

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY,

JULY 3, 2007

+ + + + +

The Public Meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Ruthanne G. Miller, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

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

OFFICE OF ZONING STAFF PRESENT:

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

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.
SHERRY GLAZER, ESQ.
MARY NAGELHOUT, ESQ.

This transcript constitutes the minutes from the Public Meeting held on July 3, 2007.

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

10:20 a.m.

CHAIRPERSON MILLER: The meeting will, please, come to order. Good morning, ladies and gentlemen. This is the July 3rd Public Meeting of the Board of Zoning Adjustment of the District of Columbia.

My name is Ruthanne Miller. I am the Chair of the BZA. Joining me today are Vice Chair, Mr. Curtis Etherly, to my right, to my left is Mr. John Mann representing the National Capital Planning Commission, Mr. Marc Loud is not with us today and also we don't have a Zoning Commission Member with us, at this point. To Mr. Mann's left is Mr. Clifford Moy from the Office of Zoning, Sherry Glazer from the Office of Attorney General, Bryan Stockton, who is an intern with OAG, and Ms. Beverley Bailey with the Office of Zoning.

Copies of today's meeting agenda are available to you and are located to my left in the wall bin near the door. We do not

1 take any public testimony at our meeting
2 unless the Board asks someone to come forward.

3 Please, be advised that this
4 proceeding is being recorded by a Court
5 Reporter and is also webcast live.
6 Accordingly, we must ask you to refrain from
7 any disruptive noises or actions in the
8 hearing room. Please, turn off all beepers
9 and cell phones.

10 Does the staff have any
11 preliminary matters?

12 MR. MOY: Yes. Good morning,
13 Madam Chairperson, Members of the Board. We
14 do have one and as you said Marc Loud will not
15 be present or participating today and
16 especially this morning, and that goes to
17 Application No. 17609 of First Baptist Church.

18 Now, I'm going to do the reading
19 for that advertisement. Pursuant to 11 DCMR
20 3103.2, for a variance from the limitation on
21 the number of stories under section 400, a
22 variance from the lot occupancy provisions

1 under section 403, a variance from the court
2 requirements under section 406 and a variance
3 from the nonconforming structure provisions
4 under subsection 2001.3, to allow the
5 construction of a four story addition to an
6 existing church in the R-4 District at
7 premises 710 Randolph Street, N.W., that's in
8 Square 3131, Lots 41 and 823.

9 The staff also notes that the
10 application was amended with withdraw variance
11 relief from section 400 and 406. And as I
12 said, previously, Marc Loud is not present
13 today and he is one of three participating
14 Members on the Board. Shall I continue or do
15 you want to pick up?

16 CHAIRPERSON MILLER: Okay. I
17 think that where you are going is that we need
18 to have a quorum of three of the Members who
19 sat on this case to decide it. And as I
20 understand, we don't even have an absentee
21 ballot in this case. So therefore, we
22 couldn't come to a decision on this case

1 today.

2 So I would like to ask if we could
3 schedule a special Public Meeting on just that
4 decision for next Monday morning, perhaps
5 after we conclude with the hearing of the
6 morning.

7 MR. MOY: Yes, ma'am.

8 CHAIRPERSON MILLER: Tuesday.

9 MR. MOY: That's possible. I'm
10 assuming you are referring to Tuesday, July
11 10th for a Special Public Meeting.

12 CHAIRPERSON MILLER: I am. I
13 don't know if I misspoke on that, but, yes, I
14 mean, Tuesday, July 10th.

15 MR. MOY: Yes.

16 CHAIRPERSON MILLER: Okay. So
17 this would be the notice then that that's when
18 we will be deciding that case. Okay. Thank
19 you. Would you call the first case then on
20 the agenda?

21 MR. MOY: Yes, ma'am. That would
22 be a request for modification of approved

1 plans to extend the expiration date of the
2 final order and a waiver of the six month time
3 requirement to Application No. 15340-A of N.V.
4 Limited Partnership, pursuant to section 3129
5 of the Zoning Regulations.

6 This is a modification to an
7 originally approved modification of approved
8 plans to Application No. 15340. Staff is not
9 going to read the entire advertisement to the
10 original approval plans, except to say that
11 originally this was for a special exception
12 under section 2516 to allow two or more
13 buildings on a subdivided lot.

14 There were multiple variance
15 requests. In addition, this is for a
16 theoretical lot subdivision and construction
17 of 34 single-family detached dwellings in an
18 R-1-A District at premises 2500 Block of 49th
19 Street, N.W. That's in Square 1397.

20 On April 3, 2007, the applicant, A
21 & S Associates, LLC, represented by
22 Greenstein, LeLorme and Luchs, PC, submitted

1 a request for minor modification of approved
2 plans to extend the expiration date of final
3 order and waiver of the six month time
4 requirement for modification pursuant to
5 section 3129. And that filing is identified
6 in your case folders as Exhibit 47.

7 The applicant also filed a
8 supplemental dated June 26, 2007 and that
9 filing is identified as Exhibit 49. The staff
10 notes that this filing also includes a revised
11 site plan and seven conditions. The staff
12 also notes that the ANC, the ANC-3D has filed
13 a response letter pursuant to section 3129.4
14 that is dated June 12, 2007 and is identified
15 in your folder as Exhibit 48.

16 This should be treated as a
17 preliminary matter, because under section
18 3129.4, parties are allowed to respond within
19 10 days of the filing for a modification
20 request.

21 Finally, staff will also -- well,
22 the Board is to act on the merits of the

1 request for minor mod and waiver of the six
2 month time requirement. Ah, here's my final.
3 We also have also a second preliminary matter.
4 Two letters from non-parties in the original
5 application. One from Anthony Herman dated
6 June the 26th and the second letter is from
7 Susan Mills. It's in the record identified as
8 Exhibit 51. The first filing is identified as
9 Exhibit 50.

10 And that completes the staff's
11 briefing, Madam Chair.

12 CHAIRPERSON MILLER: Thank you.
13 Why don't we start with preliminary matters.
14 The first being whether we want to waive the
15 time requirements for the ANC to have filed
16 their response. And I would be in favor of
17 waiving that, in that I don't see that there
18 is a prejudice to any party and I think there
19 is good cause to hear from the ANC in this
20 case. And it was minor. Okay. Then we will
21 accept the ANC's filing in the record.

22 The second one goes to letters

1 from neighbors or on behalf of neighbors. The
2 regulations that we are dealing with are under
3 11 DCMR 3129. And the one that I see that's
4 germane to this says 3129.5 says "The decision
5 on a request for modification of plans shall
6 be made by the Board on the basis of the
7 written request, the plans submitted herewith
8 and any responses thereto from other parties
9 to the original application."

10 That's why there is a question
11 about the letters on behalf of the neighbors.
12 However, I don't see any regulation that would
13 preclude our taking those letters into the
14 record. I just think that when we make our
15 decision, it couldn't be just based on those
16 letters. It needs to be based on the request
17 and the responses from parties. Is there any
18 objection to taking those into the record?

19 Okay. Then those are deemed into
20 the record. And before we go any further, I
21 think we need to talk about whether or not we
22 waive another one of the regulations under

1 3129 and that goes to our own voting on this
2 case. 3129.6 says "No Member shall vote on a
3 request for modification of plans unless the
4 Members participated in and voted on the
5 original decision or read the record."

6 Also before deciding that, I want
7 to read the regulation for a waiver, which I
8 have been somewhat referring to and that's
9 3100.5 which says "Except for 3100 through
10 3105, 3129.5 and 3125.4, the Board may, for
11 good cause shown, waive any provisions of this
12 chapter if in the judgment of the Board the
13 waiver will not prejudice the rights of any
14 party and is not otherwise prohibited by law."

15 So none of us participated on this
16 case on the previous order that's being asked
17 to be modified. There are two previous orders
18 in 1990. So based on two things, I would say.
19 Based on one, the request for modification of
20 plans goes to extending the expiration of the
21 orders. And I think that that's a legal
22 question that doesn't turn on the facts that

1 were heard in that case.

2 So for that reason, I would
3 suggest we waive it. And for the second
4 reason, it would be practicality, that in
5 order for this to be heard, we would need to
6 waive it. What's the feelings of my
7 colleagues on this?

8 BOARD MEMBER MANN: I think your
9 reasoning seems precise and I have no
10 objection, if that's the position that the
11 Chair wants to pursue.

12 CHAIRPERSON MILLER: Okay. Then
13 let's get to the merits of the case. As I see
14 this, simply, the application is seeking what
15 -- oh, they are asking for one more waiver and
16 that is to waive 3129.3, "A request for
17 modification of plans shall be filed with the
18 Board not later than six months after the date
19 of the final order approving the application."

20 Okay. This is 17 years later and
21 this is what we're to consider. I think this
22 was also considered once already in 1990 in

1 the second order issued in this case. The
2 difference being that then, the time period
3 hadn't expired and in this case it has
4 expired.

5 My view on this simply is that I
6 don't believe we have authority to revive an
7 order that is expired to extend a date that is
8 well beyond the date that was authorized in
9 the order. There were two orders in this
10 case. One was the initial order and one was
11 another order extending the time period to
12 complete the projects within a 10 year period.
13 And that has since lapsed. And I think had
14 the applicant brought this application before
15 it had lapsed, we would be in a position to
16 consider whether this was a minor
17 modification.

18 But at this point, I don't believe
19 that there is any authority to do that, at
20 this point. And I would like to hear from
21 others.

22 VICE CHAIR ETHERLY: So it would

1 be your sense, Madam Chair, that in order to
2 move forward in some fashion, the applicant
3 would have to bring a new application
4 altogether, essentially, seeking the same
5 relief, but, essentially, just updating the
6 time frame?

7 CHAIRPERSON MILLER: I didn't go
8 there, but I can. I just think that this
9 order is completed. That they can't come in
10 under this order. It wasn't clear to me based
11 on the pleadings whether or not they would
12 need special exception relief to do what they
13 want to do or not and I think that in the
14 first instance, that would be brought to the
15 Zoning Administrator. And then if they were
16 turned down by the Zoning Administrator, they
17 could appeal to us. But I don't believe that
18 we can revive an order that has lapsed.

19 VICE CHAIR ETHERLY: Lapsed.

20 CHAIRPERSON MILLER: They were
21 authorized to do something within a certain
22 period of time and that has to have some

1 meaning. I mean, we have regulations that go
2 to, you know, for instance, you have to do
3 something within two years or else your right
4 to do it lapses.

5 And I think that this is
6 comparable. When they got the first
7 extension, the order was very much alive and
8 they could modify it. At this point, I don't
9 see that.

10 BOARD MEMBER MANN: I don't have
11 any objection to your line of reasoning on
12 this. I would support your position.

13 CHAIRPERSON MILLER: Okay. In
14 which case, if there's no more deliberation on
15 this, I would move to deny the request for
16 modification of approved plans to extend the
17 expiration date of final order and waiver of
18 six month time requirement to Application No.
19 15340-A of N.V. Limited Partnership, pursuant
20 to section 3129 of the Zoning Regulations.
21 And do I have a second?

22 BOARD MEMBER MANN: Second.

1 CHAIRPERSON MILLER: Further
2 deliberation? All those in favor say aye.

3 ALL: Aye.

4 CHAIRPERSON MILLER: All those
5 opposed? All those abstaining? Would you
6 call the vote, please?

7 MR. MOY: Yes, ma'am. Staff would
8 record the vote as 3-0-2 on the motion of the
9 Chair to deny the request for modification of
10 approved plans and waiver of the six month
11 time period, seconded by -- the motion
12 seconded by Mr. Mann, also in support of the
13 motion Mr. Etherly. And we have the Zoning
14 Commission Member and a Board Member not
15 participating, not voting today.

16 CHAIRPERSON MILLER: Thank you.

17 MR. MOY: The next application for
18 decision is Application No. 17613 of Sonja
19 Sweek, pursuant to 11 DCMR 3104.1, for a
20 special exception to establish a child
21 development center, 100 children and 18 staff,
22 under section 205 in the R-4 District at

1 premises 1359 C Street, S.E., that's in Square
2 S-1039, Lot 801.

3 The staff notes that the
4 application was amended at the hearing for 68
5 children and 21 staff on-site at any one time.
6 Also, there was an amendment towards the
7 variance from the off-street parking
8 requirements under section 2101.1 and a
9 variance for enlargement of a nonconforming
10 structure under section 2001.3.

11 On May 22, 2007, the Board
12 completed public testimony, closed the record
13 and scheduled its decision on July 3rd. The
14 Board requested post-hearing documents from
15 the applicant to address multiple questions.
16 Also, the record was open for receipt of an OP
17 supplemental report as well as a supplement
18 report from DDOT and a report from the D.C.
19 Fire Department, the ANC-6B.

20 All parties -- the record also
21 allowed for all parties to respond to the
22 filings. In response, the applicant filed --

1 made a filing and that is identified in your
2 case folders as Exhibit 48. It's dated June
3 8, 2007. We also have a filing from the ANC,
4 ANC-6B dated May 30, 2007 identified as
5 Exhibit 46. The Office of Planning
6 supplemental report dated June 18, 2007 is
7 recorded as Exhibit 47.

8 We also have a response to these
9 filings from the C Street opponents. They
10 were the party in opposition. That filing is
11 dated June 25, 2007, identified as Exhibit 48.

12 Finally, staff notes that -- two
13 preliminary matters. One is the filing from
14 the Department of Transportation, a letter
15 dated June 28, 2007, identified as June 50th--
16 June 50th -- Exhibit 50. This is untimely,
17 because that filing was due June 11, so it's
18 several days late. And also, Exhibit 49 is a
19 copy of a letter that was addressed to Mr.
20 Laden of DDOT from a Rebecca Claster dated
21 June 22nd. This is not -- the record wasn't
22 open for receipt of this copy of the letter to

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1 DDOT.

2 The staff will conclude, unless
3 staff interprets that as part of the Board's
4 earlier request. I'll leave it at that.

5 CHAIRPERSON MILLER: I'm sorry,
6 Mr. Moy, I'm not sure if I heard, but I did
7 not receive a copy of the DDOT report and
8 neither did Mr. Etherly. And I wasn't sure
9 what you said about that. Maybe we ought to
10 take a quick look at it to see whether it
11 would change our deliberations in any way.

12 MR. MOY: Okay. I'll get that to
13 you as you -- as the Board deliberates.

14 CHAIRPERSON MILLER: Okay. Okay.
15 All right. Then I'll just start. I think
16 that the Board recognized at the hearing that
17 there were various interests and concerns and
18 policies that were coming into play in this
19 case that certainly a child care center is
20 valued in the community and also concerns
21 about traffic and issues to that extent.

22 However, what I want to say is

1 that those issues do factor into our analysis,
2 but our analysis is a little bit larger than
3 that, that we are governed by the regulations
4 and we need to look at tests and standards set
5 forth in the variance statute and regulations
6 and cases and in the special exception.

7 So that's how we approach this
8 case. I'm just going to pause for a second,
9 because before I go into my deliberations, I
10 do want to take a look at the DDOT report and
11 I recognize that the opponents to this case
12 made some arguments with respect to not
13 getting all the pleadings and not having a
14 chance to cross examine. So I want to just
15 take a look at this report before I go
16 further.

17 If anybody else has any
18 preliminary comments they want to make, feel
19 free. Well, in fact, I think what I would
20 like to do is in light of those comments and
21 in light of the fact that we are deliberating
22 on this and the Board is reading the DDOT

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1 report, I would like to read it into the
2 record, so that it is here, so that everyone
3 knows what we have considered.

4 It is dated June 20, 2007. The
5 Board just received it. It says "The District
6 Department of Transportation has previously
7 reviewed and approved the original
8 application. This report addresses changes
9 made to the proposed project and additional
10 observation of the site.

11 DDOT has no objections to the
12 proposal. DDOT has been notified by Office of
13 Planning staff that the applicant has modified
14 the application by reducing the total number
15 of students enrolled from 100 to 68 with a
16 child care maintaining 18 staff members. DDOT
17 staff conducted several site visits between
18 June 11th and June 14th to observe if there
19 were any potential conflicts between the
20 center and Payne Elementary School located
21 across 14th Street, S.E.

22 Staff observed the drop-off

1 activity for the elementary school occurred
2 near the intersection of 15th and C Street,
3 S.E., with parents dropping off students on
4 both roads. The applicant submitted to DDOT
5 a consent form given to all parents and
6 caregivers as part of the application process
7 where it clearly outlines the drop-off and
8 pick-up policy of the school.

9 All activity will occur on 14th
10 Street, S.E., where parents will line up along
11 the curb to drop-off children in the morning.
12 For pick-up, parents are instructed to call
13 ahead on a cell phone as they approach the
14 center and staff will walk their children to
15 the vehicle.

16 DDOT staff observed that 14th
17 Street, S.E., near the project site serves as
18 the rear yard for the properties located to
19 the south facing Kentucky Avenue, S.E., with
20 most properties having off-street parking pads
21 or carports. The street was free of parked
22 cars each day of observation. The reduced

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1 enrollment and detailed drop-off and pick-up
2 procedures will improve the operations of the
3 center and overall safety. DDOT has no
4 objections to the revised project proposal."

5 Okay. This kind of rolls into the
6 procedural issues that the C Street opponents
7 raised in their most recent pleading. And I
8 want to highlight them and address them. They
9 say, first of all, that applicant hasn't
10 complied with the procedures necessary to
11 apply for variances and no adequate public
12 notice.

