

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

SEPTEMBER 11, 2007

+ + + + +

The Regular Public Hearing 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
MARC D. LOUD Board Member

ZONING COMMISSIONS MEMBER PRESENT:

GREGORY N. JEFFRIES Commissioner
MICHAEL G. TURNBULL Commissioner (AOC)

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY Secretary
TRACEY W. ROSE Sr. Zoning Specialist
JOHN NYARKU Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

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LORI MONROE, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

STEPHEN RICE

KAREN THOMAS

The transcript constitutes the minutes from the Public Hearing held on September 11, 2007.

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P R O C E E D I N G S

CHAIRPERSON MILLER: Good morning, ladies and gentlemen. This is the September 11th morning public hearing of the Board of Zoning Adjustment of the District of Columbia.

My name is Ruthanne Miller. I'm the Chairperson of the BZA.

Joining me today to my right is Mr. Greg Jeffries, representing the Zoning Commission on the BZA. To my left is Mr. Marc Loud, a mayoral appointee for the BZA.

Further down is Tracey Rose from the Office of Zoning and Lori Monroe is here from the Office of Attorney General, and I believe -- well, let me just continue anyway.

Copies of today's hearing agenda are available to you and are located to my left in the wall bin near the door. Please be advised that this proceeding is being recorded by a court reporter and is also Webcast live.

Accordingly, we must ask you to refrain from any disruptive noises or actions in the hearing room. When presenting

1 information to the board, please turn on and
2 speak into the microphone, first stating your
3 name and home address. When you're finished
4 speaking, please turn your microphone off, so
5 that your microphone is no longer picking up
6 sound or background noise.

7 All persons planning to testify
8 either in favor or in opposition are to fill
9 out two witness cards. These cards are
10 located to my left in the bin near the door
11 and also on the witness tables.

12 Upon coming forward to speak to
13 the board, please give both cards to the
14 reporter sitting to my right.

15 The order of procedure for special
16 exceptions and variances is as follows.

17 One, statement and witnesses of
18 the Applicant. Two, government reports,
19 including Office of Planning, Department of
20 Public Works, DDOT, etcetera. Three, report
21 of the Advisory Neighborhood Commission.
22 Four, parties or persons in support. Five,
23 parties or persons in opposition. Six,

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1 closing remarks by the Applicant.

2 Pursuant to Section 3117.4 and
3 3117.5 of our regulations, the following time
4 constraints will be maintained. The
5 Applicant, Appellant, persons and parties,
6 except an ANC, in support, including
7 witnesses, sixty minutes, collectively.

8 Appellees, persons and parties,
9 except an ANC, in opposition, including
10 witnesses, sixty minutes, collectively.
11 Individuals, three minutes.

12 These time restraints do not
13 include cross examination and/or questions
14 from the board. Cross examination of
15 witnesses is permitted by the Applicant or
16 parties. The ANC within which the property is
17 located is automatically a party in a special
18 exception or variance case. Nothing prohibits
19 the board from placing reasonable restrictions
20 on cross examination, including time limits,
21 and limitations on the scope of cross
22 examination.

23 The record will be closed at the

1 conclusion of each case, except for any
2 material specifically requested by the board.
3 The board and the staff will specify at the
4 end of the hearing exactly what is expected,
5 and the date when the persons must submit the
6 evidence to the Office of Zoning. After the
7 record is closed, no other information will be
8 accepted by the board.

9
10 The Sunshine Act requires that the
11 public hearing on each case be held in the
12 open before the public. The board may,
13 consistent with its rules of procedure and the
14 Sunshine Act, enter executive session during
15 or after the public hearing on a case for
16 purposes of reviewing the record or
17 deliberating on the case.

18 The decision of the board in these
19 contested cases must be based exclusively on
20 the public record. To avoid any appearance to
21 the contrary, the board requests that persons
22 present not engage the members of the board in
23 conversation.

1 Please turn off all beepers and
2 cell phones at this time, so as not to disrupt
3 these proceedings.

4 The board will now consider any
5 preliminary matters. Preliminary matters are
6 those which relate to whether a case will or
7 should be heard today, such as requests for
8 postponement, continuance, or withdrawal, or
9 whether proper and adequate notice of the
10 hearing has been given.

11 If you're not prepared to go
12 forward with the case today, or if you believe
13 that the board should not proceed, now is the
14 time to raise such a matter.

15 Does the staff have any
16 preliminary matters?

17 MS. ROSE: The staff has a couple
18 of preliminary matters. However, we wanted to
19 know if you would like to handle them after we
20 call the cases.

21 CHAIRPERSON MILLER: Okay. I
22 think the board is aware of those preliminary
23 matters and would like to handle them within

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1 the cases.

2 MS. ROSE: Then the first case for
3 the morning will be 17653, the application of
4 Mary Fran Miklitsch and Donna Pavetti,
5 pursuant to 11 DCMR 3104.1, for a special
6 exception to allow a third story addition to
7 an existing single-family row dwelling under
8 section 223, not meeting the lot occupancy
9 requirements, section 403, and nonconforming
10 structure provisions, subsection 2001.3, in
11 the R-4 District at premises 635 E Street,
12 N.E., Square 862, Lot 174.

13 Would the Applicant -- I guess we
14 have to swear in --

15 CHAIRPERSON MILLER: What I was
16 going to suggest is before we start with the
17 first case, why don't all individuals in the
18 audience who wish to testify today on any of
19 the cases rise, and Ms. Rose will administer
20 an oath.

21 MS. ROSE: Please raise your right
22 hand.

23 [Witnesses were duly sworn]

1 MS. ROSE: You may be seated.

2 CHAIRPERSON MILLER: Thank you.

3 Would the first case please come forward, and
4 when I was doing the introductions, Mr. Cliff
5 Moy from the Office of Zoning was not here,
6 and so I just want everyone to know that he's
7 here and will be here for these hearings.

