these kind of issues that I'm speaking  
3 for. These are the kind of issues that I'm  
4 here to represent my community and have some  
5 say so for them. They elected me as a  
6 Commissioner and I've been a Commissioner over  
7 10 years, no 6 years, and I'm open for any  
8 kind of questions.

9 CHAIRPERSON GRIFFIS: Excellent.  
10 Thank you very much, Mr. Dixon. I appreciate  
11 your patience and spending the afternoon with  
12 us. I think it's important for our ANCs to be  
13 represented in appeals, as well as in the  
14 special exceptions and variances. Of course,  
15 this is an appeal.

16 I note that you do have a  
17 submission into the record. It's Exhibit No.  
18 30. I don't have any further questions of the  
19 ANC, unless Board Members have questions. Mr.  
20 Green, cross?

21 MR. GREEN: I have no questions,  
22 sir.

1 CHAIRPERSON GRIFFIS: Mr. Katz?

2 MR. KATZ: No, none.

3 CHAIRPERSON GRIFFIS: Okay. Very  
4 well. Mr. Dixon, thank you very much. We do  
5 appreciate it. Let's move ahead then.

6 MR. KATZ: I'll be brief. The  
7 Supreme Court who a dozen years ago in the  
8 Renton decision, that I have set forth in my  
9 briefings, set forth a road map for what  
10 municipalities can do to regulate adult  
11 businesses. That is not being done here.

12 Not only is it an essential part  
13 of the road map, reasonable reliance on  
14 sufficient secondary effect studies, is that  
15 the Government officials and Government  
16 agencies licensing adult businesses be doing  
17 it as administrative tasks. That is clear from  
18 the FWPBS decision of the Supreme Court that  
19 is already in my written materials.

20 What do we have here? We have an  
21 absence of even one statute, not regulation,  
22 in the District of Columbia that addresses

1 adult businesses or sexually-oriented  
2 businesses whatsoever, except for strip clubs.  
3 Well, we're not talking about strip clubs  
4 today. Fun Fair Video clearly is not that.

5 Therefore, we now have the Board  
6 of Zoning Adjustment, I think that's who  
7 issued this regulation, doing what only a  
8 legislature should be able to do, because the  
9 Board of Zoning Adjustment is an  
10 administrative agency that is supposed to be  
11 here for administrative tasks and not for  
12 creating sexually-oriented business enterprise  
13 laws through regulations.

14 But be that as it may --

15 CHAIRPERSON GRIFFIS: Just a quick  
16 correction. The Zoning Commission.

17 MR. KATZ: Sorry, the Zoning  
18 Commission.

19 CHAIRPERSON GRIFFIS: Issued the  
20 regulation.

21 MR. KATZ: Especially since I'm in  
22 front of the BZA, I would not want to say BZA

1 did something improperly that someone else  
2 did.

3 CHAIRPERSON GRIFFIS: That's all  
4 right. Okay. Go ahead.

5 MR. KATZ: And the road map was  
6 not followed of doing the secondary effect  
7 studies. You know, it's already fully  
8 available and part of the legislative history,  
9 that if you go to the D.C. -- so the D.C.  
10 Register there is nothing about secondary  
11 effects. There are other discussions about  
12 what prompted the SOBE Regulations, which came  
13 into effect, I think, around 1976.

14 But nothing about secondary  
15 effects. At most, there was reference, I  
16 believe, to letters or testimony from members  
17 of the community saying we don't like these  
18 businesses here and/or they are bad to  
19 business. That's not a secondary effect  
20 study, as will be made clear by our review of  
21 Alamita Books and Renton.

22 Now, let's go to the Hicks'

1 memorandum. The Hicks' opinion was by, not as  
2 I said before, not by a Zoning Administrator,  
3 but by an Acting Zoning Administrator,  
4 whatever the distinction or difference is or  
5 is not.