13 What happened in this case was
14 that Office of Planning noted that the
15 applicant may need variance relief as well and
16 the Board agreed at the hearing. This was
17 discussed at the hearing, so that all the
18 parties who were at the hearing were on notice
19 of that. They were all given an opportunity
20 to address the variance test, including the
21 applicant. So I don't believe that the
22 opponents were prejudiced by our not having

1 sent out new notices about variance relief.

2 Do my colleagues feel otherwise?

3 Okay. BZA scheduled to provide the ANC
4 reasonable time to hear the issues and submit
5 conclusions to BZA. I don't think that's the
6 case either. We have submitted here another
7 ANC report and I believe that the ANC chose
8 not to address the variance question. I don't
9 see any evidence that our schedule did not
10 allow them to do that.

11 I also think that the opponents
12 filed a very full pleading addressing the
13 variance test, so there doesn't seem to be any
14 prejudice that they didn't have time to
15 address the variance. They do also raise some
16 objections like with respect to this submittal
17 by DDOT that they didn't have a chance to
18 respond or cross examine DDOT on their
19 conclusions.

20 I would just say that I don't
21 think that they are prejudiced by that, but
22 that will remain to be seen after our

1 deliberations. DDOT does -- we didn't get a
2 chance to cross examine DDOT either, and so we
3 are just left with what's in this report. And
4 any gaps or weaknesses in this report are
5 there.

6 Okay. As I was saying before that
7 this case is difficult in the sense that, you
8 know, there is a very important worthwhile
9 goal that's attempting to be served here and
10 that's having a child care center which is in
11 need in the community. But what we were
12 saying to the applicant is that we can't just
13 look at this and say, you know, there is a
14 need here and we approve it.

15 It has to fall into the variance
16 test, in addition to the special exception,
17 and the variance test is not necessarily an
18 easy one to reach. And therefore, we brought
19 that to the applicant's attention and
20 suggested that they contact the Office of
21 Zoning or whoever to try to get an
22 understanding of the variance test and the

1 applicant did submit another pleading as did
2 the opponents and the ANC.

3 The first test is uniqueness. We
4 have two variances here and but probably the
5 uniqueness of the property would be -- is
6 usually the same. And that uniqueness needs
7 to give rise to a practical difficulty in
8 conforming with the regulations.

9 I think that the opponents made a
10 very good argument that the property is not
11 unique. And so that's where I think that this
12 initially falls down with respect to being
13 able to get the relief that they are seeking.
14 The opponents were saying that even though
15 Office of Planning said that they couldn't
16 provide parking on their site, that the
17 opponents were saying well, neither can most
18 of the buildings in the immediate vicinity, I
19 believe, and therefore, that they weren't
20 necessarily unique.

21 And you have to tie that to the
22 practical difficulty. You know, it may be

1 that others may share a similar situation, but
2 there is still something particularly unique
3 that gives rise to the practical difficulty.
4 And in this case, the practical difficulty, I
5 think, that the applicant was showing was,
6 number one, that they couldn't provide the
7 parking for the special exception that they
8 were seeking or for the variance, but not
9 necessarily that they couldn't comply with the
10 regulations without having the parking or that
11 their situation was unique from others.

12 And the same with adding the third
13 story, the opponents seem to say that there
14 were -- all the other buildings in the
15 neighborhood also were only two stories and
16 so, therefore, they weren't unique that way.
17 And the practical difficulty went to being
18 able to have this child development center,
19 not necessarily again complying with the
20 regulations.

21 And even with not being able to
22 have this child development center, that

1 wasn't really fully developed with respect to
2 the economics which we started to explore. So
3 I think that this case has difficulty in those
4 two most basic prongs, which are not easy to
5 meet necessarily.

6 Do others want to add anything?

7 VICE CHAIR ETHERLY: Thank you,
8 Madam Chair, for your analysis in terms of
9 setting the context for this case. I will
10 agree with your remarks in their entirety and
11 also echo as you indicated the difficulty with
12 which I met this particular case, least of
13 which, because as we heard in significant
14 portion from members of the community who
15 testified, there is absolutely no disagreement
16 on the part of this Board or this particular
17 Board Member that day care slots are, indeed,
18 very critical to every aspect of our
19 community.

20 Capitol Hill, from Capitol Hill to
21 Georgetown to just about every corner of this
22 city, day care slots are absolutely at a

1 premium. And it is, indeed, something that I
2 can perhaps, given recent events in my own
3 personal life, speak to with very personal and
4 direct knowledge, being a new father myself.

5 That being said, however, I would
6 agree with your remarks as they relate
7 specifically to the variance test and the
8 other tests, but specifically let me speak to
9 the variance test for a moment. The
10 additional submittals that were provided by
11 the applicant, I believe, were helpful in
12 terms of further fleshing out the applicant's
13 plan, the applicant's approach for the
14 proposed property and use.

15 But I agree wholeheartedly that I
16 believe where this application encounters a
17 fatal flaw is on those first and second prongs
18 of the variance test. I perhaps would want to
19 speak a little further to one of the arguments
20 that was raised by the applicant and that was,
21 in particular, the issue of the need for the
22 third floor.

1 The applicant indicated to an
2 extent during oral testimony and in some more
3 detail in her written submission some of the
4 challenges that brought about the need for, if
5 you will, certain core safety code, health and
6 fire considerations that must be addressed or
7 would need to be addressed on the first floor
8 of the building as it currently exists in
9 order to create an adequate learning
10 environment and also an environment that is,
11 indeed, co-compliant from an egress and life
12 safety standpoint.

13 The arguments, however, left me
14 somewhat wanting in terms of details to flesh
15 out and support those considerations, however.
16 As my colleagues are very much aware, this
17 Board is not unfamiliar with dealing with
18 questions. The domino-like considerations, if
19 you will, that flow from the need to place
20 stairwells in a certain location, emergency
21 exit locations, if you will, in a certain
22 place and those decisions in turn dictating

1 other architectural and building decisions
2 from the standpoint of the rest of the
3 project.

4 Here, however, again I felt that
5 the considerations that were raised just
6 simply did not provide enough evidence to
7 support as the applicant indicated in her
8 submittal at Exhibit No. 45, "Safety code,
9 health and fire considerations severely limit
10 usable space on the first floor pushing the
11 older children to upper floors. The reception
12 area, the existing kitchen, the isolation
13 room, the staff bathroom existing and a child
14 bathroom must all be housed on the first
15 floor. In order to house enough children for
16 a viable business, given the space limitations
17 on the first floor, a third floor is
18 necessary."

19 I think in order for us to
20 countenance that argument in a measurable way
21 for the purposes of the variance analysis,
22 simply put more meat would need to be attended

1 to this particular bone. And I just did not
2 find the application to contain that necessary
3 additional meat, if you will. And I don't say
4 it in that way to be flip.

5 Again, I think that the discussion
6 that we had was a very important one about
7 many of the considerations, many of the
8 challenges that growing families on the Hill
9 and in other parts of our city, in particular
10 on the Hill, are facing in terms of finding
11 placements.

12 But the variance test is very
13 clear and as relates to this particular
14 building, again, I think, Madam Chair, you hit
15 it right on the head when speaking to the C
16 Street opponent response as it relates to the
17 differences, the uniqueness, if you will, that
18 were alleged with regard to this particular
19 property.

20 I did not find the case
21 presentation from the applicant to be as
22 compelling as I would need it to be in order

1 to satisfy the variance test.

2 With respect to just broadly
3 speaking some of the other aspects here, I did
4 not necessarily find so much trouble with
5 traffic considerations. As my colleagues will
6 recall, there was a considerable amount of
7 discussion with regard to the potential
8 traffic impact at this intersection also with
9 respect to the interplay, if you will, between
10 area first responders, fire and EMS station in
11 the vicinity. Another consideration, other
12 residential uses in the area.

13 I found those arguments to be
14 somewhat less persuasive as well. So I would
15 highlight that for my colleagues. But in the
16 final analysis here, as was indicated in the
17 staff's summary of this case, we have two
18 variances as they relate both to the parking
19 and the expansion and then the special
20 exception. As we move forward in terms of our
21 deliberation, I am sure we will perhaps
22 articulate. We will articulate how we handle

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1 all of those three tests, if you will, but
2 they are interrelated.

3 And I believe if one fails, it
4 almost, in essence, requires the failure on
5 all accounts. But from my standpoint, the
6 question and the issue here is not whether or
7 not a child care center should do at this
8 site. That wasn't the fatal issue for me
9 here. The operation as it is currently
10 proposed, I think, is more the critical
11 question.

12 In particular, that expansion,
13 that issue of the third floor. I am perhaps
14 not willing to go as far as the Office of
15 Planning went in some of its discussion with
16 regard to the discussion of character, if you
17 will, with regard to the third floor itself.
18 But I simply believe that the case as it was
19 laid out by the applicant simply was not
20 successful in articulating the rationale for
21 the introduction of the third floor.

22 With that, Madam Chair, I would

1 associate myself with your remarks and be
2 prepared to move forward accordingly. Thank
3 you.

4 CHAIRPERSON MILLER: Thank you.
5 You know, I don't know if this is echoing you
6 or not, but I just want to clarify that I
7 think the problem is that the applicant didn't
8 make the case about the uniqueness and the
9 practical difficulty. I can't say that, you
10 know, it definitely could not be made, but it
11 just hasn't been made and the opponents
12 raised, you know, facts to the contrary about
13 the uniqueness and exceptional condition and
14 practical difficulty that were very
15 compelling.

16 VICE CHAIR ETHERLY: I would
17 agree, Madam Chair, and I would definitely
18 characterize your comments as an echo of my
19 comments.

20 CHAIRPERSON MILLER: Okay. Okay.
21 Good. All right. And then the third prong of
22 the variance test is that there is no

1 substantial adverse impact. And I think this
2 is probably a little bit different from where
3 you are, Mr. Etherly, but, I mean, I found
4 that there were questions raised at the
5 hearing that the Board said, you know, that
6 they needed more information on, such as
7 impact on the bike lanes, impact on emergency
8 route, impact on loading and traffic, impact
9 on parking, effect on the driveway for the
10 Kentucky Court's development.

11 And not that I can conclude that
12 there's an adverse impact on all of these, but
13 I still feel left hanging on them. And I
14 think that DDOT's report is somewhat
15 conclusory and I don't think that we should
16 necessarily rely on that too much in that the
17 parties didn't have a chance to cross examine
18 DDOT.

19 But I think in the final say, it's
20 the applicant that has the burden of proof on
21 the relief that they are seeking. And so
22 because these questions are unanswered for me,

1 I don't believe that they have met the burden
2 of proof.

3 VICE CHAIR ETHERLY: And I would
4 note, Madam Chair, as you concluded your
5 remarks, I'll definitely emphasize that that
6 is perhaps where we diverge. We are reaching
7 definitely the same conclusion and I am
8 certain the same outcome, but I would perhaps
9 offer a different spin, if you will, in that
10 I would credit the Department of
11 Transportation's report and the lack of hard--
12 I don't want to say hard core, but, the lack
13 of any evidence to suggest that there is some
14 rationale for considering conflicts, if you
15 will, with the ability of fire and EMS in the
16 area to respond.

17 Similarly, while I do recall with
18 great specificity some of the concerns that
19 were raised about the bike lane, I was left
20 wanting with regard to any deleterious impact
21 on the continued operation and prosperity of
22 that bike lane, were the application to be

1 granted. So again, they are perhaps minor
2 points in terms of the ultimate outcome that
3 we are moving toward, but I would just simply
4 note that we do differ on kind of those final
5 two points. Thank you.

6 CHAIRPERSON MILLER: Okay. Let me
7 just say this. I think that with respect to
8 the variance test that if they don't meet, if
9 the applicant doesn't meet the first two
10 prongs, we don't even need to reach the third
11 prong about adverse impact. And I also think
12 that if they can't meet the variance test,
13 then they can't meet the special exception
14 test, which is also before us for use as a
15 child care center under 205, because I don't
16 believe that we could find that the operation
17 is in harmony with the general purpose and
18 intent of the Zoning Regs, if we find that
19 they need variance relief and they didn't meet
20 that test.

21 VICE CHAIR ETHERLY: This, too,
22 would be an area where we will diverge.

1 CHAIRPERSON MILLER: Okay.

2 VICE CHAIR ETHERLY: And it is a
3 familiar point of divergence for us. In
4 principle, I agree with you wholeheartedly
5 that at a certain point if you don't get past
6 even step one of the variance test, the rest
7 of the conversation, to a large extent, does
8 indeed become academic. I believe it is
9 perhaps important here to talk in a little
10 further detail, one perhaps just because of
11 the general principle of what we're talking
12 about and while that may not necessarily have
13 an impact on the substance of the zoning, I
14 think the general principle is one that again,
15 I don't want to be lost on the applicant, and
16 the Chair said it.

17 She said it at the outset in her
18 remarks in that again, this is not disputing
19 the importance of child care options on the
20 Hill or in any part of our city, but what it
21 is about in terms of the inquiry is the
22 context and the manner in which those options

1 are provided in a particular location.

2 So I am perhaps erring on the side
3 of speaking a little more broadly and putting
4 it quite frankly, perhaps just call me a
5 softy, because as I alluded to I'm a week into
6 being a new father myself, so perhaps I'm just
7 really being a soft shoe now in a way that
8 perhaps would have been somewhat different,
9 you know, were we sitting at the same juncture
10 three weeks ago.

11 But that being said, I think the
12 outcome still is one that is dictated by the
13 variance test as it has been articulated by
14 the Chair. But the Chair is absolutely
15 correct and I agree with her wholeheartedly
16 that the outcome on the variance test to an
17 extent renders the special exception inquiry
18 moot for the most part, because clearly the
19 applicant has noted that there is a specific
20 number that she needs to reach in order to
21 make this viable.

22 As the Chairman indicated in her

1 remarks, there perhaps could have also been a
2 further articulation of that issue of
3 viability at 68 versus some smaller number,
4 but I will most certainly not verge into any
5 discussion in this venue, at this time, that
6 could be taken as what would the magic number
7 be?

8 There are any number of options
9 that the applicant may want to entertain at
10 the conclusion of whatever action the Board
11 deems to take, but I agree generally speaking
12 and broadly with you, Madam Chair, that the
13 variance outcome renders much of the remaining
14 discussion moot and academic, if you will, but
15 I'm just taking a little bit of liberty to
16 speak in a little more length, just because
17 the principle is one that I just don't want to
18 get confused.

19 We had a lot of discussion here
20 about what the applicant was trying to do. We
21 had a lot of discussion about the importance
22 of day care placements and I simply don't want

1 our action to be mistaken for some statement
2 on the appropriateness of day care at this
3 site. I just think the application as it is
4 currently proposed and articulated didn't meet
5 the test. And I just -- so I'll just leave it
6 at that, Madam Chair. Thank you.

7 CHAIRPERSON MILLER: Okay. Well,
8 I agree with your last comments. You know, I
9 think I want to say a little bit more about
10 the variance test, because I don't believe
11 that the applicant is really all that familiar
12 with it and I'm sure that it is disconcerting
13 to the applicant to be, you know, denied being
14 able to open this child care center. And I
15 think I just need to give a greater context of
16 what we're bound by.

17 And in looking at the variance
18 test, there are three prongs. And the first
19 is an exceptional condition or unique and
20 basically the case law has said "To support a
21 variance that is fundamental, the difficulties
22 are hardships due to unique circumstances

1 peculiar to the applicant's property and not
2 to the general conditions in the
3 neighborhood."

4 Therefore, we have heard in this
5 case that the conditions of this property are
6 not peculiar or unique to the neighborhood.
7 And that practical difficulty, it said that
8 "The strict application of any regulation
9 would result in peculiar and exceptional
10 practical difficulties to or exceptional or
11 undue hardship upon the owner of such property
12 and that the authorizing of the appeal would
13 relieve such difficulties or hardship."

14 And finally, without substantial
15 detriment is the third prong, that "Such
16 relief can be granted without substantial
17 detriment to the public good and without
18 substantially impairing the intent, purpose
19 and integrity of the Zone Plan as embodied in
20 the Zoning Regulations."

21 The substantial detriment aspect,
22 I'm not finding that there is going to be

1 substantial detriment to the public good. And
2 I was looking more towards impairing the
3 intent, purpose and integrity of the Zone
4 Plan, that if you -- if they need a variance,
5 I don't know how they can get permission to
6 operate as a special exception. They can't.

7 But if we want to look at any
8 other aspects of the special exception to
9 address, it was -- relief that was sought
10 before us, we can. Okay. We have addressed
11 them. I think we have talked about the
12 biggest issues were the bike lane, which I
13 find an important issue, but the case doesn't
14 turn on it.

15 And I don't think it turns on the
16 traffic necessarily either. It really turns
17 on meeting the variance test. Okay. Anything
18 else people want to say on this?

19 BOARD MEMBER MANN: I don't think
20 there's much I could add to the deliberations,
21 but I will agree that on -- the first two
22 prongs of the variance test weren't met.

1 CHAIRPERSON MILLER: Okay. And I
2 guess, I think Mr. Moy made reference to this,
3 but I will as well that we do have a May 30,
4 2007 ANC report that opposed the request for
5 special exception when it was advertised with
6 100 children and 18 staff. And they get into
7 the traffic and safety requirements. And I
8 think that we have addressed them
9 sufficiently.