8 Good morning. Would you introduce
9 yourself for the record, please.

10 MS. FOWLER: I'm Jennifer Fowler
11 of 1742 D Street, S.E.

12 MS. PAVETTI: Donna Pavetti, 635 E
13 Street, N.E.

14 CHAIRPERSON MILLER: Okay. This
15 looks like a pretty straightforward, well-put-
16 together case. Would you like to just
17 highlight, or summarize your case.

18 MS. PAVETTI: Sure. What we're
19 proposing is a rooftop addition. Currently,
20 there's an existing attic space that's full
21 height at the front of the house, there's an
22 existing mansard, and we're just simply
23 extending that roof line, raising the roof to

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1 create living space up on the third floor.

2 We're not increasing the
3 nonconformity. We're just asking for relief
4 because of the fact that we're at 69.6 percent
5 right now. We do have support from the ANC,
6 and we have a petition with about 30
7 neighbors, it should be in your file, and we
8 also have Stanton Park Neighborhood
9 Association and Capitol Hill Restoration
10 support.

11 Just to point out, we've been
12 negotiating with Historic, we did go to HPRB,
13 and they recommended a 8 foot setback from the
14 rear of the property. After that, we did
15 negotiate a little bit more with Ann Brockett,
16 and we reduced that to five feet.

17 We're still currently negotiating
18 with them, to see what that magic number is at
19 the back. The revision that you have, from 8-
20 8-07, has a five foot setback from the rear
21 with a roof deck up on the top.

22 So what we were hoping to do today
23 would be to look at the case with the full

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1 addition, with the understanding that we're
2 going to negotiate with Historic at permitting
3 level, to see what that final setback would
4 be.

5 CHAIRPERSON MILLER: So are you
6 saying we're looking at the plans that show
7 the five foot setback?

8 MS. PAVETTI: What we would like
9 to do is look at the original --

10 CHAIRPERSON MILLER: The original.

11 MS. PAVETTI: Which is the full
12 addition, rather than the revision of 8-8-07,
13 if that's a possibility.

14 And then we would have to finalize
15 our negotiations with Historic at the
16 permitting level.

17 CHAIRPERSON MILLER: Why is that?
18 I'm a little bit confused, because it sounds
19 like it may not be either of these plans. I
20 mean, it could be eight feet setback, or eight
21 foot setback, or it could be somewhere in
22 between five and eight, but yet we're looking
23 at another set of plans. That it's not likely

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1 to be those plans either, or --

2 MS. FOWLER: Well, I'll sort of
3 explain. What happened was, is that we
4 requested to go back the whole way, and
5 Historic, first of all, said eight foot
6 setback, and then they said we could have a
7 five foot setback.

8 And we sort of presented other
9 houses, and one which we look at, which had
10 received -- our understanding was they had
11 received approval to go back the whole way.
12 So we were trying to resolve that. They
13 actually named that case as a reason for
14 giving us the eight foot setback, and said we
15 could come in and look at the plans, to see
16 how they actually were using the space.

17 And when we went in to look at
18 those plans, they were granted to go back the
19 whole way. They were not required to do a
20 setback. So we were trying to resolve why we
21 were being asked to do a setback and they were
22 not, when they're identical houses and they're
23 on the exact same alleyway.

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1 So they were going back to the
2 board and they just haven't resolved that.

3 So what we'd like to do is, our
4 goal is to try and go back the whole way, and
5 if not, then we're going to come back in some
6 amount.

7 So we were hoping that what we
8 could do is, going back the whole way is the
9 most restrictive, and so we would -- and
10 that's what everything else we did, the
11 neighbors, the ANC, everything was going back
12 the whole way.

13 But we've been trying with
14 Historic and we just haven't been able to get
15 them to come to agreement on where they're
16 actually going to fall on what the setback
17 will actually be, if there will be a setback
18 at all.

19 MS. PAVETTI: We do have their
20 approval for the five foot setback at this
21 point; not the eight. So the eight's kind of
22 out of the picture right now. So it's either
23 going to be the five, or hopefully something

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1 less.

2 CHAIRPERSON MILLER: Let me ask
3 you about -- you know, we usually make a
4 decision on specific plans. We always do,
5 actually. So have you considered just coming
6 back to us after you have your final plans,
7 after you have worked things out with HPRB?

8 MS. FOWLER: I actually called
9 Zoning to figure out whether or not we had to
10 have Historic done, and they said that the
11 zoning issues and the Historic were not
12 necessarily the same, that they were sort of
13 different issues, and that we didn't actually
14 have to have it resolved.

15 So that's why, given that we were
16 already on the calendar, and again, because
17 what we were proposing to do is to do what
18 would be the most restrictive, is go out and
19 get approval for that. We would be coming in.
20 It's our hope that we could just sort of be
21 done, so that we can move forward.

22 COMMISSIONER JEFFRIES: So let me
23 just -- so you're asking us today, cause we're

1 just looking at one set of drawings -- so
2 you're asking us today to look at the drawing
3 that has no setback.

4 MS. FOWLER: No setback.

5 COMMISSIONER JEFFRIES: You want
6 us to review that.

7 MS. FOWLER: Yes.

8 MS. PAVETTI: With the original
9 submission.

10 COMMISSIONER JEFFRIES: And then
11 if HPRB determines that, you know, a five foot
12 setback is appropriate, then you're going to
13 come back here again, to have us review a five
14 foot setback.

15 MS. FOWLER: Is that what we would
16 need to do?

17 COMMISSIONER JEFFRIES: So then
18 what happens if HPRB does not sign off on the
19 no setback drawings, and we go forward with
20 it?