6 For whatever reason, this has been  
7 quite the revolving door in the D.C.  
8 Government of one Zoning Administrator after  
9 the other. They don't seem to last very long.  
10 Make the conclusions that you want about how  
11 much credence really to put on this when there  
12 is such a revolving door and what kind of  
13 competency there really is on these Zoning  
14 Administrators. Including in this area, when  
15 they have got to have their fingers in so many  
16 zoning-related ties.

17 And in response to Mr. Green's  
18 questions, this is in the record, in 2000 at  
19 the proceeding in front of Judge Simon, before  
20 I was even involved, for the first notice of  
21 infraction hearing with Mr. Montiel's first  
22 set of lawyers, for May 23, 2000, this is from

1 my submission with the notice of filing, date  
2 stamped, approximately, November 29, 2006,  
3 where at page 8, Mr. Green asks a successor of  
4 Ms. Hicks, Mr. Johnson, at line 6, "Is there  
5 any document other than 11 DCMR which you  
6 place any reliance on in determining whether  
7 the retail or wholesale video store is  
8 sexually-oriented business operation?"

9 And the answer at line 11 is  
10 "There is. There is one document that was  
11 prepared by my predecessor, Gladys Hicks, I  
12 say parenthetically, who I might note was an  
13 Acting Zone Administrator and I don't place  
14 reliance on it more, so that I use that in the  
15 sense of guidance or a baseline. As the new  
16 permanent Zoning Administrator, I obviously  
17 have the authority to differ from that and I  
18 do."

19 Consequently, a business cannot  
20 see inside the head of the Zoning  
21 Administrator with ESP, with a crystal ball or  
22 with any sixth sense. That is exactly what

1 the Supreme Court's FWPBS decision is all  
2 about. That laws regulating sexually-oriented  
3 businesses and adult businesses must be clear  
4 on paper. And that a Zoning Administrator, an  
5 administrative body, such as the BZA, that any  
6 other administrative agency must be using  
7 administerial tasks.

8 And that, therefore, the law must  
9 sufficiently deny -- sorry, define a sexually-  
10 oriented business enterprise and we don't have  
11 it. DCMR 11-199.1 is full of vagueness and if  
12 it wasn't, Ms. Hicks' opinion wouldn't have  
13 been issued in the first place and she  
14 wouldn't have said that she was being asked  
15 for clarification.

16 And today, we have a current  
17 Zoning Administrator who tells the Board that  
18 he knows anything about interpreting what is  
19 or is not a SOBE, when he has admitted himself  
20 he hasn't even looked to see if any others  
21 exist since he is defining Fun Fair as such.  
22 And we know that there are many other

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1 businesses selling such material, because that  
2 was confirmed by Mr. Stokes.

3 Now, putting aside the  
4 Constitutional arguments, let's get to the  
5 further nitty-gritty. I looked throughout the  
6 D.C. law for anything about any sanctions  
7 available for notices of infraction and found  
8 nothing other than that a fine can be issued.  
9 The very fact that Judge Simon not on just one  
10 occasion -- well, we'll just deal with what we  
11 have in front of us, even though I already  
12 told Board Member Miller that Judge Simon made  
13 the same mistake with what's in front of the  
14 Superior Court, where twice he has wrongfully  
15 ordered the cessation of Fun Fair's business  
16 on a notice of infraction, when the law only  
17 allows fines.

18 So first of all, since the ALJ is  
19 in a lower body, he doesn't control what  
20 happens here. But second of all, if there is  
21 any guidance asked by Mr. Green about what  
22 Judge Simon did, how much reliance can we put

1 on Judge Simon when two things have taken  
2 place? When he has issued an order beyond his  
3 authority, beyond issuing a fine on the notice  
4 of infraction and where he wouldn't consider  
5 to listen to one argument about what the  
6 Supreme Court has said in a road map for  
7 regulating adult businesses.

8 That's all that Judge Simon dealt  
9 with was notice of infraction. Now, I move to  
10 Administrative Law Judge McCoy.