10 I mean, especially because we are
11 really relying on the variance test for the
12 most part and they only address the special
13 exception test. Any further deliberation? Do
14 we have a motion? Okay. I would move to deny
15 Application No. 17613 of Sonja Sweek, pursuant
16 to 11 DCMR section 3104.1, for a special
17 exception to establish a child development
18 center for 68 children and 21 staff on-site at
19 any one time and for variance from off-street
20 parking requirements section 2101.1 and
21 variance for enlargement of a nonconforming
22 structure section 2001.3 in the R-4 District

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1 as premises 1359 C Street, S.E. Do I have a
2 second?

3 BOARD MEMBER MANN: Second.

4 CHAIRPERSON MILLER: Further
5 deliberation? All those in favor say aye.

6 ALL: Aye.

7 CHAIRPERSON MILLER: All those
8 opposed? All those abstaining? And would you
9 call the vote, please?

10 MR. MOY: Yes, ma'am. Staff would
11 record the vote to deny the application
12 seconded by Mr. Mann, also in support of the
13 motion Mr. Etherly. We have a Zoning
14 Commission Member and a Board Member
15 participating, but not voting. So again, the
16 vote is recorded as 3-0-2.

17 CHAIRPERSON MILLER: Thank you.

18 MR. MOY: The next application for
19 decision is Application No. 17607 of Ike or
20 Ike Agbim, pursuant to 11 DCMR 3104.1, for a
21 special exception to construct a four unit
22 apartment building under section 353 in the R-

1 5-A District at premises 721 49th Street,
2 N.E., that's in Square 5179, Lot 60 and 61.

3 On May 15, 2007, the Board
4 completed public testimony, closed the record
5 and scheduled its decision on July 3rd. The
6 Board requested post-hearing documents from
7 the applicant. The record was kept open to
8 allow a report from the ANC-7C as well as a
9 report from the Department of Transportation
10 and, of course, any filings, any responses
11 from the party in opposition.

12 In your case folder are two
13 filings. One is from the applicant,
14 identified as Exhibit No. 29. This is
15 untimely filed. It was received in the office
16 yesterday, July 2nd, and we also have a DDOT
17 report which was submitted today, July 3rd,
18 and is identified as Exhibit 30.

19 The Board is to act on the merits
20 of the special exception request to construct
21 a four unit apartment building under section
22 353. And that completes the Board's briefing,

1 Madam Chair.

2 CHAIRPERSON MILLER: Thank you. I
3 guess as a preliminary matter, we need to
4 determine whether to waive the untimeliness,
5 Mr. Moy, these two filings.

6 MR. MOY: Yes, ma'am.

7 CHAIRPERSON MILLER: Yes, okay, to
8 waive the time requirements. I think they are
9 basic to this case, so that we should accept
10 them into the record.

11 VICE CHAIR ETHERLY: I have no
12 objection.

13 CHAIRPERSON MILLER: Okay. Then
14 as to the merits, would someone like to start
15 the discussion?

16 BOARD MEMBER MANN: Yes, Madam
17 Chair. Would you prefer that I discuss the
18 merits of the case first or do you think it
19 would be appropriate to act on this case under
20 a motion?

21 VICE CHAIR ETHERLY: I have no
22 objection, Madam Chair, to moving forward

1 under a motion.

2 CHAIRPERSON MILLER: I don't have
3 an objection to that. We'll still fully
4 deliberate it.

5 BOARD MEMBER MANN: Yes.

6 CHAIRPERSON MILLER: Okay.

7 BOARD MEMBER MANN: We can still
8 go through all the aspects of it. It would be
9 my motion then to approve Application No.
10 17607 of Ike Agbim, for a special exception to
11 construct the four unit apartment building
12 under section 353. This one being at 721 49th
13 Street, N.E.

14 VICE CHAIR ETHERLY: Seconded,
15 Madam Chair.

16 BOARD MEMBER MANN: As I just
17 mentioned, and as Mr. Moy mentioned a little
18 while ago, this is a special exception under
19 section 353. And this 353 special exception
20 test is much different than the variance test,
21 for example, that we previously heard. The
22 burden of proof or the test that has to be

1 met, rather, is much different.

2 It's prescribed in the Zoning
3 Regulations, in this case, under section 353
4 and it lays out a series of tests that simply
5 have to be met in order for us to grant this
6 special exception. There was a party in
7 opposition in this case and regarding their
8 particular opposition, I think that as I go
9 through OP's report, I can address that
10 opposition.

11 We didn't hear anything from the
12 ANC in this case. They didn't file any report
13 and I don't believe that for this case that
14 they showed up to even testify. So we don't
15 have a position from the ANC.

16 The Office of Planning was in
17 support of the application, so it's probably
18 easiest if I just go through each aspect of
19 the 353 via their report.

20 The first aspect that we need to
21 consider is 353.2 "The Board shall refer the
22 application to the Board of Education for

1 comment and recommendations." That was done,
2 but no comments were received from the Board
3 of Education. The Office of Planning did,
4 however, do their own analysis and determined
5 that there is an adequate number of public
6 schools within one mile of this proposed four
7 unit development. And they back that up with
8 information from the census. And I don't
9 think there's any problem with their analysis
10 and the building is only four units.

11 Section 353.3 requires that "The
12 Board refer the application to Department of
13 Transportation and the Housing and Community
14 Development." Of course, we just received
15 today the report from the Department of
16 Transportation and they have no objections to
17 the proposal.

18 There were some issues regarding
19 the alley that is currently unpaved in the
20 rear of this proposed building that will have
21 to be paved. The applicant has indicated that
22 he is going to improve that alley to the

1 requirements that DDOT would impose in order
2 for him to be able to access the proposed
3 parking in the rear of the building.

4 Also, regarding the parking, the
5 applicant is required to and is providing four
6 parking spots, that is what a building of that
7 size would require. The next door neighbor
8 one of his objections was that -- the next
9 door neighbor, the party in opposition owns
10 the building next door and rents it out and he
11 was concerned that this building may inhibit
12 his tenant's ability to park.

13 However, the proposed building is
14 providing the required number of parking
15 spaces. So I think that addresses the
16 Department of Transportation comments, unless
17 the Chair had a question for me.

18 CHAIRPERSON MILLER: Did DDOT
19 comment on the parking plan, did you say, or
20 the parking lot being constructed in
21 accordance with DDOT's standards?

22 BOARD MEMBER MANN: What they --

1 well, in the submittal that we got today it
2 says that "The surface parking lot will be
3 located and accessed directly from the public
4 alley. The alley is unimproved and the
5 condition is not suitable for automobile
6 traffic." The applicant met with staff from
7 OP and DDOT. DDOT informed the applicant that
8 the alley would have to be paved and
9 constructed to DDOT's standards for the
10 applicant to use it, to access the required
11 parking spaces.

12 My recollection is that the
13 applicant had planned on doing this anyway,
14 otherwise there would be no way for him to
15 access those parking spaces that he had
16 planned in the back.

17 CHAIRPERSON MILLER: Okay.
18 Because I'm looking at the OP report.

19 BOARD MEMBER MANN: Um-hum.

20 CHAIRPERSON MILLER: And it says
21 that OP referred the parking plan to DDOT for
22 analysis. So they don't have any further

1 comments on the parking plan, so I assume that
2 that means that that's in accordance with
3 their standards.

4 BOARD MEMBER MANN: That was the
5 impression that I got.

6 CHAIRPERSON MILLER: Yes, okay.
7 Well, how about, we can get to this probably
8 later, but just while we're talking about it,
9 with respect to that public alley, do you see
10 that as a condition that we would put on this
11 order, that the applicant would construct the
12 public alley to the rear of the site to DDOT's
13 standards?

14 BOARD MEMBER MANN: I haven't
15 anticipated as a condition. I haven't thought
16 about that, but I would certainly -- I
17 wouldn't have any objection to that. Again,
18 it's going to they're going to have to do it
19 in order to access the parking as they have
20 proposed it in the plans that they have
21 submitted anyway. I don't have an objection
22 to making it a condition though.

1 CHAIRPERSON MILLER: Do you have
2 any comment, Mr. Etherly, while we -- or do
3 you want to deal with it when we -- later?

4 VICE CHAIR ETHERLY: Well --

5 CHAIRPERSON MILLER: It's just the
6 way that DDOT phrased the last paragraph.

7 VICE CHAIR ETHERLY: Correct.

8 CHAIRPERSON MILLER: Yes.

9 VICE CHAIR ETHERLY: Correct.

10 CHAIRPERSON MILLER: DDOT has no
11 objections provided that, you know, provided
12 the applicant constructs the public alley to
13 the rear of the site to DDOT's standards.

14 VICE CHAIR ETHERLY: So if we were
15 to condition it, I mean, I'm kind of caught
16 between one of two ways to approach it. It
17 sounds as though we would require revised
18 plans if we were to condition that or would
19 they be coming in pursuant to this kind of
20 final round of deliberations any way?

21 BOARD MEMBER MANN: I believe the
22 plans that were already submitted --

1 VICE CHAIR ETHERLY: Is the alley
2 indicated?

3 BOARD MEMBER MANN: Well, the
4 alley isn't specifically indicated, but it is
5 certainly indicated in relation to the lot's
6 position on 49th Street.

7 VICE CHAIR ETHERLY: And could you
8 specify, Mr. Mann, which drawing you are
9 looking at just to make sure we're looking --
10 I'm looking at the right one?

11 CHAIRPERSON MILLER: Is this
12 Exhibit 28?

13 BOARD MEMBER MANN: I was looking
14 at Exhibit 29.

15 CHAIRPERSON MILLER: Oh.

16 BOARD MEMBER MANN: Which shows
17 the most recent one. Although there is no
18 change to the parking from the prior
19 submittal. And it could be that on the
20 surveyor's plat that it might show it in
21 relation to the alley, which it does at
22 Exhibit 2.

1 VICE CHAIR ETHERLY: I mean, I
2 have no objection to including it as a
3 condition. I agree with the observation that
4 was made by both Mr. Mann and the Chair with
5 regard to DDOT's submittal at Exhibit 30. My
6 only hesitation was DDOT indicates that the
7 alley would have to be paved and constructed
8 to DDOT's standards for the applicant to use
9 it and then continues on that "The applicant
10 propose constructing the public alley from
11 Hayes Street, N.E., access point to the
12 southern edge of subject property."

13 My hesitation with actually
14 conditioning it was, of course, that DDOT
15 would have to be intimately involved, but I
16 guess it's not a big deal. My only concern
17 would be, and I'm not necessarily getting any
18 vibes of the concern from OAG in this regard,
19 so I'm comfortable with a condition that would
20 mirror or mimic that language or simply
21 requesting that we had revised plans by the
22 applicant, which would show or illustrate the

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1 alley.

2 I guess, let me, I'm being coy
3 with the question. If I could, Madam Chair,
4 through you to the Office of Attorney General,
5 my hesitation was conditioning, potentially
6 conditioning the order directing the applicant
7 to build or construct the alley in accordance
8 with DDOT's standards. Is that a condition
9 that this Board would be able to properly
10 enforce, if you will? That's the only thing
11 I'm struggling with.

12 I understand the rationale behind
13 the condition and it helps to address some of
14 DDOT's concerns, but from an enforceability
15 standpoint, is it a little awkward? Does it
16 carry us too far afield of our authority?

17 MS. GLAZER: Vice Chair, I don't
18 know about the enforceability, that could be
19 a problem, but I think it would still
20 certainly be reasonable to impose that as a
21 condition, since it was suggested by DDOT.

22 VICE CHAIR ETHERLY: Okay.

1 MS. GLAZER: It would be
2 appropriate to rely on the DDOT report and the
3 enforceability would be another question. It
4 would probably be --

5 COURT REPORTER: Could you speak
6 into the microphone, please?

7 MS. GLAZER: I'm sorry. Can you
8 hear me now? Okay.

9 VICE CHAIR ETHERLY: Okay.

10 MS. GLAZER: That's about it.

11 VICE CHAIR ETHERLY: Okay. Thank
12 you, Mrs. Glazer. With that additional
13 testimony, Madam Chair, or with that
14 additional guidance, I would have no objection
15 to a condition consistent with DDOT's language
16 regarding the alley.

17 CHAIRPERSON MILLER: Thank you.
18 Okay. I think it would be a good idea.

19 BOARD MEMBER MANN: Okay. Yeah, I
20 have no opposition to that.

21 CHAIRPERSON MILLER: Okay.

22 BOARD MEMBER MANN: Going on,

1 there was also a requirement that the
2 Department of Community -- Department of
3 Housing and Community Development be given the
4 opportunity to comment. They didn't, but
5 Office of Planning believes that this proposal
6 does support the housing agency's goals.

7 353.4 "The Board refers the
8 application to Office of Planning," and that's
9 the report that I'm reading from, and there is
10 a number of things that Office of Planning has
11 specifically asked to comment on. The first
12 one is a site plan and the second one is
13 building arrangement and structure.

14 Regarding both of those aspects,
15 Office of Planning doesn't have any problem in
16 this regard. The proposed buildings are
17 designed to meet the setback requirements of
18 Chapter 4 and there will be windows on all
19 sides and floors of the new building, but
20 there is space enough between this building
21 and the neighboring structures to minimize the
22 adverse impacts regarding the privacy of use

1 and enjoyment of neighboring properties.

2 And this goes directly to the
3 comment that the party in opposition made,
4 that they thought that the building was too
5 close, but, in fact, as I stated, the proposed
6 building does meet all the setback
7 requirements and Office of Planning finds that
8 there is no impact to light and air and I
9 didn't hear any testimony that would make me
10 believe otherwise.

11 Parking, as I noted earlier when I
12 was talking about the DDOT requirements, they
13 have to provide four spaces and they're
14 providing four spaces.

15 The next category is recreation.
16 There is no on-site recreation area, but there
17 is recreation in the neighborhood and Office
18 of Planning didn't find that to be a problem
19 and neither do I. Landscaping, the applicant
20 proposes to provide landscaping and I thought
21 the landscaping that we asked -- the
22 landscaping plan that we asked for provided

1 adequate information to find that it was
2 acceptable.

3 CHAIRPERSON MILLER: That's in
4 Exhibit 29 as well, correct?

5 BOARD MEMBER MANN: It is.

6 CHAIRPERSON MILLER: Okay.

7 BOARD MEMBER MANN: The most
8 recent one shows the most recent landscape
9 plan. Although I'm not certain that it even
10 changed from the previous exhibit.

11 CHAIRPERSON MILLER: Okay.

12 BOARD MEMBER MANN: And Office of
13 Planning was asked to comment on grading, but
14 there were no grading issues with this site.
15 That leaves a question in general of the
16 special exception. Will the special exception
17 be in harmony with the general purpose and
18 intent of the Zoning Regulations and Maps?
19 Office of Planning finds that it is and again,
20 I didn't hear any testimony that would lead me
21 to believe otherwise.

22 And will the special exception

1 tend to adversely affect the use of
2 neighboring property in accordance with the
3 Zoning Regulations and Maps? Office of
4 Planning finds no and again I agree with their
5 conclusion.

6 I believe that covers everything
7 that I wanted to address, unless the Chair can
8 remind me of anything that I forgot.

9 CHAIRPERSON MILLER: No, I think
10 you did a very thorough job. I was just
11 looking at Exhibit 29 and I think this might
12 be the case where Mr. Turnbull asked for
13 details of the fence or whatever and that's
14 noted in the revised landscaping plan as well.

15 BOARD MEMBER MANN: That's right.
16 And I think we also asked for revisions or
17 more clarification on the lighting plan and
18 that was provided.

19 CHAIRPERSON MILLER: Excellent.
20 Okay. Anything else?

21 VICE CHAIR ETHERLY: Nope.

22 CHAIRPERSON MILLER: Okay. We

1 have a motion and that was to approve this
2 application. And I would like to add a
3 friendly amendment to that, I guess, with the
4 condition that we talked about that the
5 applicant construct the public alley to the
6 rear of the site to DDOT's standards to
7 provide access to the required parking spaces.

8 BOARD MEMBER MANN: I have no
9 objection to your amendment.

10 CHAIRPERSON MILLER: Okay. All
11 right. Then any further deliberation? All
12 those in favor say aye.

13 ALL: Aye.

14 CHAIRPERSON MILLER: All those
15 opposed? All those abstaining? Would you
16 call the vote, please?

17 MR. MOY: Yes, staff would record
18 the vote as 3-0-1. This is on the motion of
19 Mr. Mann to approve the application with a
20 friendly amendment to add the condition as
21 suggested by DDOT regarding constructing or
22 paving the public alley at the rear. I

1 believe it was seconded by Mr. Etherly.

2 VICE CHAIR ETHERLY: Yes.

3 MR. MOY: Okay. Thank you. Also
4 in support of the motion Ms. Miller, the
5 Chairperson. We have a Board Member not
6 participating on this application. Staff also
7 has that we have an absentee ballot from Mr.
8 Turnbull who is not present and his absentee
9 ballot is to approve the application with such
10 conditions as the Board may impose. So that
11 would give a final vote of 4-0-1.