21 MS. PAVETTI: Our understanding
22 was we would negotiate, continue with the
23 negotiations with Historic, and finalize for

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1 permanent. So when they sign off on the
2 permanent application, we would need to set it
3 in however many feet that they require us to.
4 But we're asking for your support for the full
5 addition, knowing that we're probably going to
6 back it off at the permanent level, and not
7 come back through BZA.

8 CHAIRPERSON MILLER: I mean,
9 again, I think we do approve the plans that
10 are before us, and I mean, sometimes they go
11 to HPRB and there are modifications that don't
12 affect our zoning determinations. I guess I'm
13 of the view, looking at your file, there don't
14 seem to be many issues, at all, if any, with
15 respect to your being able to get special
16 exception relief in this case.

17 You don't have any opposition, no
18 indication of any adverse impacts. Probably
19 whichever way you go on the plan. So I think
20 my view would be -- and I want to open this up
21 for discussion -- but to squeeze you in when
22 you have final plans, and I would anticipate
23 that it would be a very quick decision.

1 But we would be looking at the
2 plans that we would be approving. We would
3 just, you know, give you a continuance. This
4 would be -- I would see this as a very quick
5 case, so therefore, you wouldn't have to wait
6 four months for an opening in the calendar.
7 We could fit you in, squeeze you in, almost as
8 soon as you're ready, after the HPRB decision.

9 That's one option. Do board
10 members have some other opinions?

11 MEMBER LOUD: I'm inclined to
12 agree with you, Madam Chair. I think that the
13 particular issue that they're confronted with
14 sounds like one that may be resolved fairly
15 quickly, in that overlooking the particular
16 house that had the setback that you're trying
17 to get them directing you to look at that
18 file, and then you discovering that they had
19 a setback that you want in this case, is
20 something that sounds like it might be
21 resolved in a week or so, based on what you've
22 represented this morning.

23 So I would feel more inclined to

1 give you that time to get it resolved, and
2 then bring back a final set of plans for us.

3 MS. PAVETTI: So would this be
4 just a postponed decision hearing? Is that
5 what you're proposing? Or would it be a
6 postponed hearing?

7 CHAIRPERSON MILLER: That's a good
8 question. I was thinking of the whole thing
9 being postponed. I don't know whether you can
10 address all your other issues today, separate
11 from your final plans.

12 Do you think you can? Otherwise,
13 I think it could be addressed again, fairly
14 expeditiously, because -- and almost stand on
15 the record, except we don't know exactly what
16 the plans are, because I think the record's so
17 strong.

18 But I'd be open to other opinions.

19 MS. PAVETTI: Can we just have one
20 minute to discuss. Thank you.

21 [Pause]

22 MS. PAVETTI: I think we would
23 probably lean towards taking your

1 recommendation then, if it's going to be
2 within a reasonable timeframe. Do we have any
3 idea of when --

4 CHAIRPERSON MILLER: Well, do you
5 have an idea of when you're going to have your
6 final plans?

7 MS. FOWLER: Well, we have been
8 talking to Historic for two weeks, and they
9 keep saying we'll get back to you tomorrow.
10 They were supposed to get back to me last
11 week. So I really don't know on their end.
12 I mean, it's sort of -- it feels like it's an
13 unusual situation on their end. They were
14 completely surprised. In the decision they
15 gave us, they referenced this house, that had
16 an eight foot setback. It has no setback.

17 So they are trying to figure out,
18 I think, how to come up with a reason, or
19 something, to treat us differently, and I'm
20 not sure how they're going to do that, but I
21 think they are trying to do that.

22 So I don't know what the process
23 is but we're trying to sort of work with them

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1 and to be responsive to what they're asking
2 us. So I don't know how long it could be.

3 I mean, we were trying to just --
4 you know, we sort of feel like we've been on
5 top of this, and sort of going through the
6 process, and we're just trying not to have
7 another huge delay.

8 So, again, if we can get on
9 quickly, then --

10 CHAIRPERSON MILLER: Well, like I
11 said, I think this is a quick case, so we'd be
12 willing to squeeze you in. But when do you
13 think you might be ready? I mean, you know,
14 what's a safe time for you? A month? Two
15 weeks? Six weeks? I don't really know.

16 MS. PAVETTI: I would say we could
17 probably push some of that, a couple weeks to
18 make a decision.

19 CHAIRPERSON MILLER: Two weeks?

20 MS. PAVETTI: I would think so;
21 yes.

22 CHAIRPERSON MILLER: Okay.

23 MS. FOWLER: We did tell them that

1 we were going to sort of come with sort of
2 this plan, and they still didn't -- I mean, I
3 said we were going to be here on Tuesday, and
4 we didn't sort of feel like we had any option,
5 except to sort of go with the full -- without
6 a setback. So they knew that we were planning
7 to do that, and still didn't sort of respond
8 with sort of where they are, and trying to
9 figure out what their decision's going to be.

10 CHAIRPERSON MILLER: So we're
11 looking at the 25th; right? Of September.

12 Mr. Moy, do you think it would
13 work to put this first in the afternoon? It's
14 either last in the morning or first in the
15 afternoon.

16 MR. MOY: My initial feeling is
17 since I think there's only one narrow issue
18 for the board, we could probably take of first
19 thing in the morning. No? I mean, that's a
20 thought. That's a suggestion. Or first in
21 the afternoon. I mean, I think this seems
22 fairly quick.

23 COMMISSIONER JEFFRIES: And we're

1 comfortable in two weeks? I mean, you think
2 in two weeks this is all going to be squared
3 away?