11 I have already cited to the  
12 section of the DCMR that talks about revoking  
13 Certificates of Occupancy. It is clearly the  
14 obligation of the law makers or regulation  
15 makers to set forth the standards by which a  
16 Certificate of Occupancy can be revoked. I  
17 cited the only section I found on that and the  
18 one that was governing that hearing in front  
19 of Judge McCoy, which talks about revoking a  
20 Certificate of Occupancy based on physical  
21 structural problems.

22 As I already said, Judge McCoy's

1 opinion and the matter before Judge McCoy had  
2 nothing to do with physical structural issues,  
3 such as whether there is not enough sidewalk  
4 space, etcetera. Judge McCoy, therefore, was  
5 without authority even under the governing  
6 statute and regulations to revoke the  
7 Certificate of Occupancy.

8 Moving then to the revocation of  
9 the mechanical booth license. The D.C. law  
10 that I referred to makes it absolutely clear  
11 that it is only the Mayor or the Mayor's  
12 Agents who can revoke a mechanical booth or  
13 video viewing booth license.

14 Mr. Green tried to argue earlier  
15 that the Administrative Law Judge is properly  
16 the agent of the Mayor and also said that he  
17 was not expecting that argument that I was  
18 making, even though it is in my written  
19 submissions that were provided months ago to  
20 opposing counsel.

21 If hypothetically we accepted that  
22 the Administrative Law Judge is the agent of

1 the Mayor, then this entire proceeding should  
2 disappear and ALJ McCoy's and Simon's rulings  
3 should be completely reversed immediately,  
4 because I found nothing in the law that is  
5 supposed to make an Administrative Law Judge  
6 anything but an independent decision maker,  
7 independent of the Mayor.

8 Because if he is not independent  
9 of the Mayor, that makes the Administrative  
10 Law Judge on the same plane as Mr. Green and  
11 the Mayor. That means that all that money  
12 that Mr. Montiel spent on legal counsel to  
13 even have an Administrative Law Judge hearing  
14 was a charade. It was a false adversarial  
15 process.

16 Mr. Green can't have it both ways.  
17 It was either an adversarial hearing as  
18 required by the law, by the DCMR and by the  
19 statutory law or it wasn't. So if it wasn't  
20 adversarial, it was a total, total sham  
21 hearing and should be reversed by -- as to the  
22 proceedings before Judge McCoy and Judge

1 Simon. And if it was adversarial, therefore,  
2 the Administrative Law Judge was not an agent  
3 of the Mayor and had no authority to revoke  
4 the license.

5 For all those reasons, the ALJs'  
6 decision should be reversed. Thank you.

7 CHAIRPERSON GRIFFIS: Thank you  
8 very much. Very well. That will conclude the  
9 appeal for today. I had the record open only  
10 for briefings on the court case, if we needed  
11 it, other than that, I didn't have any other  
12 indication, unless, Ms. Bailey, you had other  
13 indications of such?

14 MS. BAILEY: No, Mr. Chairman.

15 VICE CHAIR MILLER: Mr. Dixon made  
16 reference to letters from the community. I'm  
17 not sure whether you want to leave the record  
18 open for that.

19 CHAIRPERSON GRIFFIS: Right. My  
20 question --

21 MR. GREEN: Right. I'll make sure  
22 you get that.

1                   CHAIRPERSON GRIFFIS:     Well, I  
2 wonder how we would take that in the record  
3 under an appeal, is my question.

4                   VICE CHAIR MILLER:    Yes, I mean,  
5 the appellant might have a concern that you  
6 wouldn't have a chance to respond to them.

7                   MR. KATZ:     Well, not only that,  
8 but the -- I think that the regulations  
9 governing this proceeding are very clear that  
10 any such letters have to be provided at least  
11 14 days before today's hearing and I think --  
12 I believe it is too late to submit them after  
13 that.   And I have taken my time twice to  
14 review the record --

15                   VICE CHAIR MILLER:    Okay.

16                   MR. KATZ:     -- before these  
17 hearings.

18                   CHAIRPERSON GRIFFIS:    Okay.

19                   VICE CHAIR MILLER:    Okay. I hear  
20 you.   And I also think that, Mr. Dixon, we  
21 heard from you and I think we get the  
22 sentiment of the community and the decision is

1 going to be based on a legal analysis. I  
2 would guess that it probably don't address the  
3 legal issues that are raised. Okay.