12 The next application for decision
13 is Application No. 17618 of Sylvia Kotz Realty
14 Revocable Trust, pursuant to 11 DCMR 3104.1,
15 for a special exception to permit a surface
16 parking lot under section 213 in the DC/R-5-B
17 District at premises 1629 Corcoran Street,
18 N.W., Square 179, Lot 71.

19 On June 12, 2007, the Board
20 completed public testimony, closed the record
21 and scheduled its decision on July 3rd. The
22 Board requested the applicant to file post-

1 hearing documents, that was done and is in
2 your case folders identified as Exhibit 34.
3 The filing is dated June 26, 2007.

4 We also have a filing from the
5 Office of Planning, a supplemental report,
6 identified as Exhibit 33. Although the Board
7 did not request a supplemental from OP, staff
8 can interpret that the Board had requested the
9 applicant work closely with the applicant in
10 the revision of their landscape plan.

11 And the Board is to act on the
12 merits of the special exception request to
13 permit the surface parking lot under section
14 213. That completes the staff's briefing,
15 Madam Chair.

16 CHAIRPERSON MILLER: Thank you.
17 To the extent that it's necessary, I would
18 recommend that we waive the record to admit
19 the supplemental report of Office of Planning.
20 I think it probably was inadvertent that we
21 didn't state that we were leaving the record
22 open for that, in that Office of Planning was

1 working with the applicant and we certainly
2 want to know that Office of Planning is
3 satisfied with the latest revisions. So do
4 you agree?

5 VICE CHAIR ETHERLY: No objection.

6 CHAIRPERSON MILLER: Okay. So
7 that's in the record. Okay. Would someone
8 like to start the discussion on this?

9 BOARD MEMBER MANN: I would be
10 happy to start the discussion on this. This
11 again is a special exception and the
12 regulations lay out fairly clearly sort of the
13 -- what we need to take into consideration.
14 This application has perhaps made just
15 slightly more complicated by the fact that I
16 believe we may be considering whether or not
17 to include conditions, several conditions that
18 were proffered.

19 And so again, I would ask the
20 Chair if she would prefer that I continue
21 under a motion or if you want to go through
22 all the elements of the case first?

1 CHAIRPERSON MILLER: Why don't we
2 wait then until we have all the conditions,
3 because this one is probably going to have
4 more conditions than certainly the one before.

5 BOARD MEMBER MANN: Yes, okay. I
6 would note that OP recommended conditional
7 approval of this application. I'll go through
8 the OP report in a moment. Again, they have
9 laid out a very thorough analysis that's easy
10 to follow through and we can address each of
11 the elements of the application.

12 The Department of Transportation
13 recommended conditional approval. Their
14 condition was a little bit unusual and I'll
15 get to that.

16 CHAIRPERSON MILLER: Can I
17 interrupt you for one minute?

18 BOARD MEMBER MANN: Yes.

19 CHAIRPERSON MILLER: I just want
20 to remind us that at the end of the hearing we
21 requested specifically two items from the
22 applicant, which they did provide to us. And

1 one very important one was the authorization.
2 And then the second were maintenance
3 agreements and they did come into the record.

4 BOARD MEMBER MANN: That's right.
5 I thought that everything we had asked for was
6 adequately addressed in the supplemental
7 filings. ANC-2B supports the application.
8 Also, the applicant had reached a sort of
9 separate agreement outside of the Zoning
10 Regulations with ANC-2B and they have signed
11 a usage agreement which addressed a lot of
12 sort of non-zoning issues.

13 And if I recall, this use has been
14 around for some time and the zoning had lapsed
15 on it, if I'm correct. And this -- when it
16 was made known that they needed to seek
17 relief, I guess that triggered this usage
18 agreement with the ANC, which went well beyond
19 zoning issues and it addresses other issues
20 that are important to the neighborhood, but
21 that we have no -- over which we have no
22 jurisdiction.

1 So I think that, if it's
2 appropriate, that I start to go through some
3 of the elements of section 213 regarding
4 parking lots. These are the actual areas that
5 we have to make sure the applicant met.

6 The relevant one to start with
7 would be then 213.2 "The parking lot shall be
8 located in its entirety within 200 feet of the
9 existing Commercial or Industrial District."
10 And indeed it is. It is located directly
11 across the alley from the C-2-B District.

12 Section 213.3 "The parking lot
13 shall be contiguous to or separated only by an
14 alley." And as I noted, it is.

15 Section 213.4 "All provisions of
16 Chapter 23 have to be complied with." And OP
17 addressed this separately and I'll get to
18 those in a moment.

19 Section 213.5 "No dangerous or
20 otherwise objectionable traffic conditions
21 shall result from the establishment of the use
22 and the present character and future

1 development of the neighborhood will not be
2 affected adversely." OP finds that there are
3 no dangerous or objectionable traffic
4 conditions as a result of this parking lot.
5 It has existed. It's not a new parking lot.
6 It has been somewhat differently configured,
7 but nonetheless, OP finds that it currently
8 doesn't and is not likely in the future to
9 create any objectionable traffic conditions.

10 I think this is where it's
11 probably appropriate to note that in the
12 Department of Transportation's report, they
13 asked -- their condition as it were was that
14 a no left hand -- no left turn sign be placed
15 in the alley, which in and of itself may be a
16 fine recommendation, but the applicant really
17 has no authority to place this sign on what
18 otherwise is public property or certainly not
19 their own property, at any rate.

20 The Department of Transportation
21 asks that the applicant take this into
22 consideration and work to get it done. They

1 could, I suppose, undertake that. They could
2 ask the Department of Transportation perhaps
3 to do it or whatever, but they -- I don't
4 believe it is appropriate to tell the
5 applicant that they have to install this sign
6 independently on property that they -- over
7 which they don't have any control.

8 CHAIRPERSON MILLER: Right. And
9 there seems to be some problems with that as
10 well perhaps and I didn't think that we needed
11 to reach that, because DDOT could always do
12 that outside of the zoning process.

13 BOARD MEMBER MANN: That's right.

14 CHAIRPERSON MILLER: Correct?

15 BOARD MEMBER MANN: Yes.

16 CHAIRPERSON MILLER: Okay.

17 BOARD MEMBER MANN: Section 213.6
18 "The parking lot shall be reasonably necessary
19 and convenient to other uses in the vicinity,
20 so that the likely result will be a reduction
21 in overall parking in neighborhood streets."
22 It is directly located behind the McDonald's

1 just as it always has been and it's intended
2 primarily -- it is intended for use by
3 McDonald's and it doesn't appear that that's
4 going to change in any regard from its past
5 use.

6 213.7 "The majority of parking
7 spaces shall serve residential uses or short-
8 term parking needs of retail, service and
9 public facility uses in the vicinity." Again,
10 it's going to be used by McDonald's.

11 213.8 "Before taking final action
12 on the application, the Board shall submit the
13 application to DDOT." I just noted what
14 DDOT's comments were.

15 Then there is, as I noted earlier,
16 some special provisions in section 2301,
17 parking lots, that have to be met. "Parking
18 lot shall conform to the following provisions:
19 Areas devoted to driveway access and parking
20 area shall be surfaced and maintained with an
21 all weather surface in addition to traditional
22 impervious. It can also be pervious." That's

1 going to be met.

2 "The parking lot shall be designed
3 so that no vehicle or part of the vehicle
4 projects over lot line or building line." We
5 received plans that show that that's not going
6 to be any problem.

7 "No other use shall be conducted
8 from or upon the premises. No structure other
9 than attendant shelter shall be erected." And
10 it's only going to be used for vehicular
11 parking and for the trash receptacle. There
12 isn't an attendant shelter or won't be.

13 "No vehicular entrance or exit
14 shall be within 40 feet of a street
15 intersection." It's, approximately, 110 feet
16 from the closest intersection.

17 "Lighting used to illuminate the
18 parking lot shall be arranged so that the
19 direct rays of the lighting are confined to
20 the surface of the parking lot." It appears
21 that's going to be done, as the light is going
22 to be downward directed.

1 "The parking lot shall be kept
2 free of refuse and debris and shall be
3 landscaped." There is a requirement that
4 landscaping cover a minimum of 5 percent of
5 the total area. The applicant, as they have
6 proposed it on their plans, is covering
7 significantly more of the area than 5 percent.
8 I believe that it is 20 percent that is
9 proposed.

10 Regarding the provision that they
11 have to keep the parking lot free of refuse
12 and debris, well, first of all, that's a
13 requirement of the Zoning Regulations and,
14 second, it's also covered in greater detail in
15 the usage agreement and the applicant also
16 provided their agreement with their
17 landscaping company that keeps these areas
18 clean anyway.

19 So I think that they have shown
20 their intentions to comply with that provision
21 of the regulation.

22 CHAIRPERSON MILLER: Where is the

1 regulation that it's supposed to be kept free
2 of refuse and debris? I seem to think that we
3 put that in as conditions in a lot of these
4 orders.

5 BOARD MEMBER MANN: Well, I'm
6 looking under the Office of Planning's report
7 and it says section 213.6. Oh, no, I'm sorry,
8 2301.1(f). So unless they have paraphrased or
9 misphrased the Zoning Regulation, I'm not
10 looking directly in the regulation. I'm
11 looking at the OP report. Shall we pull out
12 the regulations and take a look?

13 CHAIRPERSON MILLER: But it just
14 goes to one of the things that we often
15 discuss when we do these conditions, you know.
16 If it's already in the regs, do we need to put
17 it in the order? And it seems like some of
18 these we do anyway.

19 BOARD MEMBER MANN: Right.

20 CHAIRPERSON MILLER: It's just so
21 they are out there for the public, I guess.

22 BOARD MEMBER MANN: I think it

1 actually should be section 2303.1(f), so there
2 appears to be a typo in the OP report.

3 CHAIRPERSON MILLER: I thought
4 maybe my regs weren't updated. Okay.

5 BOARD MEMBER MANN: Does that
6 answer your question?

7 CHAIRPERSON MILLER: Yes.

8 BOARD MEMBER MANN: Okay.

9 CHAIRPERSON MILLER: Thanks.

10 BOARD MEMBER MANN: And finally
11 section 2303.5, "The Board may require any
12 special treatment of the premises that it
13 deems necessary to protect the value of
14 adjacent property." And there was some
15 discussion regarding landscaping and that it
16 be, you know, hardy and low-maintenance and I
17 believe sufficient additional information has
18 been provided showing that hardy and low-
19 maintenance plants are going to be part of
20 this, part of the landscaped area.

21 The Office of Planning report did
22 go on to talk about something that's not

1 really relief that has been sought, but they
2 did discuss section 721.3(s)(III) and that is
3 the dumpster. And the dumpster is going to be
4 in this masonry enclosure with a gate that
5 meets the requirements of the Zoning
6 Regulations. So it's not something from which
7 the applicant is seeking relief, but it is
8 something with which they are complying.

9 And again, just the general
10 special exception test, Office of Planning
11 finds, and I agree, that the special exception
12 is in harmony with the general purpose and
13 intent of the Zoning Regulations and Maps and
14 that the special exception will not tend to
15 adversely affect the use of neighboring
16 property in accordance with the Zoning
17 Regulations.

18 As I said, there was testimony in
19 opposition to the application, although there
20 was not a party in opposition. But the
21 testimony that we heard mostly went to items
22 regarding the operation of the McDonald's

1 itself and not the parking lot per se.
2 Nonetheless, the reconfiguration of the
3 parking lot and several of the items agreed to
4 in the independent usage agreement do go to
5 address some of those operational aspects that
6 were identified by the testimony in
7 opposition.

8 Overall, I believe that the
9 testimony in opposition that we heard insofar
10 as regard to the parking lot has been
11 adequately addressed and I think the problems
12 have been mitigated or negated.

13 And that's everything that I
14 recollect about this case, Madam Chair. If
15 you have additional information to add?

16 CHAIRPERSON MILLER: Well, I just
17 want to note, I think this is an instance
18 where this property had come out of compliance
19 and is now coming into compliance. And I want
20 to note that my reading of the ANC report is
21 that they supported the application with
22 conditions from the usage agreement that the

1 BZA determines is appropriate and applicable.

2 And so at the hearing we started
3 to go through those conditions and we're
4 spotting some that seem to go more just for
5 usage agreement which did not address really
6 the zoning issues before us and others that
7 were appropriate for our order. So I think
8 that you fully discussed the meeting of the
9 requirements of special exception.

10 And I think, at this point, we
11 should probably turn to conditions, because I
12 think some conditions are in order to ensure
13 that it operates in harmony with the
14 neighborhood. And I guess in the last
15 pleading by the applicant, No. 34, at Exhibit
16 D, they submit proposed conditions.

17 I think that's what we were
18 saying. Some conditions need to be addressed
19 with our order. They can't just be in the
20 usage agreement, because if we find that there
21 is a condition that needs to be mitigated, it
22 should be in our order, because we don't know

1 what's going to happen with the usage
2 agreement, how long it's going to last or
3 whatever.

4 So I guess we could start looking
5 at their order and then see if there is --
6 what we think of those conditions and then if
7 there is anything else we want to add.

8 BOARD MEMBER MANN: I think that's
9 appropriate. And I thought that these
10 conditions that were proffered at Exhibit D of
11 Exhibit 34 were pretty responsive to what we
12 had asked them to do and that was to try and
13 address things that were really responding to
14 Zoning Regulations. I also agree that perhaps
15 we can discuss whether or not some of these
16 need to be conditions, because they are in the
17 Zoning Regulations.

18 CHAIRPERSON MILLER: Okay. The
19 first condition, "The parking lot shall be
20 improved as shown in the drawings approved by
21 the BZA in its approval of Application No.
22 17618." I think that's pretty basic and we

1 might as well -- you know, I think we should
2 leave it in. I mean, I think it's a given
3 that that's what they have to do. That's what
4 I was getting at before when I noticed the
5 language dealing with refuse and debris and
6 stuff, that some of these -- it's in the
7 regulations, but the public might not be fully
8 aware of the regs and this is a clean way for
9 them to know what conditions they need to be
10 under. So I have no objection to that.

11 BOARD MEMBER MANN: Yes, I have no
12 objection.

13 CHAIRPERSON MILLER: Okay.

14 BOARD MEMBER MANN: I think that's
15 a good comment.

16 CHAIRPERSON MILLER: No. 2, "All
17 parking spaces shall meet applicable standards
18 with respect to size and location as set forth
19 in section 2115 and 2116 of the Zoning
20 Regulations."

21 BOARD MEMBER MANN: Well, you
22 could make the same argument that you just

1 made.

2 CHAIRPERSON MILLER: Exactly.

3 BOARD MEMBER MANN: It certainly
4 doesn't contradict anything in the
5 regulations.

6 CHAIRPERSON MILLER: Right. I
7 think the only time that maybe we would steer
8 away from this is if there are so many
9 conditions that it becomes muddied, but okay.
10 Do you have an objection?

11 VICE CHAIR ETHERLY: No objection.

12 CHAIRPERSON MILLER: Okay. We can
13 leave that in. Consistent with 2303.1 of the
14 Zoning Regulations, "The parking lot shall be
15 designed and striped, so that no vehicle or
16 any part of a vehicle projects over any lot
17 line or building line." I think that's the
18 same rationale. Okay. We can leave that in.

19 No. 4 is different and I was
20 trying to look for the rationale for this one.
21 It says "The parking lot shall be reserved for
22 the exclusive and temporary use of McDonald's

1 customers and employees. Signs shall be
2 installed in the rear of the McDonald's
3 building and upon entry to the property
4 indicating that the property is reserved for
5 parking by McDonald's customers and employees
6 only."

7 Do you all remember why? What
8 adverse condition that might be geared to
9 mitigate?

10 BOARD MEMBER MANN: I don't think
11 that it was necessarily couched in the same
12 way that if we were hearing a new application,
13 because this parking lot had already been in
14 existence for some time. I think you could
15 almost make the opposite argument that if the
16 parking lot were to go away, then it might
17 create, you know, an increased parking hassles
18 or, you know, more difficult to find parking.

19 So by continuing its use, you
20 know, for the exclusive and temporary use of
21 McDonald's, then it continues to address the
22 parking needs of McDonald's.

1 CHAIRPERSON MILLER: Okay. I note
2 that it is in the usage agreement.

3 BOARD MEMBER MANN: Right.

4 CHAIRPERSON MILLER: 2(d). I'm
5 just trying to think why it should be in this
6 one.

7 BOARD MEMBER MANN: I do believe
8 that it is adequately covered in the usage
9 agreement and that I'm not certain that I can
10 make a really strong argument that it
11 addresses with particularity any of the
12 provisions of the Zoning Regulations that I
13 had just read. I understand the spirit of it,
14 but if you believe that it is adequately --
15 that because it's already covered in the usage
16 agreement, that you would not support this
17 condition, I wouldn't be opposed to that.

18 VICE CHAIR ETHERLY: And, Madam
19 Chair, I don't recall necessarily whether we
20 had testimony of any length regarding non-
21 McDonald's generated parking on the lot.
22 Typically, the language of this type is

1 perhaps aimed at addressing rogue parking, if
2 you will, or parking that's not associated
3 with the use at issue here. But I don't
4 believe anything was presented in the record
5 in any substantial way to speak to that being
6 a consistent challenge with this particular
7 property.

8 CHAIRPERSON MILLER: Okay. I
9 agree. So what I would suggest is that we not
10 include it, because we can't remember how it
11 would mitigate some adverse condition. And
12 it's in the usage agreement, so it's covered
13 and they certainly can restrict it. We're not
14 saying they can't. We're just not requiring
15 it. Okay. So we will strike No. 4.