4 MS. FOWLER: I don't know what
5 else -- I don't really know. I mean, I'm not
6 sure how to answer the question since they
7 told us it was --

8 COMMISSIONER JEFFRIES: Yes; yes.
9 Okay.

10 MS. FOWLER: When I asked two
11 weeks ago, they said it was going to be in a
12 day, so --

13 MS. PAVETTI: Maybe two-three
14 weeks is a --

15 COMMISSIONER JEFFRIES: Okay.

16 MS. PAVETTI: Let's maybe one week
17 later.

18 CHAIRPERSON MILLER: The 25th is
19 okay, still? Are you saying three weeks?

20 MS. PAVETTI: Maybe the 2nd of
21 October, you know, the following Tuesday, just
22 to give us a little more breathing room.

23 CHAIRPERSON MILLER: I think the

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1 25th looks better on our calendar, if you
2 think you can do it.

3 MS. PAVETTI: That's fine.

4 CHAIRPERSON MILLER: Okay. So I
5 think we'll put you first in the afternoon,
6 and can I ask you, basically, I don't believe
7 you're going to be offering much testimony or
8 anything as far as our timing goes.

9 MS. PAVETTI: No.

10 CHAIRPERSON MILLER: Cause the
11 record is very full. We'll just have the
12 right plans and you'll address that. Okay.
13 So why don't we do that. So it's continued to
14 September 25th, first in the afternoon.

15 Thank you.

16 MS. FOWLER: Thank you so much.

17 CHAIRPERSON MILLER: Okay.

18 Ms. Rose, will you call the next
19 case when you're ready.

20 MS. ROSE: Yes. The next case is
21 Application No. 17652 of Emanuel and Marcia
22 Finn, pursuant to 11 DCMR Sections 3104.1 and
23 1555.2, for a special exception to develop a

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1 child development center, 30 children and four
2 teachers, under section 205, in the 16th
3 Street Heights Overlay/R-1-B District, at
4 premises 5707 14th Street, N.W., Square 2796,
5 Lot 833.

6 CHAIRPERSON MILLER: Thank you.

7 Would you introduce yourselves for
8 the record when you're ready, please.

9 MS. BALDWIN: Hello. My name is
10 Stephanie Baldwin. I'm from the law firm of
11 Greenstein DeLorme and Luchs, and I'm here on
12 behalf of Pat Brown, who couldn't be here
13 today. The Finns brought our firm on last
14 Friday afternoon to help them out with the
15 case. Also here -- I'll let everyone
16 introduce themselves.

17 MR. BELTON: I'm Ralph Belton, the
18 architect working on the project.

19 MR. FINN: I'm Emanuel Finn. Good
20 morning.

21 MS. ST. HILAIRE-FINN: I'm Marcia
22 Finn.

23 MR. WHATLEY: I'm Steve Whatley,

1 chairman, ANC 4A.

2 MR. LANG: Brian Lang, Advisory
3 Neighborhood Commissioner 4A06 in whose single
4 member district the proposed facility resides,
5 or is situated.

6 MR. FINN: There is one other
7 person. Pull up a chair.

8 MR. LETZKUS: Tim Letzkus,
9 president of the 16th Street Heights Civic
10 Association.

11 CHAIRPERSON MILLER: Okay. Good
12 morning. I think Mr. Loud would like to
13 address the parties first.

14 MEMBER LOUD: Good morning,
15 everyone. I just wanted to, before we start,
16 as a preliminary matter, place on the record
17 that I know personally a number of the parties
18 on both sides of the case. Mr. and Mrs. Finn
19 are neighbors of mine in Sheppard Park and our
20 kids attend the same school, and Mr. Finn and
21 I have served, actually, on a cyberspace
22 committee, we didn't meet personally, but
23 through e-mail that worked on writing grants

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1 for the school.

2 I also know Mr. Whatley very well
3 from my work on the upper Georgia Corridor and
4 his work on the upper Georgia Corridor as
5 well.

6 So I wanted to make sure that
7 everyone knew that notwithstanding, I do
8 believe I can be fair and impartial and review
9 the case on its merits, and not based on any
10 preexisting relationships in this matter.

11 CHAIRPERSON MILLER: Are there
12 questions from board members, first of all,
13 with respect to that?

14 Mr. Loud, I just would ask you to,
15 if you could elaborate a little bit more, what
16 you mean by neighbors.

17 MEMBER LOUD: Well, both with
18 respect to the Finns and Mr. Whatley, we live
19 in Sheppard Park. Neither of them live on the
20 same block that I live on but it's a community
21 where folks tend to know each other. So we've
22 known each other over the years, and that
23 would sort of capture the relationship.

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1 CHAIRPERSON MILLER: Do you have
2 any questions, Mr. Jeffries?

3 COMMISSIONER JEFFRIES: No, Madam
4 Chair. From what I've heard and understand
5 the situation to be, I mean, I'm perfectly
6 comfortable with Board Member Loud
7 participating in the case.

8 CHAIRPERSON MILLER: Are there any
9 concerns or questions from the parties?
10 Anyone object to Mr. Loud's participating in
11 this case?

12 MR. FINN: No, Madam Chairman.

13 MR. WHATLEY: No, Madam Chairman.
14 No objection.

15 CHAIRPERSON MILLER: Okay. Not
16 hearing any objections, then we can proceed
17 with our quorum. Okay.

18 I believe there are two
19 preliminary issues before us. The first is
20 applications for party status and the second
21 is a motion for a continuance, and I'd like to
22 do the party status applications first,
23 because then the parties can weigh in on the

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1 motion for a continuance.

2 So I have one party status
3 application, it's marked as Exhibit 24, from
4 Mr. Letzkus, and I wanted to ask you, is this
5 -- I don't believe this is in your personal
6 capacity. I think you're seeking party status
7 on behalf of the 16th Street Heights Civic
8 Association.