4 MR. DIXON: It would probably read  
5 the same thing I have.

6 VICE CHAIR MILLER: Okay. Good.

7 CHAIRPERSON GRIFFIS: Excellent.  
8 Good. Thank you for your understanding of  
9 that. We appreciate it. Okay. In which  
10 case, we have one element open. Other than  
11 that, I don't have any other indication that  
12 we're going to have anything further in.

13 Ms. Bailey, did you have any other  
14 notes?

15 MS. BAILEY: No, Mr. Chairman.  
16 I'm not sure if you want findings of fact and  
17 conclusions of law, that's the only other  
18 thing that comes to mind.

19 CHAIRPERSON GRIFFIS: Is there an  
20 opinion of whether you would like to provide  
21 a proposed findings and conclusions of law?

22 MR. KATZ: Just as long as they

1 are considered as advisory.

2 CHAIRPERSON GRIFFIS: Mike.

3 MR. KATZ: Pardon. Just as long  
4 as they are considered as advisory, obviously.  
5 I would object if they are just signed off on  
6 without edit.

7 CHAIRPERSON GRIFFIS: I don't know  
8 if we have ever in my six year history signed  
9 off on anything, but I appreciate that. And  
10 it's an important thing actually in all  
11 seriousness and directness. Of course, it is  
12 one last vehicle that the Board sometimes  
13 allows for.

14 Frankly, there is absolutely no  
15 area of introduction of new evidence or  
16 testimony of any kind, but it's just a  
17 repackaging almost of the case presentation.  
18 I actually have differing opinions of it in  
19 this case, so I'm not so strongly in one way  
20 or the other.

21 MR. KATZ: Well, for this case, I  
22 mean, I'm satisfied enough with my arguments,

1 my written arguments before.

2 CHAIRPERSON GRIFFIS: Okay. I  
3 tend to agree.

4 MR. KATZ: And not have to do  
5 anything.

6 MR. GREEN: Mr. Chairman, Members  
7 of the Board, I hate to say it, but I think we  
8 have gas-bagged on this thing enough.

9 CHAIRPERSON GRIFFIS: Yes, yes,  
10 yes. I'm with you. I understand correctly  
11 the legal interpretation of that. Yes, okay.  
12 Very well. We can move ahead then and we will  
13 hold the record open. Mr. Green, do you have  
14 any intention, do you want to brief the court  
15 case that was provided here?

16 MR. GREEN: What was the case?

17 CHAIRPERSON GRIFFIS: It was the  
18 books.

19 MR. KATZ: Alamita Books. It was  
20 either Alamita Books or the City of Los  
21 Angeles v. Alamita Books.

22 CHAIRPERSON GRIFFIS: Right. It

1 is up to you. The opportunity is there for  
2 you to brief it if you would like.

3 MR. GREEN: All right. I mean,  
4 you know, I don't see any benefit. I mean, I  
5 think we're here again not on a Constitutional  
6 law issue.

7 CHAIRPERSON GRIFFIS: Sure, sure.  
8 Not required. Just asking.

9 MR. GREEN: Yes.

10 CHAIRPERSON GRIFFIS: Do you want  
11 to brief it?

12 MR. GREEN: Not really.

13 CHAIRPERSON GRIFFIS: Okay. There  
14 it is then. We will close the record then  
15 today. Nothing else then would be provided  
16 into the record. We have a shield at this  
17 point.

18 Ms. Bailey, Mr. Moy, if you would  
19 assist me, we can set a date for decision on  
20 this.

21 MS. BAILEY: Mr. Chairman, the  
22 next meeting of the Board is March 6<sup>th</sup>. Is

1 that too soon?