16 No. 5 says consistent with 2303.1
17 of the Zoning Regulations, "Landscaping with
18 trees and shrubs shall cover a minimum of 5
19 percent of the total area of the property as
20 provided in the drawings approved by the BZA
21 in its approval of Application No. 17618. The
22 landscaping chosen and plantage shall be

1 maintained in a healthy growing condition in
2 a neat and orderly appearance."

3 Okay. My concern with this is
4 that the applicants represent that, let me
5 see, in their statement of the application,
6 Exhibit 27, approximately, 20 percent of the
7 total area of the property will be landscaped,
8 including trees and shrubbery. And this
9 refers to meeting the minimum 5 percent. So
10 that seems to lower the standard. So I would
11 want to delete the first sentence that says
12 that "Landscaping will cover a minimum of 5
13 percent of the total area of the property."

14 I believe the drawings are
15 supposed to reflect 20 percent of the
16 property. It says on page 4 of applicant's
17 statement "Approximately, 20 percent of the
18 total area of the property will be landscaped,
19 including trees and shrubbery." I want to
20 check the drawings, but I think it could be
21 changed to say, approximately, 20 percent of
22 the total lot area of the property will be

1 landscaped as provided in the drawings
2 approved by the BZA."

3 I think we just need to check
4 whether that is shown in the drawings if we
5 were to do that.

6 BOARD MEMBER MANN: Well, it was
7 always represented to us as 20 percent and I
8 don't think that we asked for a measured
9 drawing to prove that the calculations were
10 correct. So I've been working on the
11 assumption that the drawings and the landscape
12 plan that we saw indeed shows 20 percent
13 landscaping.

14 CHAIRPERSON MILLER: Okay. Why
15 don't we -- how about if we just say,
16 approximately, 20 percent of the total lot
17 area of the property will be landscaped,
18 including trees and shrubbery. And then say
19 the landscaping chosen to plant shall be
20 maintained in a healthy growing condition in
21 a neat and orderly appearance?

22 BOARD MEMBER MANN: I think that

1 sounds fine.

2 CHAIRPERSON MILLER: Before we
3 leave that area though, they submitted two
4 maintenance agreements and I think we might
5 want to add them in here.

6 BOARD MEMBER MANN: And Mr. Moy
7 points out to me that, indeed, the plans do
8 indicate, there is a general note that reads,
9 landscaping provided 391 square feet and in
10 parentheses 20.8 percent.

11 CHAIRPERSON MILLER: Good. Let's
12 put back in then the reference to as provided
13 in the drawings approved by the BZA in its
14 approval of Application No. 17618.

15 BOARD MEMBER MANN: Right.

16 CHAIRPERSON MILLER: I would also
17 suggest, I think we ought to consider the
18 maintenance agreements that were submitted.
19 Tell me what you think about a condition such
20 as McDonald's franchise operator shall
21 maintain the landscaping agreement for
22 installation, planting and semi-annual

1 maintenance of landscaping as shown on
2 approved plan.

3 BOARD MEMBER MANN: I don't have
4 any objection to that. Is that to replace No.
5 6?

6 CHAIRPERSON MILLER: Just let me--

7 BOARD MEMBER MANN: Or is that in
8 addition?

9 CHAIRPERSON MILLER: No, I think
10 it would be in addition, but let me -- I was
11 pulling that from their latest pleadings. Let
12 me just get that.

13 BOARD MEMBER MANN: It's certainly
14 consistent with what they have said they are
15 going to do.

16 CHAIRPERSON MILLER: Okay. I
17 guess I was just wondering, they refer in
18 their latest filing two exhibits and I don't
19 know how many exhibits we want to refer to, so
20 now, I'm wondering if we should just say
21 something like McDonald's franchise operator
22 shall maintain a landscaping agreement for

1 installation, planting and semi-annual
2 maintenance of landscaping.

3 And then their second one, while
4 you're thinking about that, is McDonald's
5 franchise operator shall maintain agreement
6 for daily and weekly regular maintenance of
7 landscaping to include watering and weeding
8 and removal of debris.

9 BOARD MEMBER MANN: I think the
10 minimal wording is adequate, in my mind,
11 because it is addressed much more extensively
12 in the usage agreement.

13 CHAIRPERSON MILLER: Okay. Oh, I
14 have to look back at the usage agreement then,
15 but we specifically asked for these
16 maintenance agreements as recommended by
17 Office of Planning.

18 BOARD MEMBER MANN: Yes, I guess
19 we had asked for those to be entered into the
20 record.

21 CHAIRPERSON MILLER: Right.

22 BOARD MEMBER MANN: Was it just to

1 help us in our deliberations or do you think
2 it was our intention that they would be
3 referenced in the order?

4 CHAIRPERSON MILLER: I guess, in
5 my mind, I thought it was so that we could be
6 assured that this was going to be done. And
7 usually to be assured that it's done, you put
8 it in as a condition. So that's why I'm
9 leaning that way. Where is it in the usage
10 agreement?

11 BOARD MEMBER MANN: Well, what I'm
12 referring to is page 3 of the usage agreement
13 under section 4 maintenance and then there is
14 maintenance standards and it goes A through F.
15 It covers more than just the parking lot, but
16 it does talk to the maintenance for the -- I
17 don't know if it's the entire property, but
18 everything that the ANC was evidently
19 concerned about.

20 CHAIRPERSON MILLER: Okay. I
21 guess this is one of the cases where I would
22 say that it should be in our order separate

1 from the usage agreement, because it's very
2 specific to the maintenance of the parking
3 lot.

4 BOARD MEMBER MANN: I have no
5 objection to that.

6 CHAIRPERSON MILLER: Okay. Okay.
7 My final question, I think, on this one issue
8 though is the wording. When they submitted
9 their landscaping agreements they say that
10 they are going to have this agreement. This
11 is on page 1 of the June 26th filing, Exhibit
12 34. They say "Landscape maintenance
13 agreements between McDonald's franchise
14 operator and Montclair Landscaping for
15 installation, planting and semi-annual
16 maintenance and landscaping as shown on
17 approved plan, Exhibit C1."

18 I guess I don't think we have to
19 go that far to refer to Exhibit C1. That was
20 my question. If we just make it a condition
21 that they have a landscaping agreement for
22 installation, plantings and semi-annual

1 maintenance of landscaping. All right. You
2 think that goes far enough? Okay. I don't
3 think we have to dwell on this. We're going
4 to write them up afterwards.

5 Okay. So we would include these
6 two conditions, the semi-annual maintenance
7 and the daily and weekly maintenance. Okay.

8 The next condition that that
9 application proposed is "The property shall be
10 kept free of refuse and debris. The trash
11 enclosure on the property shall remain locked
12 and securely covered when not in active use.
13 The trash enclosure shall be kept in a neat
14 and tidy condition." I'm fine with that.

15 Okay. We do need to talk about
16 the term.

17 BOARD MEMBER MANN: Oh, yes, in
18 fact, we do. I neglected to mention that.

19 CHAIRPERSON MILLER: And I don't
20 know if there are any other conditions. I
21 just want to make sure that we don't forget
22 that we have to talk about the term. Are

1 there any other conditions?

2 BOARD MEMBER MANN: No, I believe
3 that you've covered all the conditions
4 adequately.

5 CHAIRPERSON MILLER: Okay. And
6 the rest, there are plenty in the usage
7 agreement. Okay. But the ones that we need
8 for this parking lot are in our order. Okay.
9 Term. I think the ANC was requesting 2 years
10 and Office of Planning, did they suggest 5?

11 BOARD MEMBER MANN: Office of
12 Planning recommended 5 years.

13 CHAIRPERSON MILLER: Okay.

14 BOARD MEMBER MANN: And I would
15 support 5 years. I think, quite frankly, 2 is
16 barely enough time to get through one
17 application before you start another. And
18 given the parking lot has been in operation
19 for a very long time, and now there is this
20 new usage agreement, which, you know, really
21 seems to address all the ANC's concerns, I
22 don't see any reason to go less than 5 years.

1 CHAIRPERSON MILLER: I agree. I
2 agree. Yes, they would have to turn around
3 and do another application pretty soon for 2
4 years and with all these conditions applying
5 to this property now and attention to it, I
6 think that 5 years is a reasonable amount of
7 time. Okay. Anything else on this
8 application? Do we have a motion?

9 BOARD MEMBER MANN: It would be my
10 motion then to approve Application 17618 of
11 Sylvia Kotz Realty Revocable Trust, for a
12 special exception to permit a surface parking
13 lot under section 213 at 1629 Corcoran Street,
14 N.W., and as conditioned in our, not
15 deliberations, but our discussion.

16 CHAIRPERSON MILLER: Second. Any
17 further deliberations?

18 All those in favor say aye.

19 ALL: Aye.

20 CHAIRPERSON MILLER: All those
21 opposed? All those abstaining? And would you
22 call the vote, please?

1 MR. MOY: Yes, ma'am. The staff
2 would record the vote as 3-0-1. This is on
3 the motion of Mr. Mann to approve the
4 application as conditioned, seconded by Ms.
5 Miller, also in support of the motion Mr.
6 Etherly. We have a Board Member
7 participating, but not voting. Finally, there
8 is an absentee ballot from Mr. Hood, Anthony
9 Hood, who also participated on the
10 application, and his vote is to approve with
11 such conditions as the Board may impose, so
12 that would give a final vote of 4-0-1.

13 Finally -- no, go ahead.

14 CHAIRPERSON MILLER: I think in
15 this case, we do not have a party in
16 opposition, so that I would suggest that we
17 waive our rules and regulations for a full
18 order of findings and conclusions and issue a
19 summary order in this case setting forth the
20 conditions. Okay. Thank you.

21 MR. MOY: The next and final
22 action of the Board is a motion for

1 reconsideration of Application No. 17446-A,
2 pursuant to section 3126 of the Zoning
3 Regulations. The original application is
4 17446 of Pauline Ney, which was pursuant to 11
5 DCMR 3104.1, for variances from lot occupancy
6 requirements under 403, and nonconforming
7 structure provisions under subsections 2001.3
8 and 2002.4, to construct four residential
9 units above existing one story retail
10 structures in the R-5-B District at premises
11 2160 through 2162 California Street, N.W., and
12 that's in Square 2530, Lots 99 and 100.

13 On May 14th of this year, the party
14 in opposition, the Woodrow Cooperative filed
15 a motion for reconsideration, a scheduling for
16 a rehearing and a stay of the order pending
17 any reconsideration and/or appeal. And that
18 filing is identified in your folders as
19 Exhibit 99. The motion was timely filed
20 meeting the 10 day filing requirement deadline
21 pursuant to 3126.7.

22 After that, there has been a

1 succession of filings. The first from the
2 applicant, the property owner, who filed an
3 opposition to the motion for reconsideration
4 and that filing is dated May 21, 2007,
5 identified as Exhibit 103. The Board is also
6 in receipt of a filing from Woodrow
7 Cooperative. They filed a response to the
8 applicant's opposition dated June 1st of this
9 year, exhibit -- identified as Exhibit 105.

10 The applicant filed a supplemental
11 response dated June 28, 2007 recorded as
12 Exhibit 107. Finally, there is a block of
13 filings from three other parties, who have
14 joined with the Woodrow Cooperative, they are:
15 The Sheridan-Kalorama Neighborhood Council
16 dated May 21, 2007, Exhibit 102; The Sheridan-
17 Kalorama Historical Association, Inc. dated
18 May 21st and May 23rd, Exhibits 101 and 104,
19 respectively; and from Guy McMichael, III
20 letters dated May 21st and June 4th, Exhibits
21 100 and 106.

22 The Board is to act on the merits

1 of the motion as described pursuant to section
2 3126. And that completes the staff's
3 briefing.

4 CHAIRPERSON MILLER: Thank you. I
5 just want to go back and remind the Board,
6 which I'm sure the Board remembers, that
7 basically the day that we were deliberating on
8 the order in this case, it was brought to our
9 attention that there was newly discovered
10 evidence. And at that time, we stated that
11 the record had already closed and it was too
12 late for us to consider that evidence, at that
13 time. And that a party could have the
14 opportunity to file a motion to reopen the
15 record after the order was written, based on
16 that discovery of new evidence.

17 And I just want to refer to the
18 regulations that we are dealing with in this
19 case. The first is 3126.4, which says "A
20 motion for reconsideration shall state
21 specifically all respects in which the final
22 decision is claimed to be erroneous, the

1 grounds of the motion, the relief sought."

2 3126.6 "No request for a rehearing
3 shall be considered by the Board unless new
4 evidence is submitted that could not
5 reasonably have been presented at the original
6 hearing."

7 So I think that's where we are in
8 3126.6. Though, the opponents have sought,
9 you know, three things. One is
10 reconsideration of the order. Just to do
11 that, we don't need to reopen the record. Two
12 is the rehearing, based on the new evidence.
13 And then the third thing that they are asking
14 for is a stay of the order pending any
15 reconsideration and/or appeal.

16 I think we should focus on 3126.6,
17 the reopening of the record, because we could
18 reconsider the order in any event and that
19 doesn't require reopening the record. The big
20 issue, as I see it here, is reopening the
21 record. And 3126.4 says -- I mean, .6 says
22 that "It shall be considered" -- "No request

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1 shall be considered unless new evidence is
2 submitted that could not reasonably been
3 presented at the original hearing."

4 And the opponents in this case say
5 that they could not have presented this newly
6 discovered evidence at the hearing, because
7 they weren't aware of the evidence, that they
8 discovered the evidence after the hearing was
9 over. And that evidence is the existence of,
10 what they characterize as, a large residential
11 apartment in the basement space of applicant's
12 building.

13 And they say that the significance
14 of this evidence is that applicant would need
15 to seek a use variance, which is a higher
16 standard to meet, and that would materially
17 affect the decision.

18 Just to paraphrase, the applicant
19 seems to be saying that they could have
20 discovered this earlier. I don't think that
21 was very well presented. This is in the
22 applicant's control and the opponents are

1 saying that, in fact, the applicants
2 misrepresented the use of their building.

3 So anyway, I think, number one,
4 putting it out there that I don't see that
5 they could have discovered this evidence
6 earlier. It's not really within their
7 control. And they seem to have discovered it
8 by happenstance and that it is the obligation
9 of the applicant to be honest and forthcoming
10 with the material facts of their property. So
11 I don't think that we should not hear the
12 opponents for that reason.

13 And then the applicants also say
14 that, if I can paraphrase it correctly, I
15 think that it wouldn't affect the outcome of
16 their case, because of the way they did their
17 calculations. And I'm really not sure about
18 that. You know, and I have to say that I was
19 in the dissent on this and I certainly -- but
20 these issues were something that I considered
21 in my dissent, but I just want to lay that out
22 there.

1 I do think when I was looking back
2 at the order as written that it would change
3 some of our findings of fact and whether those
4 findings of fact, you know, would change the
5 decision, for instance, No. 5 says "Both
6 buildings will be retained by the applicant,
7 but both are nonconforming as to use and
8 structure." Well, according to the opponents,
9 the new evidence shows that that's not true.
10 That's one example.

11 Again, our finding of fact 35 goes
12 to -- it says that "the past use of the
13 existing building for commercial purposes."
14 Now, if, in fact, it was also used for
15 residential purposes, it would change that
16 finding of fact.

17 So I think that, to me, it raises
18 questions that rise to the level of reopening,
19 but I would like to defer to my colleagues on
20 this who really you signed off on that order
21 and it wasn't an order that I necessarily
22 signed off on, though I'm certainly allowed

1 and supposed to consider the motion for
2 reconsideration.

3 VICE CHAIR ETHERLY: I would be
4 more than happy to weigh in, Madam Chair. I
5 will reach the same conclusion that you do,
6 but through an entirely different, shall we
7 say, walk. I would also perhaps stand a
8 little perhaps more on the point of the
9 reconsideration issue, as I think it's a
10 necessary procedural step that we should take.

11 As you indicated, of course, you
12 were in the minority, not that we normally
13 speak in terms of minority and majority
14 opinions here, we are not that institution a
15 little further up the street on 1st Street.
16 But be that as it may, initially I was left --
17 let me just perhaps speak generally and then
18 I'm going to try to kind of put this in the
19 context of what the opponent is seeking, but
20 I'll get to the conclusion first, which is
21 that I think the reconsideration is proper.

22 With respect to the request kind

1 of on its face, I was initially kind of left
2 with kind of so what. And I don't mean that--
3 this is the second time I'm saying to you, I
4 don't mean that flippantly, but in all
5 honesty, I do not mean that flippantly. I was
6 left wondering whether or not this ultimately
7 has any impact on the relief that was being
8 sought.

9 One of the things that perhaps in
10 part answer to the question, but in part
11 perhaps highlighted the need to explore a
12 little further was, however, the submittal at
13 Exhibit No. 107 by the applicant. And I'm
14 going to read the relevant portions into the
15 record that in part lead me to believe that
16 the reconsideration is proper. And I'm not
17 going to speak to just yet kind of the context
18 and the scope of that reconsideration, but I
19 think those are also going to be very
20 important issues here in terms of that
21 reconsideration.