9 Am I correct on that?

10 MR. LETZKUS: Madam Chair, that is
11 correct.

12 CHAIRPERSON MILLER: Okay. And do
13 you have authorization from the organization?

14 MR. LETZKUS: I do, indeed.

15 CHAIRPERSON MILLER: And is that
16 in the record?

17 MR. LETZKUS: It is probably not
18 in your record. It is in our -- I can get you
19 a copy of our minutes of our June meeting,
20 which I was given authority to participate in
21 these proceedings.

22 CHAIRPERSON MILLER: Okay. Can
23 you just put on the record right now, was

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1 there a vote, or how was that done?

2 MR. LETZKUS: Yes, ma'am. I'm
3 sorry; yes. This issue came up at our June
4 meeting. We had members present, and I can't
5 remember the exact date in June. It's the
6 second Tuesday in June of 2007, this issue
7 came up and we specifically asked for the
8 officers to be allowed to participate in this
9 proceeding. So that was one vote, which was
10 in the affirmative.

11 And the second vote was in which
12 way should we participate as a proponent or in
13 opposition, and the second vote was in
14 opposition.

15 CHAIRPERSON MILLER: And who
16 votes? Is it officers? Is it the members?
17 It's members?

18 MR. LETZKUS: It's the members.
19 Yes, ma'am.

20 CHAIRPERSON MILLER: Okay. Was
21 there a number? Was there a vote?

22 MR. LETZKUS: Let's see. I don't
23 remember the number. It was a unanimous vote

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1 to participate.

2 CHAIRPERSON MILLER: Okay.

3 MR. LETZKUS: It was a split vote
4 in terms of proponent and opposition. But a
5 clear majority for opposition.

6 CHAIRPERSON MILLER: And how many
7 members are there?

8 MR. LETZKUS: Let's see. We have
9 60 members.

10 CHAIRPERSON MILLER: Okay. Any
11 other questions, preliminary questions?

12 MEMBER LOUD: I just wanted to ask
13 you, did the group have a quorum for the June
14 meeting that you're referencing?

15 MR. LETZKUS: Let's see. Did we
16 have a quorum? A quorum is not required by
17 our association.

18 MEMBER LOUD: Thank you.

19 MR. LETZKUS: You're welcome.

20 CHAIRPERSON MILLER: Are there
21 other requests for party status here?

22 [No response]

23 COMMISSIONER JEFFRIES: So Mr.

1 Letzkus, I'm looking at number six of the
2 party status application, and that's typically
3 where I zero in on, cause I'm always trying to
4 figure out how a particular person is more
5 significantly, or distinctly, or uniquely
6 affected.

7 So can you expound on that. I'm
8 looking at your response, and I guess I
9 probably need a little bit more explanation as
10 to how you're significantly, distinctly,
11 uniquely affected in character or kind.

12 MR. LETZKUS: Well, first of all,
13 I'm not.

14 COMMISSIONER JEFFRIES: Yes. I
15 recognize that.

16 MR. LETZKUS: But the association
17 is. I have testimony that I intended to give
18 today. I'm happy to put that in the record
19 now. It explains how we are, we think,
20 negatively impacted by this proposed child
21 care center.

22 COMMISSIONER JEFFRIES: This
23 organization.

1 MR. LETZKUS: This organization.
2 The neighborhood. We represent the
3 neighborhood. We're not an organization. We
4 represent a neighborhood, people who live in
5 the neighborhood. So it's a civic association
6 as you know, not a homeowner's association
7 kind of thing.

8 So we are, we think, negatively
9 affected in several major ways. One, traffic.
10 Two, noise. Three, as outlined in the 16th
11 Street Heights Overlay, nonresidential use.

12 COMMISSIONER JEFFRIES: Thank you.

13 MR. LETZKUS: Does that help?

14 CHAIRPERSON MILLER: Now let me
15 just follow up. I'm also of the impression --
16 I think that you might have stated that you
17 have knowledge and understanding of the
18 overlay, and the intent of the overlay, that
19 you would be able to discuss in the hearings
20 as it relates to this case; is that correct?

21 MR. LETZKUS: That's correct.

22 CHAIRPERSON MILLER: Okay. Do the
23 other parties have any objections or comments

1 with respect to the party status application
2 of the 16th Street Heights Civic Association?

3 MS. BALDWIN: The Applicant has no
4 objection.

5 CHAIRPERSON MILLER: Okay. ANC?
6 Does the ANC have a comment on the party
7 status application of the 16th Street Heights
8 Civic Association?

9 MR. WHATLEY: No comment. We
10 request that it be approved. Thank you.

11 CHAIRPERSON MILLER: Okay. Then I
12 think we should, the board maybe should
13 deliberate on this one, briefly. I think that
14 party status should be granted to the Civic
15 Association. They do represent the members in
16 the area in which this application falls, and
17 I understand that they do have an
18 understanding of the history and the
19 application of the overlay, that they would
20 address in the hearing.

21 So I think they are distinctly
22 affected from the general public.

23 COMMISSIONER JEFFRIES: Just one

1 more question. In terms of the membership of
2 the civic association, are any of the adjacent
3 owners, are they members of your civic
4 association? I mean, adjacent neighbors to
5 the location.

6 MR. LETZKUS: Yes. Yes, there are
7 some. Yes, there are some; yes.

8 COMMISSIONER JEFFRIES: Like next
9 door? Two doors? Three doors?

10 MR. LETZKUS: People who would be
11 impacted along the alley, along 14th Street,
12 along Montague.

13 COMMISSIONER JEFFRIES: Okay.
14 Okay.

15 MR. LETZKUS: Yes, sir.

16 COMMISSIONER JEFFRIES: Okay.
17 That's fine. So I would also, Madam Chair, be
18 in favor of granting party status to the civic
19 association as well.