2 CHAIRPERSON GRIFFIS: Let's do it  
3 the 6<sup>th</sup>.

4 MS. BAILEY: March 6<sup>th</sup>.

5 MR. KATZ: Do the parties need to  
6 be present?

7 CHAIRPERSON GRIFFIS: No.

8 MR. KATZ: Because I'm going to  
9 have to be somewhere else.

10 CHAIRPERSON GRIFFIS: Right. And  
11 let me go to that. The first Tuesday of the  
12 month is always scheduled as our Public  
13 Meeting. Our meetings are those which we call  
14 to order and deliberate in open. It is all  
15 cases that the record is closed. There is no  
16 opportunity for anyone to address the Board,  
17 at that point.

18 You are, obviously, all welcome to  
19 be here and hear our deliberation. We are  
20 being broadcast, also you can watch, if need  
21 be on the website, but other than that, in  
22 this particular case there is no other

1 findings, there is nothing that the Board is  
2 anticipating coming in, so we can timely move  
3 to March 6<sup>th</sup>.

4 I do not know where it will be on  
5 the order of the meeting. We have at least  
6 four, if not more, cases to decide that  
7 morning. So at some point during the day it  
8 will, obviously, be called and we will have  
9 it.

10 MR. GREEN: Would it be in the  
11 morning or in the afternoon?

12 CHAIRPERSON GRIFFIS: Absolutely  
13 in the morning.

14 MR. GREEN: Okay.

15 CHAIRPERSON GRIFFIS: We will set  
16 our meeting. Often times our meetings,  
17 depending on how much deliberation, which we  
18 can't anticipate, may take us into the  
19 afternoon, but I think it will definitely be  
20 accomplished.

21 MR. GREEN: And if I cannot make  
22 it, will we be notified?

1 CHAIRPERSON GRIFFIS: About?

2 MR. GREEN: About the --

3 CHAIRPERSON GRIFFIS: About the  
4 decision?

5 MR. GREEN: Well, everything with  
6 the decision.

7 CHAIRPERSON GRIFFIS: Yes. You  
8 should be issued the order once it comes out,  
9 but I can tell you that probably the best way  
10 to do it is just to call into the office.

11 MR. GREEN: Okay.

12 CHAIRPERSON GRIFFIS: For,  
13 obviously, not an official ruling, but one of  
14 the staff members, obviously, can tell you  
15 what was accomplished in the public record.

16 MR. GREEN: Thank you.

17 CHAIRPERSON GRIFFIS: Okay. Any  
18 other procedural questions I can answer? Any  
19 other aspects?

20 MR. KATZ: I just want to thank  
21 everyone for their time. I mean, I know it  
22 has been a long day and I apologize for that.

1 MS. BAILEY: Mr. Chairman?

2 CHAIRPERSON GRIFFIS: This is what  
3 we volunteer for. Yes, Ms. Bailey?

4 MS. BAILEY: May I suggest, sir,  
5 that the 27<sup>th</sup> is when Mr. Katz is to file the  
6 brief that the Board is asking for.

7 MR. KATZ: I think we --

8 MS. BAILEY: Didn't we ask for the  
9 brief on the court case?

10 CHAIRPERSON GRIFFIS: Oh, we left  
11 it open and Mr. Green actually indicated that  
12 he did not want to brief.

13 MS. BAILEY: Oh, okay.

14 CHAIRPERSON GRIFFIS: So I think  
15 we're set.

16 MS. BAILEY: Okay.

17 MR. KATZ: Yes, we are.

18 CHAIRPERSON GRIFFIS: I wouldn't  
19 anticipate anything in at this point. Very  
20 well. If there's nothing further then, thank  
21 you all very much. Have a great evening.  
22 Thanks for coming.

1 MR. GREEN: Thank you, Mr.  
2 Chairman.

3 MR. KATZ: Thank you.

4 MR. GREEN: Members of the Board.

5 CHAIRPERSON GRIFFIS: And we will  
6 call this on the 6<sup>th</sup>. If there is nothing  
7 further, no other business for the Board,  
8 let's adjourn.

9 (Whereupon, at 5:41 p.m. the  
10 Public Hearing was concluded.)

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