22 My initial reaction again was

1 somewhat of well, does it really matter? Was
2 it a material omission or oversight on the
3 part of the applicant? The applicant's
4 submittal and response, again Exhibit No. 107,
5 dated June 28th in relevant portion at its
6 first paragraph writes in response to the
7 Woodrow's allegation:

8 "The Woodrow's allegation, the
9 purported apartment in the basement of 2162
10 California Street, N.W., is somehow
11 significant is wrong. The Woodrow fails to
12 recognize that the basement area of 2162
13 California Street was not included in the
14 calculations for the conversion of one
15 nonconforming use to another. That is the
16 Woodrow's discovery of an alleged apartment
17 has absolutely no bearing on the approval
18 granted by the Board of Zoning Adjustment in
19 Case No. 17446. Consequently, the motion
20 should be denied."

21 That's essentially the close of
22 the first paragraph. That initially had me

1 convinced and sold. If in fact there was an
2 omission, was it material? Did it materially
3 affect or impact the relief that was being
4 sought? What perhaps confused me was in the
5 second sentence or the first sentence of the
6 next paragraph.

7 "The applicant is eliminating
8 entirely the office/art gallery space located
9 in 2162 California Street, which is the
10 purported location of the 'undisclosed
11 apartment.'" That sentence to an extent
12 somewhat undermines the first sentence that I
13 read, because it raised a question for me as
14 to so are we, in fact, doing something with
15 space that's devoted to a conforming use and
16 then, in fact, converting it to a
17 nonconforming use?

18 It created therefore enough of a
19 question for me that I think a reconsideration
20 is appropriate. But in my mind, that
21 reconsideration, and I'm not yet speaking to
22 the issue of the stay, which as the Chair

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1 mentioned is a component of the relief that's
2 sought in the motion here, but just on the
3 issue of the reconsideration, I felt that that
4 created enough of a question, because if there
5 is conforming use here that is being changed,
6 I think that is something that needs to be
7 clarified and needs to be clarified on the
8 record.

9 I am not convinced that, however,
10 it necessarily will affect the ultimate
11 outcome, but I think there is enough of a
12 question there that a reconsideration of some
13 type, whether it's a rehearing, whether we do
14 it now, however we decide to do it, I think
15 it's appropriate enough to reopen and parse
16 that question out and at least get a clear
17 answer on yes, there is conforming use here
18 that is being replaced by nonconforming use.
19 Here is how it's being replaced, but, Board,
20 it ultimately has no affect on the relief that
21 we sought.

22 That could be a very short

1 rehearing. Obviously, we may have two or
2 three different perspectives on the answer to
3 that question. And at the end of the day, we
4 may end up being at the same place, again,
5 with myself and Mr. Mann voting in support of
6 the application or alternatively, it could be
7 argued that well, that does materially change
8 the relief here and we need to clarify that.

9 I'm not exactly sure yet what
10 exactly is going on in this apartment space in
11 all honesty. The grainy pictures, the broad
12 and general sometimes specific descriptions of
13 what is happening there, who knows. Artists
14 can be a very interesting group of folk and
15 they can live in very different types of
16 circumstances. But I think there is enough,
17 again, not trying to be too flip or too
18 humorous with it, I think there is enough here
19 to support a reconsideration, so we get this
20 critical clarification.

21 But again, I'm still leaving open
22 that it may be the case at the end of that

1 clarification it ends up being not much of
2 anything. But that's where I stand on that
3 question. But the reason why I mentioned the
4 reconsideration, Madam Chair, is I think it is
5 an important first step to get to, because,
6 quite honestly, the outcome that we reached in
7 the original verdict or in the original
8 hearing, if you will, the original decision
9 was one that I supported.

10 So I don't want to step too glibly
11 over reconsidering, because I would -- if it
12 weren't for that question, that I think has
13 been validly raised, I would just as soon say
14 no, I don't want to reconsider it and I don't
15 want to reopen the record and get into it. So
16 I'm perhaps being a little persnickety on the
17 procedural issue, but I would perhaps suggest
18 that the reconsideration is an important first
19 step in terms of the motion.

20 My position would be to grant that
21 reconsideration and then move into discussion
22 as to how we proceed with that. And in all

1 likelihood, I would hazard a guess that it's
2 probably going to have to be a re -- some type
3 of limited hearing on the record in a very
4 focused and specific way. And again, I'm not
5 yet going to speak to that issue of the stay,
6 which is perhaps a little more complicated in
7 terms of procedurally how we deal with it.

8 But ultimately, I'm reaching the
9 same perspective you are, Madam Chair, I'm
10 just getting to it in a little bit of a
11 different manner. Thank you, Madam Chair.

12 CHAIRPERSON MILLER: It just
13 sounds like we're on the same page, but you're
14 saying that it's almost a two step process
15 that we agree to reconsider?

16 VICE CHAIR ETHERLY: Absolutely.

17 CHAIRPERSON MILLER: As opposed to
18 -- we're not -- you're not ready --

19 VICE CHAIR ETHERLY: Absolutely.

20 CHAIRPERSON MILLER: -- to address
21 the other issues in the motion for
22 reconsideration?

1 VICE CHAIR ETHERLY: From the
2 stand --

3 CHAIRPERSON MILLER: I mean,
4 usually we rule on the motion, the whole thing
5 at once, the motion for reconsideration. We
6 look at the merits of the motion. But I'm
7 just going to look at the rule again. We are
8 agreeing to reopen the record, which may
9 affect the decision, so, in fact, we are going
10 to reconsider the decision in light of what
11 may come out of the hearing, right?

12 VICE CHAIR ETHERLY: But I'm just
13 parse -- I think I agree with you, but I'm
14 just parsing out the reconsideration step as
15 separate and distinct in this process. I just
16 didn't want to just kind of step up, because,
17 you know, normally, occasionally and from time
18 to time, there are times when I disagree with
19 you and I just want to be sure that, you know,
20 I don't let you walk through that door too
21 easily.

22 But I'm more than happy to perhaps

1 look to OAG or just, you know, visit our rules
2 just to be sure that I'm not making a mountain
3 out of -- you know, a procedural mountain out
4 what should be just a little mole hill.

5 CHAIRPERSON MILLER: I don't think
6 the rules are real clear, but I think that
7 actually we are deciding to grant a
8 reconsideration. We are reconsidering it and
9 reopening the record.

10 VICE CHAIR ETHERLY: Correct.
11 Pursuant to 3126.

12 CHAIRPERSON MILLER: 26.

13 VICE CHAIR ETHERLY: Correct.

14 CHAIRPERSON MILLER: Right. Okay.

15 VICE CHAIR ETHERLY: Correct. And
16 I would agree that pursuant to 3126.6 that
17 there is new evidence that has been submitted
18 which could not reasonably have been presented
19 at the original hearing. And that part I
20 agree wholeheartedly with your comments on the
21 record with regard to that particular issue,
22 because I believe -- I just don't believe the

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1 record was very clear. I'm not necessarily
2 ascribing, you know, or characterizing, you
3 know, how that omission occurred, but I just
4 don't think the record was clear at all on the
5 issue of this space in question.

6 So my suggestion would simply be
7 as our first step that the reconsideration
8 that I would move to grant the motion for
9 reconsideration of our order based on the new
10 evidence.

11 CHAIRPERSON MILLER: I second
12 that. Are you on board, Mr. Mann?

13 BOARD MEMBER MANN: I am on board.
14 I think that Mr. Etherly has probably
15 represented my viewpoint much more
16 articulately than I could have regarding this
17 fairly complicated legal issue. But I think
18 that we are at the same place on this.

19 CHAIRPERSON MILLER: Okay. We can
20 vote on this and then talk further about how
21 to proceed. Well, wait a second. The only
22 thing is that also wrapped in this motion for

1 reconsideration and rehearing is the question
2 of the stay. So perhaps we can address that
3 as well and then vote on it. No, you want to
4 vote on it?

5 VICE CHAIR ETHERLY: Well, yes,
6 because that gets -- definitely I agree with
7 you there, that gets rather complicated. I
8 think once we act on the reconsideration, then
9 we begin to grapple with okay, what does that
10 mean in terms of how we proceed to get this
11 clarification? And I would then suggest, you
12 know, there are a couple of different ways we
13 can approach that.

14 CHAIRPERSON MILLER: Okay. Okay.

15 VICE CHAIR ETHERLY: And then
16 perhaps in that second phase of our
17 discussion, we will get into this issue of the
18 stay, because I think there are probably going
19 to be some different interpretations on
20 whether a stay is something that has to happen
21 formally or whether it is something that
22 happens automatically by virtue of the fact

1 that now we are reconsidering the order.

2 Because there is a question of
3 there is an order out there, so conceivably,
4 the applicant could run off and with all due
5 haste in the next 30 minutes, do your thing.
6 But of course, that probably happens at the
7 applicant's risk considering the fact that
8 there may be a reconsideration. I'm getting
9 way ahead of our conversation.

10 CHAIRPERSON MILLER: Go right
11 ahead.

12 VICE CHAIR ETHERLY: But in terms
13 of how I'm approaching this, we reconsider,
14 grant the reconsideration, so this application
15 is back in front of us or the order is back in
16 front of us and then we begin to answer the
17 question of now that it is back in front of
18 us, what do we do with it and how do we move
19 forward.

20 CHAIRPERSON MILLER: Okay. Just
21 procedurally, are you willing to -- are you
22 wanting to vote on the reconsideration and the

1 rehearing as one motion? Because I'm
2 comfortable doing that, but if you are not, we
3 can separate it.

4 VICE CHAIR ETHERLY: I'm
5 comfortable doing that. I perhaps have a
6 different perspective on how we approach the
7 rehearing.

8 CHAIRPERSON MILLER: Right.

9 VICE CHAIR ETHERLY: As my
10 colleagues may know, but --

11 CHAIRPERSON MILLER: I think we
12 should discuss that, but I just want to make
13 sure before we have a motion that if we're not
14 going to vote separately, we can, maybe before
15 we vote on it, talk about what this rehearing
16 would be limited to, because I think that that
17 is one of your concerns --

18 VICE CHAIR ETHERLY: Correct.

19 CHAIRPERSON MILLER: -- outlining
20 how it should be limited.

21 VICE CHAIR ETHERLY: And hence,
22 part of my desire was to keep it all very

1 separate and clean.

2 CHAIRPERSON MILLER: Okay.

3 VICE CHAIR ETHERLY: Because each
4 one of these conversations could get fairly
5 involved.

6 CHAIRPERSON MILLER: All right.
7 So you want to vote first that we would
8 reconsider the application?

9 VICE CHAIR ETHERLY: Just
10 reconsider, correct.

11 CHAIRPERSON MILLER: Okay. Okay.
12 Then I would move for reconsideration of
13 Application No. 17446-A.

14 VICE CHAIR ETHERLY: I think I
15 beat you to it, Madam Chair.

16 CHAIRPERSON MILLER: Oh, you did?
17 Okay. Do we have a second?

18 VICE CHAIR ETHERLY: We had a
19 second.

20 CHAIRPERSON MILLER: Okay.

21 VICE CHAIR ETHERLY: I moved. We
22 had a second.

1 CHAIRPERSON MILLER: Okay.

2 VICE CHAIR ETHERLY: So I would
3 suggest let's vote.

4 CHAIRPERSON MILLER: Let's vote.
5 All those in favor say aye.

6 ALL: Aye.

7 CHAIRPERSON MILLER: All those
8 opposed? All those abstaining? Okay. Do you
9 want to call the vote?

10 MR. MOY: Yes, ma'am. The staff
11 would record the vote as 3-0-2 on the motion
12 of Mr. Etherly to grant the motion for
13 reconsideration, seconded by Ms. Miller, also
14 in support Mr. Mann. We have no Zoning
15 Commission Member nor Board Member
16 participating.

17 CHAIRPERSON MILLER: Okay. Next
18 is the motion for rehearing. Do you want to
19 address that now?

20 VICE CHAIR ETHERLY: I would be
21 more than happy to just kind of offer some
22 thoughts on that.

1 CHAIRPERSON MILLER: Okay.

2 VICE CHAIR ETHERLY: Okay. Now
3 that it's here, what do we do with it? Part
4 of my desire before saying what I would like
5 to -- how I would like to deal with the fact
6 that it's here is I think that the question in
7 front of us is -- the questions in front of us
8 are fairly specific and minimal. And I mean
9 minimal from the standpoint of really there
10 are only perhaps two to three questions.

11 One is what is happening in this
12 space now? What's going to happen to this
13 space? Should the applicant be allowed to
14 move forward? And does whatever happens to
15 that space, if it is a change, especially from
16 a conforming use to a nonconforming use, does
17 that materially impact the relief that was
18 sought?

19 I think those are generally
20 speaking the three kind of key questions that
21 need to be answered. Perhaps there are some
22 additional ones, but I think those are kind of

1 the big ones in the room. And for me, I could
2 be just as happy dealing with those today.
3 But I am more than open to concerns about the
4 appropriate level of notice for all of our
5 participants to be prepared to adequately
6 argue and provide evidence as to the answers
7 to those questions.

8 So I am, by no means, committed or
9 highly motivated to do it today. I'm always
10 about judicial efficiency where appropriate,
11 but if it's more appropriate for us to deal
12 with this in a deliberate fashion, I'm open to
13 that. So those are, I think, kind of the key
14 three questions that are out there in front of
15 us, if not perhaps one or two more. I'm open.
16 I'm not saying let's limit it, but I think the
17 rehearing, the reconsideration should be very
18 tightly focused, that's perhaps my biggest
19 concern.

20 BOARD MEMBER MANN: Okay. I
21 agree. I would disagree with going forward
22 any way today, for the reasons that you just

1 listed, but I think you are right that it
2 needs to remain focused and that not every
3 aspect of this case be opened up and that
4 somebody try to reargue it.

5 CHAIRPERSON MILLER: I agree that
6 the rehearing should be limited to the
7 implications of the newly discovered evidence.
8 I think you said, Mr. Etherly, that, you know,
9 you wanted to know what was there today and
10 what will be there in the future. I think
11 it's important to know the history of what was
12 there, you know, what was there at the time of
13 the application, you know, because we're
14 talking about is there a change from a
15 conforming use to a nonconforming use. That
16 seems to be the issue.

17 And then, as you stated, how does
18 this new evidence affect the relief that was
19 granted in this case? Okay. I think we are
20 all on the same page then about the
21 limitations of the hearing tied to this
22 evidence. It's not a hearing on everything

1 that was listed as concerned in the motion for
2 reconsideration. It's only related to the
3 newly discovered evidence.

4 Okay. Did we vote on this?

5 VICE CHAIR ETHERLY: No.

6 CHAIRPERSON MILLER: Are we ready
7 to vote on this or do you have more to say?
8 Oh, as far as procedure goes, I can't possibly
9 see going forward today. The parties have had
10 no notice that they would be required to
11 address this issue or that they could address
12 this issue and they may want to have witnesses
13 and documents and so they need time, the ANC
14 needs time to weigh in. So I would not be in
15 favor of going forward today.

16 VICE CHAIR ETHERLY: No, and I
17 would certainly add to the consensus on that.
18 I mean, again, I was flexible either way, so
19 I'm more than happy to just make it a complete
20 consensus and would perhaps suggest that the
21 next step, it's not a motion on that, it
22 simply would be looking to our schedule to see

1 when something could happen. And, of course,
2 there are a number of different considerations
3 that impact that. So I'm more than
4 comfortable with that step, Madam Chair.

5 CHAIRPERSON MILLER: Okay. I
6 think before looking at the schedule, we can
7 vote then on the motion to grant -- we can
8 vote on granting the motion for rehearing of
9 Application No. 17446-A with respect to the
10 newly discovered evidence.

11 All those in favor say aye.

12 ALL: Aye.

13 CHAIRPERSON MILLER: All those in
14 opposed? All those abstaining? Would you
15 call the vote, please?

16 MR. MOY: Yes, staff would record
17 the vote as 3-0-2. This is on the motion of,
18 was it, Mr. Etherly?

19 VICE CHAIR ETHERLY: I'll be more
20 than happy to have made that motion and accept
21 a second from Mr. Mann, perhaps we could just
22 follow the -- Mr. Mann, if you would be so

1 kind as to --

2 BOARD MEMBER MANN: I believe I
3 did second that.

4 VICE CHAIR ETHERLY: Excellent.

5 MR. MOY: Okay. Thank you very
6 much. That was on the motion of Mr. Etherly,
7 seconded by Mr. Mann to grant the motion for
8 a rehearing to the limited specific questions
9 as described -- as discussed. Also in support
10 of the motion Ms. Miller and, of course, we
11 have no Zoning Commission Member nor Board
12 Member participating. So as to the proposed
13 schedule hearing date, would you like me to
14 weigh in?

15 CHAIRPERSON MILLER: Well, I just
16 wonder if we should leave that for last?
17 Would that be all right?

18 MR. MOY: That's fine.

19 CHAIRPERSON MILLER: Because we
20 still have one more pending issue and that's
21 the question of the stay. They asked for a
22 stay of the order pending any reconsideration

1 and/or appeal. Okay. With respect to our
2 reconsideration, 3126.9 says "Unless the Board
3 orders otherwise, neither the filing nor
4 granting of a motion for reconsideration or
5 rehearing shall automatically stay the effect
6 of a final decision."