20 MEMBER LOUD: I would as well,
21 Madam Chair, but I would also like to again
22 just, I guess, reinforce the board's request
23 for a copy of the minutes wherein the civic

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1 association was authorized to seek this party
2 status.

3 CHAIRPERSON MILLER: And as I
4 understood you, Mr. Letzkus, you're
5 representing the association as a whole, but
6 not every member is necessarily opposed to the
7 application; is that correct?

8 MR. LETZKUS: That's correct.

9 CHAIRPERSON MILLER: Okay. Now I
10 do see that there is a letter -- well, have we
11 resolved them, that they will be a party? I
12 think we've heard three members. Okay. So
13 you are accepted as a party.

14 I just want to move on to just
15 Exhibit No. 25 is a letter that purports to
16 ask for party status. It's from a Mr. Nelson
17 Dorsey and Erica Dorsey. Are they here today?

18 MS. ST. HILAIRE-FINN: No, ma'am,
19 they're not here today.

20 CHAIRPERSON MILLER: Okay. I'm
21 just going to highlight, then, what they say,
22 basically, is they're asking for party status
23 for themselves, and that they live less than

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1 150 feet away, and their concerns are
2 neighborhood losing the residential character,
3 property values decreasing, traffic, danger to
4 the kids from traffic.

5 Okay. Basically that highlights
6 it. However, they're not here, and party
7 status usually means that you are asking to
8 participate as a party, and that means
9 actively being a part of these proceedings,
10 and you can't do that, usually, if you're not
11 here, and in rare instances, someone who is
12 really quite committed but can't be here for
13 some reason, sometimes can submit, in writing.
14 But that really is not the case here. All we
15 have is a party status application.

16 So I'm just going to -- before I
17 throw this to the board, I want to ask if the
18 parties are aware of any other information
19 with respect to this application, that the
20 board should hear before we decide on whether
21 or not to grant or deny it, and if you have a
22 position.

23 MR. LANG: I just have a question.

1 If they are denied party status, would their
2 letter of opposition still be introduced, as
3 written, into the record as written
4 opposition? Or could that occur.

5 CHAIRPERSON MILLER: First of all,
6 their letter would be considered evidence, as
7 testimony in the record. The other option is
8 we can postpone this one until when the
9 hearing picks up, in the event that they come.
10 But I wouldn't be inclined, certainly, to
11 grant it today.

12 Do I have any other comments, now
13 that I've thrown that out, either, you know,
14 against it, for it, or application or
15 postpone?

16 MS. BALDWIN: No objection to the
17 application. I think we agree that putting it
18 off until, if they show up the next time,
19 might be the fair thing to do.

20 MR. LANG: I would tend to support
21 that as well.

22 CHAIRPERSON MILLER: Okay. I
23 think we could support that. That's it for

1 party status applications, that I'm aware of.
2 What happens also in a postpone, though,
3 since, for instance, we already have other
4 parties, the ANC and the 16th Street Heights
5 Civic Association, if there are any pleadings
6 to serve, then the Applicant would serve these
7 parties in the interim, in any event, okay,
8 because they are already-established parties.

9 Okay. I think that's the second
10 preliminary issue. If there's no other
11 discussion on party status, we can go to the
12 motion for continuance, and I would turn to
13 the Applicant to address that issue.

14 MS. BALDWIN: Again, Stephanie
15 Baldwin, attorney for the Applicant. As I
16 mentioned before, our firm was brought on as
17 counsel of the Finn's on Friday afternoon, and
18 as such, the Applicant, and we request time to
19 work with the Applicant, the community, the
20 ANC, the civic association, and the Office of
21 Planning, to resolve the unsettled issues of
22 the case. And we have asked for 60 days.

23 I've been warned that that might

1 be a pipedream, but the sooner the better
2 would be fantastic.

3 CHAIRPERSON MILLER: Comments from
4 the other parties. The ANC, first, if you
5 would like.

6 MR. WHATLEY: It is the position
7 of the ANC that we're opposed to a continuance
8 at the present time. Due notice was provided
9 to the Applicant in a timely fashion for our
10 June 5th meeting, which they could present to
11 the ANC. The ANC took a vote. The Applicant
12 then requested to be reheard at our September
13 meeting, which was last Tuesday, and the
14 Applicant didn't show. And so they had the
15 entire summer to prepare, and to come in at
16 this date, and to say that they want a
17 continuation, we've given them more than 90
18 days. We've given them 90 days to come back
19 to the ANC, to be reconsidered before the ANC.

20 So we've given them that
21 opportunity. And we came in today, prepared
22 to handle this event today, and on such short
23 notice, for the opponents to -- for the

1 Applicant to have additional time to get
2 their, quote, ducks in a row, would be, I
3 think -- would present a problem for us
4 because we have civilian -- have other jobs.
5 So we'd have to take off work, and we've
6 already done our work to be prepared to go
7 forward today.

8 Thank you.

9 CHAIRPERSON MILLER: Did you say,
10 did they present at the June 5th meeting?

11 MR. WHATLEY: Yes, they did.

12 CHAIRPERSON MILLER: And after
13 that, you shared with them all the concerns of
14 the ANC; is that right?

15 MR. WHATLEY: At the ANC meeting,
16 they got to present their application and
17 listen to our discussions. There was
18 discussion, back and forth, on things that
19 could be changed, what could be done. That
20 whole thing occurred.

21 We then had a vote on the
22 application. We had a quorum and the vote was
23 four to three to oppose the Applicant's

1 request. And in the letter I sent forward on
2 September 4th to the board, it covers the
3 highlights, the main areas of concern.