7 And the question of a stay, I
8 think, is generally governed by the rules for
9 a stay as set forth in Court of Appeals'
10 decision certainly where they talk about
11 irreparable harm, they talk about likelihood
12 of success on the merits. They talk about
13 prejudice to parties. I can't remember the
14 fourth one off hand.

15 But in any event, I don't think
16 that there is a case here that was made of
17 irreparable harm or really likelihood of
18 success in the merits necessarily. And again,
19 I was in the dissent on this case. But I
20 don't see that -- in fact, they didn't really
21 argue the elements for a stay. They basically
22 just asked for one.

1 You know, as far as irreparable
2 harm goes, the applicant can proceed at their
3 own risk, if they are -- if it's reversed and
4 the applicant loses and they have chosen to go
5 ahead and build anyway, then they would have
6 to tear down what they have built. So I don't
7 see irreparable harm there in this and it
8 wasn't really made, so I don't know if others
9 feel differently, but I don't think the case
10 has been made for a stay.

11 VICE CHAIR ETHERLY: No, I would
12 agree, Madam Chair. It's perhaps an unusual
13 footing that we find ourselves on on that
14 particular issue, because clearly the grounds
15 for a stay are laid out in a fairly well-
16 developed line of jurisprudence, so I would
17 not be inclined to grant. And as you
18 indicated, our regulations are very clear on
19 the impact of a reconsideration.

20 That all being said, of course,
21 the most important point, the million dollar
22 point is, of course, the applicant would take

1 any further action with regard to moving
2 forward under the outstanding order at their
3 own peril. And that can be taken as it is.
4 So I would think the appropriate outcome would
5 be to deny the request for a stay. But
6 nevertheless, it is clear or it should be
7 clear to all parties that there is further
8 action that nevertheless will be taking place
9 on this case one way or the other, so prudence
10 would probably dictate everyone maintaining
11 status quo.

12 But I don't think it would be the
13 appropriate step for this Board to mandate it
14 as the argument was not made in the submission
15 regarding the grounds for a stay. Thank you,
16 Madam Chair.

17 CHAIRPERSON MILLER: Thank you.
18 That was very well said. Mr. Mann, do you
19 have anything?

20 BOARD MEMBER MANN: I agree.

21 CHAIRPERSON MILLER: Okay. In
22 which case, I would move to deny the request

1 for a stay.

2 VICE CHAIR ETHERLY: Second it.

3 CHAIRPERSON MILLER: Further
4 deliberation? All those in favor say aye.

5 ALL: Aye.

6 CHAIRPERSON MILLER: All those
7 opposed? All those abstaining?

8 MR. MOY: Staff would record the
9 vote as 3-0-2 on the motion of Ms. Miller to
10 deny the request for the stay, seconded by Mr.
11 Etherly, also in support of the motion Mr.
12 Mann. And again, no Zoning Commission Member
13 nor other Board Member participated.

14 CHAIRPERSON MILLER: Okay. I
15 think, at this point, it would be appropriate
16 to look at our schedule to see where we could
17 schedule a hearing for the limited purposes we
18 discussed.

19 MR. MOY: If the staff may, the --
20 again, as the Board is familiar, these hearing
21 dates are pretty full up through October, but
22 sometimes there are some -- a few openings.

1 Staff might suggest for the Board to consider
2 for the month of July as a potential. We have
3 a case that's been withdrawn, July 24th, in
4 the morning, number one.

5 Number two, we have July 31st in
6 the afternoon for carryover cases. And number
7 three, what's my number three? We're well
8 into October, because I'll have to be honest
9 with you, beginning in the fall in September,
10 we have -- the Board -- the staff office has
11 scheduled appeal cases in the afternoon
12 through the month of September and October.

13 CHAIRPERSON MILLER: Okay. Just
14 to recap. You are saying that on July 24th
15 and I'm looking at the schedule as well, that
16 we have a withdrawal in the morning, so we
17 have a space for that, correct?

18 MR. MOY: Yes, ma'am.

19 CHAIRPERSON MILLER: And what's
20 the next date?

21 MR. MOY: The next potential
22 schedule date could be July -- the afternoon

1 of July 31st.

2 CHAIRPERSON MILLER: Okay. And
3 then the next date?

4 MR. MOY: The next date,
5 typically, I'm seeing three cases in the
6 morning and an appeal case in the afternoon.
7 If the Board would -- I mean, the morning
8 would be tight if you want to add a fourth
9 case, otherwise, we're looking at October 23rd
10 where we can add a third case in the morning.

11 My only note might be that the
12 staff notes that there are parties in the
13 audience if the Board needs some input in
14 terms of when they could be prepared to file,
15 number one. And number two, whether or not
16 the Board is desiring that when this opens for
17 limited hearing, if the Board would want to
18 impose any time limitations on testimony.

19 CHAIRPERSON MILLER: Okay. Yes, I
20 think our rules provide that we can seek input
21 from -- testimony input from members of the
22 audience. And we're basically finished with

1 our meeting anyway, at this point. We're at
2 scheduling questions. So if there are parties
3 or persons involved in this case who want to
4 come forward to discuss the scheduling, that
5 would be fine.

6 MS. BROWN: Good afternoon, Madam
7 Chair.

8 CHAIRPERSON MILLER: Let's see.

9 MS. BROWN: Carolyn Brown on
10 behalf of the applicant. The July dates would
11 be fine with us and I might suggest that we
12 brief the issue for you prior to any hearing,
13 so we can get this fully flushed out and just
14 focus on the narrow issue that needs to be
15 addressed.

16 CHAIRPERSON MILLER: Yes, thank
17 you. I was just thinking about that. Okay.

18 MS. BEGGS: Kathleen Beggs on
19 behalf of the California House/California
20 Court party who has joined this motion.
21 Sitting here today, I'm not sure what the
22 availability of the people who are witnesses

1 would be. I know that July tends to be, in
2 our city, a vacation month and so I guess I
3 would prefer the October month, because
4 everyone seems to be back in pocket at that
5 point.

6 But I actually wanted to ask a
7 question is one of the points that the Board
8 made was that a lot of the facts at issue here
9 are ones that are peculiarly in the possession
10 of the applicant and especially her son who
11 has been her representative here for the
12 entire time. I'm wondering whether he is
13 going to be here, so that we can ask the
14 questions that we all want to answers to.

15 I mean, as the Board seems to have
16 recognized one of our citizens accidentally
17 happened upon this apartment, I must say I've
18 lived across the street from this building for
19 19 years and I had no idea that there was a
20 residence down there. And it was through an
21 odd set of circumstances that she happened to
22 cross it. Certainly, we would want her to be

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1 here to testify and again, I think it's right
2 that some of these issues seem to need further
3 briefing.

4 CHAIRPERSON MILLER: Wait. Who
5 are you saying you want to testify?

6 MS. BEGGS: Well, Marie Drisoll
7 was the one who took what was described as the
8 grainy photographs.

9 CHAIRPERSON MILLER: Well, you
10 know what I think of it, it might be helpful,
11 I mean --

12 MS. BEGGS: She could not be here
13 today.

14 CHAIRPERSON MILLER: Yes, okay.
15 I'm not sure whether we're going to need to go
16 there or not or whether the applicant is going
17 to stipulate whether or not there was an
18 apartment use available or not. If so, I
19 don't anticipate a lot of factual testimony.
20 It depends on what happens with the applicant,
21 at that point.

22 If the applicant were to just say

1 okay, because they didn't deny it in their
2 response to the reconsideration/reopening
3 motion that there was no apartment use, that
4 there was an apartment use, so if that's not
5 going to be in dispute and maybe Ms. Brown can
6 address that a little bit, I don't know, then
7 it's really going to seem to turn maybe on a
8 legal argument.

9 MS. BEGGS: I would absolutely not
10 disagree with you.

11 CHAIRPERSON MILLER: Okay.

12 MS. BEGGS: Except for the fact
13 that the existence of this apartment was
14 actively concealed. It was not -- and sitting
15 in front of me with a bunch of pictures of the
16 basement and they have -- you know, it goes
17 down to the detail of where the utility boxes
18 are and where the gas meter is and somehow the
19 existence of a very large apartment is omitted
20 from those drawings.

21 CHAIRPERSON MILLER: Right.

22 MS. BEGGS: So whether -- I mean,

1 to the extent we can get to the bottom of this
2 through stipulations, I would be more than
3 happy to do that.

4 CHAIRPERSON MILLER: Okay.

5 MS. BEGGS: I'm just concerned
6 that -- I mean, this has been something that
7 I really think was hidden from us.

8 CHAIRPERSON MILLER: Right. Ms.
9 Brown do you want to address that, because
10 we're trying to figure out what's going to
11 happen at this hearing.

12 MS. BROWN: Without speaking with
13 the owner, I cannot stipulate to any facts,
14 but I can say that if we want to go forward on
15 the assumption that there is an apartment use
16 in the basement for argument sake, I'm fully
17 willing to do that.

18 CHAIRPERSON MILLER: Okay.
19 Because this goes to who needs to be here at
20 the hearing, you know.

21 MS. BEGGS: Of course, and we also
22 need to know the length of time that it has

1 been there and things like that.

2 CHAIRPERSON MILLER: Okay.

3 MS. BEGGS: Because there were
4 others of the regulations that, as I read
5 through them, and I don't claim to be any kind
6 of an expert on zoning law.

7 CHAIRPERSON MILLER: Okay.

8 MS. BEGGS: I have it from the
9 get-go here. But I understand that there is
10 a three year triggering point --

11 CHAIRPERSON MILLER: Okay.

12 MS. BEGGS: -- that we need to
13 know about. I mean, it's not just whether
14 somebody is living down there right now.
15 There are a couple of other things that we
16 need to know.

17 CHAIRPERSON MILLER: Okay.

18 MS. BEGGS: Including things like
19 the size of the apartment. I have no idea
20 what the answers to these are.

21 CHAIRPERSON MILLER: Okay. Ms.
22 Brown, do you think that we could get to some

1 of that information prior to the hearing?

2 MS. BROWN: Yes, but again, you
3 know, I cannot make any stipulations or
4 admissions on behalf of the owner.

5 CHAIRPERSON MILLER: Right.

6 MS. BROWN: Because I certainly
7 don't have that information personally. But
8 if we wanted to operate from a legal point,
9 I'm willing to say let's assume that their
10 assumptions are correct, that the basement has
11 been used as an apartment for 10 years. And
12 if we start from that point --

13 CHAIRPERSON MILLER: So you're
14 willing --

15 MS. BROWN: I'm not conceding.

16 CHAIRPERSON MILLER: -- to say
17 that on behalf of your client that you can
18 make that assumption?

19 MS. BROWN: No. I'm not saying
20 that.

21 CHAIRPERSON MILLER: Oh.

22 MS. BROWN: I'm saying that we can

1 take the argument from a different level, from
2 the ground floor up and not even have to
3 address the basement. And whether or not it's
4 true that there is an apartment in the
5 basement, we're not going to say yes or no,
6 but at this point, obviously, I can't, because
7 I don't have the authority to. I don't
8 personally know and I don't know what the
9 facts are.

10 But even if all those assumptions
11 are true, we can start from that point in our
12 brief.

13 CHAIRPERSON MILLER: I guess my
14 question is I'm trying to figure out what you
15 are saying, because, you know, I'm sorry,
16 what's your name?

17 MS. BEGGS: Beggs, B-E-G-G-S.

18 CHAIRPERSON MILLER: B-E-G-G-S.
19 Ms. Beggs, are you saying that -- I understand
20 how you can make your argument.

21 MS. BEGGS: Um-hum.

22 CHAIRPERSON MILLER: But for Ms.

1 Beggs to have the information to make her
2 argument, are you saying they can assume that
3 there was an apartment there?

4 MS. BROWN: I guess two things.
5 First off, I'll see what information I can
6 collect to document it. But even if I don't
7 have the documentation, I'm willing to let Ms.
8 Beggs start from the point that her
9 assumptions are correct.

10 VICE CHAIR ETHERLY: See here is
11 what I think. Perhaps let me just take a step
12 back. I think the critical question will be
13 for the opponents scheduling a date and a
14 time, such that you would have the ability to
15 present your witnesses to help buttress your
16 argument that there was some type of apartment
17 use underway in this basement in question.

18 Part of what I think you were
19 successful with thus far was in your
20 submissions creating enough of, I don't want
21 to say a presumption, but you met a bar, you
22 know, kind of a minimal bar illustrating

1 enough facts here to suggest that there is a
2 question that needs to be sorted out.

3 I think in my mind I am taking
4 your comments, your testimony, Ms. Beggs, to
5 suggest that you would be concerned if Mrs.
6 Drisoll were not available to provide her
7 experience or her interactions as she has had
8 them with this space in question.

9 I am perhaps inclined to feel that
10 what you have submitted on the record is more
11 than sufficient in that regard, because she
12 has provided fairly decent documentation in
13 your submittal, painstakingly so outlining her
14 experience with this space in question. And
15 then further, the submittal from Mr. Logan
16 also. So to an extent, and I want to be very
17 careful in terms of how I walk, because I
18 don't want to necessarily impute to you now
19 and your applicant, Mrs. Brown, a
20 responsibility to rebut.

21 But to an extent, part of what I
22 think we will need to hear from you is after

1 you have conferred with your client, with the
2 applicant, yes, there was an apartment use
3 here, but here is why it is not material or
4 here is how we think it does impact the relief
5 and here is how we want to resolve it. That
6 may be part of your argument versus,
7 obviously, what the opponents are going to
8 say, well, we think it has a very significant
9 impact on the relief that was sought and here
10 is why.

11 But I think we can do that without
12 Ms. Drisoll, if it's the case that she can't
13 be here, because I think she submitted very
14 detailed testimony. So I think the critical
15 question from the Chair perhaps still is do
16 you feel that there would be, I don't want to
17 say prejudice, but do you feel that you would
18 be unfairly hamstrung or handcuffed in your
19 ability to present at our reschedule date if
20 it's one of those dates that Mrs. Drisoll
21 would not be available?

22 I'm trying to avoid kind of the

1 let's assume or accept the argument or
2 stipulate and I'm just trying to get to do you
3 feel that Ms. Drisoll and perhaps another
4 witness are so critical to the case of the
5 apartments existence that you just would not
6 really be able to move forward without them if
7 we were to schedule one of those dates that
8 might not be available? Because I understand
9 your point. July is a tough month. August,
10 everyone goes by that time, but July is a
11 tough month.

12 MS. BEGGS: July is actually fine
13 for me, but -- and some of this is that I
14 honestly have had not enough time to noodle it
15 through. One of the things that I'm hearing
16 counsel saying and I certainly saw it in the
17 letter that we got after the close of business
18 on Thursday is that it's irrelevant that this
19 apartment was there all along.

20 And I guess the question that
21 immediately jumps to my mind and I haven't had
22 time to really think through the legal

1 implications of it is that why did you hide it
2 from us? I mean, you've got an architect who
3 shows us where the gas meter is, but he
4 doesn't show us that there is a major
5 residential apartment down there?

6 I think that that tells us that
7 they thought it was very significant and they
8 decided not to tell us about it. And from my
9 standpoint, that requires -- what you are
10 telling me is that's a legal issue, right?
11 And it might be right is that I don't need
12 Marie Drisoll to come in and tell you how she
13 happened upon this apartment, because there
14 were lights on after and during a late night
15 dog walk kind of thing.

16 I can understand why you are
17 saying that's not terribly significant to me,
18 but what would be significant to me and I
19 guess I ask the Board this question is I would
20 like to hear the applicant's explanation for
21 this, because, frankly, I was shocked by this.

22 VICE CHAIR ETHERLY: Right. Well,

1 I think, and I'm definitely just speaking as
2 one Board Member, let me be very clear about
3 that. Part of what I think is the issue here
4 is there clearly is a sense that something was
5 hidden or not divulged and it should have
6 been. Part of my response to that is I don't
7 think we necessarily need to answer that
8 question, because you got what you wanted.
9 You are back at the table now, so let's move
10 forward and sort out what does it mean.

11 If in fact there was an apartment
12 use there, what does it mean for the zoning
13 relief that is being sought? The issue of it
14 not having been divulged or demonstrated at an
15 earlier point, we're here now.

16 MS. MONROE: Madam Chair, can I
17 just weigh in here? We're going to have a
18 rehearing. We don't need to rehash all this.
19 I think you should set a date, whoever is
20 available comes, and I think that at that
21 point you guys will have the opportunity to
22 cross examine both sides. You make your case.

1 And I don't want to get into a lot of
2 substance at this point, because nobody -- we
3 don't have the facts and we shouldn't really
4 be haranguing this. Whatever date suits, I
5 think will --

6 CHAIRPERSON MILLER: Okay. The
7 thing is that I just think it makes sense if
8 the parties know what to focus on and that
9 they are most focused ahead of time and then
10 we have a hearing that's, you know, focused.
11 And I thought Ms. Brown's suggestion of
12 briefing the issue was a good one, in which
13 case she would do it first, so that you would
14 know what their arguments are and then you
15 could respond to them.

16 I think that that makes sense,
17 because as you pointed out in your opposition,
18 in your motion for rehearing that troubling
19 questions were raised. Okay. And it's about
20 this apartment use. And then the response
21 seems to be that well, it doesn't affect the
22 outcome of the case anyway and it's a legal

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1 issue.

2 Okay. Personally, I mean, when
3 I'm looking at the order, I think the order
4 makes findings of fact that might not be true
5 if there, in fact, was a residential use
6 there. So I would be interested in that
7 information. I don't know why it should be
8 hidden. I mean, if it was a mistake,
9 whatever, we really are not getting into, you
10 know, motives for that or, you know, we're not
11 assessing any penalties for whether they
12 divulged the information or not.

13 I think you just want to know, was
14 there an apartment there? For how long? And
15 those kind of questions affect zoning issues.
16 And that's fine. And then you can make your
17 argument in response. And, you know, normally
18 we do just sort of like a hearing and whoever
19 can come, come, but it seems to me that, tell
20 me if I'm wrong, that -- are you the most
21 involved party in this case, so that if we
22 were to do this sooner, rather than later, no

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1 one would be prejudiced or you would have
2 enough time or this is a good time for you to
3 reach the issues.

4 MS. BEGGS: I suppose --

5 CHAIRPERSON MILLER: I know the
6 applicant is --

7 MS. BEGGS: -- of the two July
8 dates presented, I would prefer the 31st over
9 the 24th, because I'm not able to meet with
10 any of the other people in the neighborhood
11 yet. But I guess I do want to return to my
12 other question and maybe I should ask the
13 Board, ask Ms. Brown through the Board, is the
14 applicant's son going to be here to answer
15 these questions? Because as I say, these are
16 factual.

17 We didn't know about this
18 apartment. I don't know how many people I can
19 bring in from my neighborhood to say we didn't
20 know.

21 CHAIRPERSON MILLER: Right. I
22 think, and, Ms. Brown, you can tell me if you

1 disagree with me, but I think what we want to
2 do is get beyond the factual question into the
3 legal question. Like I think that hopefully
4 she will tell you enough factually, so you can
5 then make your legal argument. You know, we
6 don't have to wait to cross examine this guy
7 to see whether he was there.

8 I hope in Ms. Brown's briefing
9 they will say, okay, this was an apartment.
10 Somebody -- we can get this down today.
11 Somebody lived there for so long, etcetera,
12 etcetera. And so, you know, don't get into
13 like well, why didn't you tell us. The issue
14 is was there or wasn't there. Okay. You will
15 get that before the hearing.

16 MS. BEGGS: Yes, I couldn't agree
17 with you more.

18 CHAIRPERSON MILLER: Okay.

19 MS. BEGGS: But I don't hear --
20 what I don't hear from Ms. Brown is that yes,
21 I'll give you that before the hearing or that
22 I'll give you the applicant. I'm not hearing

1 either of those things from her. And if I
2 did, I would feel totally confident.

3 CHAIRPERSON MILLER: Ms. Brown,
4 what do you think about that?

5 MS. BROWN: I have to consult with
6 my client. But in any event, there will be
7 enough facts in what I present to the Board in
8 my opening brief on this issue that the -- Ms.
9 Beggs and Mr. Matz can adequately respond to
10 it.

11 MS. BEGGS: Then what I would like
12 to do is leave open the possibility of saying
13 there is not enough facts in what she has
14 presented to the Board. So far there hasn't
15 been and I have very little confidence that
16 there will be, given that she is saying that
17 she doesn't even know until she can talk to
18 her client.

19 CHAIRPERSON MILLER: No. I know
20 you need to talk to your client, but it just
21 bothers me that, as a Board member, it puts
22 into question some of our findings of fact, so

1 we need to revisit them. So we need an answer
2 of what was the use there? Was there a
3 conforming use, a nonconforming use? As I
4 said in my deliberations, No. 5, I said that
5 both buildings are conforming as to use and
6 structure.

7 I mean, if there is something
8 that's --

9 MS. BROWN: I understand your
10 point.

11 CHAIRPERSON MILLER: -- wrong, you
12 know, we based it on the record.

13 MS. BROWN: No.

14 CHAIRPERSON MILLER: So if there's
15 something wrong in the record --

16 MS. BROWN: I understand
17 completely and we will get the information.

18 CHAIRPERSON MILLER: Okay.

19 MS. BROWN: And make sure that the
20 record is clear.

21 CHAIRPERSON MILLER: Yes, please.

22 MR. MATZ: My name is Harry Matz.

1 I am a resident of the Woodrow and I think I
2 can speak for them. We were the initial
3 moving party for reconsideration. Thank you
4 for your attention to this matter. I think
5 the only thing I would ask that Ms. Beggs has
6 not noted is, if I may make the request
7 through the Board, for an opportunity to enter
8 the premises, possibly to measure and inspect
9 them, because to be quite honest, we are, at
10 this point, not able to credit everything that
11 the applicant says about the property.

12 And so we want to trust, but
13 verify, to coin a phrase. I don't know if
14 this is unusual. I don't do this sort of
15 thing for a living. But I wonder if you could
16 tell me if I'm out of line, so be it, but --

17 CHAIRPERSON MILLER: You could
18 always ask, but I don't believe the Board has
19 authority to order that. But I do think the
20 burden is on the applicant, at this point, to
21 prove what the premises were used for, because
22 you have certainly raised the question, that's

1 why we're having the hearing and the applicant
2 has the burden of proof.

3 MR. MATZ: The only reason I ask
4 is it could -- I agree that most of this is
5 going to come down to the law. I mean, have
6 we put forward information that changes this
7 into a use variance case from an area variance
8 case? We had argued from Lincoln that it was
9 a use variance case. We apparently didn't
10 prevail.

11 The question is does the
12 conforming use of the basement make itself in
13 light of the intended mix-use in the future?
14 That's where we -- it may come down to square
15 footage on the basement versus the, you know,
16 first floor. It may come down to things like
17 that. That's the only reason I wonder about
18 this. It's certainly information we may want
19 to know.

20 MS. BEGGS: Can I actually make a
21 procedural suggestion and maybe we can just
22 move this along? What if we set dates for

1 briefs and like I don't know who -- Carolyn,
2 I don't know how long you need. Is it a week,
3 two weeks? And then we will respond and if in
4 our responses we don't have enough facts, then
5 I think that we're going round and round on
6 what kind of facts we need and we're not going
7 to know that until --

8 CHAIRPERSON MILLER: Okay.

9 MS. BEGGS: -- she is able to talk
10 to her client.

11 CHAIRPERSON MILLER: All right.

12 MS. BEGGS: And so --

13 CHAIRPERSON MILLER: What we can
14 do is set a date, but in setting that date,
15 we're considering a date that's pretty soon.
16 And I just want to make sure we don't have any
17 problems like, for instance, that the ANC
18 doesn't have time to weigh in on this or
19 something like that or you don't have time or
20 you don't have time. Do you have any comments
21 on that?

22 MS. BEGGS: Well, we can tell you

1 about the ANC, because I spoke with them at
2 the last meeting we had. I guess it was
3 probably Monday before last and they said they
4 are standing behind their original
5 recommendation, which was to disapprove of
6 this project. And we will get you that in
7 writing, that's the least of --

8 CHAIRPERSON MILLER: Okay. That's
9 fine.

10 MS. BEGGS: -- that's the least of
11 my --

12 CHAIRPERSON MILLER: That's fine.
13 And they can be notified and if they feel they
14 need to have a special meeting, they can do
15 that. Okay. So you said the 31st is really
16 what you need?

17 MS. BEGGS: Well, in terms of
18 putting up briefings, we're at the 3rd now and
19 I think people --

20 CHAIRPERSON MILLER: Okay.

21 MS. BEGGS: -- are going to be
22 away for kind of a long weekend now. And so

1 in terms of if they are going to put in papers
2 and then we're going to put in papers, you
3 tell me. I mean, I think it's looking more
4 like August, but if that's a downward for
5 you --

6 CHAIRPERSON MILLER: Well, the
7 Board doesn't meet in August.

8 MS. BEGGS: Oh, okay.

9 CHAIRPERSON MILLER: So that's the
10 thing. It's either the 31st or we go to
11 October.

12 MS. BEGGS: Either one of those is
13 fine with me, but I don't know whether that is
14 adequate time to get the briefings in, which
15 seems to be the most expeditious, the most
16 judicious use of your time is to have this
17 presented in paper.

18 CHAIRPERSON MILLER: Right.

19 MS. BEGGS: Because --

20 CHAIRPERSON MILLER: And your
21 time, too.

22 MS. BEGGS: -- I think we all

1 agree that a lot of this comes down to legal
2 arguments.

3 CHAIRPERSON MILLER: Right.

4 MS. BEGGS: And not so much
5 factual ones.

6 CHAIRPERSON MILLER: Okay. Let me
7 ask you if we can expedite this. It's really
8 because of the Board situation. There are
9 only three of us here who sat on this case and
10 it takes three to make a decision. And Mr.
11 Mann won't be here on the 31st, unfortunately.
12 So my question is if we can make this happen
13 a little quicker in order to have a hearing on
14 the 24th.

15 Could the applicant, I guess, you
16 are able to probably do things more quickly,
17 I think. Could you speed up the normal amount
18 of time that we give to file a brief in this
19 case? Could you do it, I think, if we did it
20 within a week? I know we're going in the
21 opposite direction. We usually start from the
22 date and work backwards, I'm just trying to

1 see if there is enough room.

2 MS. BROWN: I'm just looking at my
3 schedule. I have hearings on the 9th and the
4 10th and the 11th, but I could, yes, get
5 something in by next Tuesday.

6 CHAIRPERSON MILLER: Okay. Ms.
7 Beverley, now, do you want to look? I don't
8 know if we could go backwards or forwards, but
9 if Ms. Brown could get something in by next
10 Tuesday, how much time would there be left for
11 the opponents to respond?

12 MS. BAILEY: I'm sorry, Madam
13 Chair, what was the date that we are setting
14 the schedule for?

15 CHAIRPERSON MILLER: We're trying
16 to -- this is pretty quick, but it's just one
17 limited issue. We're trying to see if we can
18 schedule this case for the 24th.

19 MS. BAILEY: The 24th,

20 CHAIRPERSON MILLER: So that all
21 three of us can be here.

22 MR. MOY: Madam Chair?

1 CHAIRPERSON MILLER: Yes.

2 MR. MOY: If I may, one week would
3 take us to the 10th from the applicant, it
4 would be July 10th and for other parties, the
5 following week would be July 17th. The
6 following week after that is July 24th.

7 MS. BAILEY: My only concern is
8 would that be sufficient time for the ANC or
9 are we saying the ANC, there is not an issue
10 about the ANC meeting and getting the report
11 in to us?

12 MS. BEGGS: Again, I'm going to
13 have to talk to them. The last time we had an
14 ANC meeting, this matter was on the agenda and
15 the consensus of the people present and the
16 ANC Commissioner, we only have two, of the two
17 ANC Commissioners who were both there, was
18 that they were standing by their prior vote to
19 disapprove of the project. And I don't think
20 that anything has happened in the last nine
21 days that's going to change that, but I can
22 check with Marietta and Sandy Pearletter.

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1 As I said, I don't think that's
2 the problem. I think that getting the legal
3 work done is more of an issue.

4 CHAIRPERSON MILLER: Right. How
5 about I think you could have a little more
6 than a week to respond to this. By what date
7 would they need to get the response to the
8 applicant's filing then?

9 MS. BAILEY: If the applicant's
10 response comes in on the 10th of July, I would
11 push it as far as to July 19th for the
12 opposition to respond. If that would give the
13 Board sufficient time, you would only -- you
14 perhaps would get it that Friday. You would
15 get all of the information on that Friday if
16 it comes in on the 19th. You would get it on
17 the 20th for your 24th decision.

18 MS. BEGGS: What day of the week
19 is the 24th?

20 MS. BAILEY: The 24th is on
21 Tuesday.

22 MS. BEGGS: That's a Tuesday?

1 Okay. Okay.

2 MR. MOY: Madam Chair, I mean, for
3 the parties that respond to that Friday, that
4 Thursday or Friday, which is the 19th or 20th,
5 don't forget the 24th is the hearing. It's a
6 limited hearing. It's not a Public Meeting
7 unless you were combining that. But you can
8 have that or you can have that they are filing
9 later, which would be fine. It would not
10 impact your --

11 CHAIRPERSON MILLER: I see. And
12 if they needed the weekend to go to the
13 Monday, you could -- we could get it on
14 Monday. We're not making -- yes, Mr. Moy is
15 just saying sometimes, you know, it's really
16 important that we have a document like before
17 the weekend when we're actually going to have
18 a meeting and deciding the issue.

19 We're actually going to be only
20 having the hearing on Tuesday, so that if you
21 needed the weekend and we got your filing on
22 Monday morning, that would be enough time for

1 us to read it and be prepared for a hearing.

2 Do you think you would need that extra time?

3 MS. BEGGS: We might, but I would
4 try to commit to getting it to you by the
5 19th.

6 CHAIRPERSON MILLER: Well, that's
7 great.

8 MS. BEGGS: I guess I would like
9 to have the parties agree that we will email
10 one another our filing, so we don't have that
11 issue of waiting for the three days in the
12 mail turnaround.

13 CHAIRPERSON MILLER: Okay. Good.

14 MS. BROWN: Absolutely. And I'll
15 do my best to try to get something in before
16 the 10th to make sure that they have enough
17 time to respond.

18 CHAIRPERSON MILLER: That would be
19 great. And then they would know whether or
20 not they need to call any witnesses at the
21 hearing, etcetera. And would you be
22 identifying if you are calling any witnesses

1 in your brief?

2 MS. BROWN: I would be happy to if
3 we decide to call any witnesses at all.

4 CHAIRPERSON MILLER: Okay. I just
5 think the more information you share ahead of
6 time, the more focused the hearing and the
7 more easily you will be able to plan as to
8 what witnesses you need to bring to the
9 hearing, if any, because it may just come down
10 to a legal issue, which it should. Okay.

11 MS. BEGGS: I couldn't agree with
12 you more, Madam Chair.

13 CHAIRPERSON MILLER: Do you have
14 any other question on this then? All right.

15 MS. BROWN: No, thank you.

16 CHAIRPERSON MILLER: Then it's set
17 for July. Do you want to recap, Ms. Bailey?

18 MS. BAILEY: The property owner's
19 submission will be due July the 10th. The
20 opposition will have until July 19th to
21 respond. And also, the July 19th date will be
22 for the ANC. Hopefully, they will be able to

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1 meet that deadline, July 19th for the ANC.

2 CHAIRPERSON MILLER: The record
3 will be left open.

4 MS. BAILEY: The record will be
5 left open --

6 CHAIRPERSON MILLER: They are
7 certainly not required or requested to --

8 MS. BAILEY: -- for the ANC, okay.

9 CHAIRPERSON MILLER: -- file
10 anything, but they can.

11 MS. BAILEY: And then the 24th the
12 Board will have a limited Public Hearing on
13 the application. This is July 24th for a
14 limited Public Hearing.

15 CHAIRPERSON MILLER: And that will
16 be in the morning.

17 MS. BAILEY: In the morning.

18 CHAIRPERSON MILLER: Okay.

19 MS. BEGGS: Should we calendar
20 that for 9:00 a.m. or 9:30?

21 MR. MOY: Madam Chair, to help you
22 in that, I had -- the staff had asked earlier

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1 whether or not the Board wanted to limit the
2 testimony at that hearing date, since it's a
3 limited hearing, but that's of your choosing.

4 MS. BEGGS: No, I promise we're
5 not going to bring in a boat load of
6 witnesses. I only want to know if we are
7 calling them, what time we should tell them to
8 get here.

9 CHAIRPERSON MILLER: Mr. Moy,
10 though do you think it makes sense -- I'm not
11 I guess ready to put on limits, at this point.
12 There are limits in our regulations anyway.
13 But it is a pretty focused limited hearing.
14 So does it make sense to have this one first
15 or last is my question, I guess. Do you think
16 first, because it's a limited hearing?

17 MR. MOY: Well, the staff can go
18 either way. It's up to you. We can deal with
19 it either way.

20 CHAIRPERSON MILLER: Okay. We'll
21 put you on first. We'll slip you in first.

22 MS. BEGGS: Thank you.

1 CHAIRPERSON MILLER: So that means
2 -- well, not 9:00, I mean, 9:30 at the
3 earliest, 9:30.

4 MS. BEGGS: Very good. We'll be
5 here.

6 CHAIRPERSON MILLER: Okay. Okay.
7 Good. Okay. Well, thank you very much.

8 MS. BROWN: Thank you, Madam
9 Chair.

10 CHAIRPERSON MILLER: Oh, my
11 goodness, do we have anything else on the
12 agenda for the Public Meeting?

13 MR. MOY: No, Madam Chair.

14 CHAIRPERSON MILLER: Okay.

15 MR. MOY: I think that's it.

16 CHAIRPERSON MILLER: Then this
17 concludes the Public Meeting.

18 MS. BAILEY: Madam Chair, there
19 may be some people in the audience who is here
20 for the Public Hearing, so you may just want
21 to --

22 CHAIRPERSON MILLER: Okay. We

1 just concluded our Public Meeting from this
2 morning. And therefore, the Board is going to
3 take a break and get ready for the afternoon
4 hearings and we will be returning at 2:00. So
5 I'm sorry for any inconvenience to people who
6 have come here for a 1:00 hearing. It's hard
7 to tell sometimes how long the morning is
8 going to take.

9 So we will be back fresh for the
10 hearings by 2:00.

11 (Whereupon, the Public Meeting was
12 concluded at 1:10 p.m.)

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