4 The Applicant then came back and
5 said they would like -- came to me and asked,
6 could they have another opportunity before the
7 ANC, to have us reconsider the action, and I
8 agreed yes, they could come to our September
9 meeting and present. And, in turn, then they
10 came back and said can we now request a
11 continuance. I guess a couple a days, the day
12 before the meeting, or day after, around that
13 time, the date of the meeting.

14 He then contacted me and requested
15 additional time, and I, in turn, said, well,
16 you have to come to the meeting because this
17 has to be voted on by the ANC. I can't just
18 arbitrarily negate what we had voted in.

19 But under parliamentary
20 procedures, we can reconsider the issue. They
21 did not attend the meeting, and they were on
22 the agenda, and they were notified of the
23 agenda in a timely fashion.

1 CHAIRPERSON MILLER: Did you know,
2 when you had your meeting, that they were
3 requesting a continuance, or was that
4 afterwards?

5 MR. WHATLEY: What we knew was
6 that they wanted to continue meeting with us
7 before anything happened before the BZA.
8 That's what we knew. I did not know they were
9 going to request, formally request a
10 continuance.

11 CHAIRPERSON MILLER: I mean, not
12 that the ANC always has this opportunity
13 anyway.

14 MR. WHATLEY: Right.

15 CHAIRPERSON MILLER: But I assume,
16 then, you didn't take a vote on your position
17 on the motion for a continuance?

18 MR. WHATLEY: They were there, so
19 there was no reason to vote on an action when
20 there was no proponent for the action at the
21 meeting.

22 CHAIRPERSON MILLER: I understand
23 you're representing the ANC through these

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1 proceedings.

2 MR. WHATLEY: Correct.

3 CHAIRPERSON MILLER: And so
4 sometimes, I think, you know, you have time to
5 ask the whole body to vote on the position
6 you're going to take, and sometimes you have
7 to take a position and then it can be
8 validated later. But in this case, I'm just
9 wondering -- you know, I'm not sure of the
10 exact dates, like, you know, had a letter been
11 submitted requesting an official continuance
12 for this case prior to your ANC meeting?

13 MR. WHATLEY: If the ANC had
14 received a formal notice in a timely fashion
15 for us to consider, that may not have changed
16 our position towards whether or not to grant
17 a request for a continuance. The position may
18 not have changed. We might have said, no, we
19 still don't want to continue this.

20 But I had no way of voting on
21 whether or not the ANC would approve a request
22 for a continuance. There was no one there to
23 make the motion, so we couldn't take the

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1 action, and I, on my own, could not take the
2 action without the concurrence of the ANC, of
3 the other commissioners. I couldn't
4 arbitrarily say we're going to continue this.
5 No. I couldn't do that.

6 CHAIRPERSON MILLER: But you're
7 taking a position now to oppose the
8 continuance.

9 MR. WHATLEY: Oh. We just found
10 out about this continuance that we're talking
11 about now. The attorney came over to me and
12 mentioned that they were going to request a
13 continuance. This is the first formal time
14 I've been notified of this action and we are
15 opposed to that.

16 MEMBER LOUD: Today.

17 MR. WHATLEY: Today. Right.

18 MS. BALDWIN: We sent a letter to
19 the ANC yesterday. We couldn't find an e-mail
20 address or anything quicker. So I was hoping
21 I'd see them here today. We did try to e-mail
22 it to the civic association from the e-mails
23 that were on their application form. Their

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1 lawyer's e-mail didn't work, so we did try Mr.
2 Letzkus's address.

3 MR. LANG: I would also state the
4 Advisory Neighborhood Commissioners' official
5 mailing address is available through the
6 Office of Advisory Neighborhood Commissioners,
7 as is all other contact information. So I
8 don't feel that an e-mail notification with
9 less than one day's notice is sufficient to
10 the Advisory Neighborhood Commission, when
11 other official forms of notification,
12 including faxes, is available to the
13 Applicant.

14 CHAIRPERSON MILLER: Mr. Letzkus.

15 MR. LETZKUS: I think we're
16 opposed to a continuance. I checked my e-mail
17 as late as 10:00 o'clock last night and
18 received nothing from any of the parties.
19 Actually, that's not true. I did receive
20 something from Mr. Whatley, notifying me that
21 he and Brian would be here, Mr. Lang would be
22 here. So I know my e-mail works, and I am in
23 the record, not officially as party status,

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1 but certainly it's part of the record, that
2 anybody could copy my e-mail address, I think
3 is on there twice. So we're ready to go this
4 morning, and really see no need to delay this
5 any further.

6 This has been going on, actually,
7 since last spring, and then culminated with
8 the ANC meeting in June.

9 MR. LANG: I would also add that I
10 do not believe, that should a continuance be
11 requested, that any additional information
12 could be provided by the Applicant that would
13 further support their application. The four
14 opposing votes on the Advisory Neighborhood
15 Commission are unified in their position, and
16 I do not feel that there would be any new
17 evidence or new compromises that could
18 significantly alter our position.

19 And, in fact, I think with
20 additional information, there may be -- and
21 should a vote be recast, that additional
22 negative votes would be a very strong
23 possibility, in which case it would be further

1 disadvantageous to the Applicant.

2 So I do not feel that a
3 continuance is warranted, in light of what
4 Chairman Whatley said. The Applicant did
5 provide a rather extensive presentation at the
6 June meeting, including copies of all of the
7 blueprints, and a very high quality bound
8 binder of their -- so, I mean, ample
9 information has been shared, that the Advisory
10 Neighborhood Commission 4A was able to make an
11 informed decision.

12 MEMBER LOUD: I hear a couple of
13 different arguments being made, Mr. Lang, one
14 of which is a continuance would allow the
15 movants in this case to come back before the
16 ANC and essentially get a second bite at the
17 apple.

18 A second argument is that counsel
19 for the movants need additional time to
20 prepare, having just been retained this
21 Friday.

22 I wanted to ask, in relation to my
23 last point, I wanted to ask Mr. Finn or

1 counsel, Mr. Whatley mentioned that you could
2 have retained counsel and began the
3 preparation of your case over the summer, I
4 think the last meeting on it having been maybe
5 in June of 07, and did you have a response to
6 that? Are there reasons why you were not able
7 to retain counsel prior to Friday?

8 MR. FINN: Commissioner Loud, yes,
9 -- thanks for the question -- we did. And I
10 must tell you, we've been trying to find an
11 attorney who deals with zoning issues. We've
12 had a challenge in that regard.

13 So that is the case, why, we've
14 interviewed several people, and consequently,
15 we haven't had an opportunity to really deal
16 with an attorney who understands zoning issues
17 and understands the city planning issues, and
18 that's the reason why.

19 CHAIRPERSON MILLER: Ms. Baldwin,
20 what do you hope to accomplish during the
21 continuance?

22 MS. BALDWIN: We want to work with
23 the Applicant and the community to try and

1 iron out some of the problems that they see.
2 I think we definitely want that opportunity,
3 to see if a negotiation can be made to allow
4 this child development center to exist. Also
5 to work with Office of Planning to resolve
6 some of the issues that they saw with the
7 application.

8 CHAIRPERSON MILLER: Mr. Jeffries.

9 COMMISSIONER JEFFRIES: Well, I
10 want to, Madam Chair, address Mr. Lang.

11 In the three plus years that I've
12 been on the Zoning Commission, the BZA, I've
13 experienced, in several instances, where
14 Applicants have been able to go back and
15 revisit, they've gotten additional counsel,
16 other experts that have come back and
17 revisited a particular application, and I have
18 seen movement.

19 So my only hope, that if this
20 board determines that a continuation is
21 appropriate, that, you know, the ANC would
22 have an open mind.

23 I listened to Board Member Loud

1 talk about everybody knows everybody, so this
2 is, to me, somewhat of a family feud, and I
3 would hope that -- I mean, procedurally, I
4 think that, you know, the ANC's made a good --
5 you've clearly stated that you gave them 90
6 days and so forth, and I think that, you know,
7 that is something that I think weighs heavy
8 with me, I mean, that you have really afforded
9 them a lot of opportunity.

10 But for something as serious as
11 this, I would hope that, you know, the ANC
12 would have an open mind, and see if this
13 Applicant could perhaps compile a case that
14 could be acceptable, or not, you know? But I
15 think a second chance might be, you know,
16 appropriate. At least that's where I'm
17 leaning at this point. So I just wanted to
18 put that on the record to you.

19 I just would hope that you'd have
20 an open mind.

21 MR. WHATLEY: Commissioner
22 Jeffries, may I make a comment on that. The
23 reason why we wanted the Applicant to come

1 back in September was for exactly that reason.
2 Because initially, the Applicant had stated
3 that they had some additional information,
4 there were some other things they wanted to
5 try to do to prepare, and come back to the
6 ANC. The ANC is trying its best to work for
7 everyone in the community and we believe in
8 giving everyone opportunities, and sometimes
9 two and three opportunities to make
10 presentations to us.

11 However, at some point in time, we
12 have to be able to say okay, we've given you
13 X amount of changes. Now is the time to vote,
14 go through with the business or complete the
15 business and task at hand. That's exactly why
16 I did what I did, was to reschedule them, was
17 to give them that opportunity, in September,
18 to come back in with additional petitions,
19 with additional drawings, with additional
20 whatever, to work through this issue, to work
21 through this application. But nothing
22 happened.

23 And so I can't -- you know, what's

1 the guarantee to me, that something else is
2 going to change over the next 30 days? And
3 another continuation. Then the next 30 days
4 or the next 60 days. They're just going to
5 drag on, and on and on, when we've given them
6 90 days. We gave them 90 days to come back.

7 COMMISSIONER JEFFRIES: You know,
8 what you're saying, Mr. Whatley, is not
9 really, you know, defensible. I hear you. I
10 think, you know, what you've done and what the
11 ANC has done, I mean, is laudable, and I think
12 the Applicant, from what I'm hearing, you
13 know, it seems as if the ANC has really been
14 trying to work with you here. Let me just
15 finish.

16 But, again, you know, these are
17 procedural issues, and I think obviously, you
18 know, the case has fallen apart on procedural
19 issues. But I think the substance issues --
20 you know, there still might be something that
21 can happen here. Maybe not.

22 But I would just hate for there to
23 be a situation where this community sort a

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1 falls apart, you know, because, you know,
2 somebody wasn't given a second chance, and I
3 think you've given them one chance, and that
4 is the 90 day period; right?

5 MR. WHATLEY: No, no, no.
6 Actually, it's been two, cause, initially,
7 they presented to us in June.

8 COMMISSIONER JEFFRIES: Right.

9 MR. WHATLEY: And that's when they
10 made the full formal presentation with the
11 brochures and handouts, and all of that. They
12 made that one. The second opportunity was our
13 September meeting, which was last week, which
14 we had invited them to come back, and they did
15 not come back.

16 COMMISSIONER JEFFRIES: But the
17 June meeting was really -- I mean, they had no
18 idea, sort of -- or maybe they did. Did they
19 have any sense of, you know, the opposition or
20 the concern? I mean, it was a four to three
21 vote, I mean, so -- I guess I'm not looking at
22 the June meeting as the first -- I mean, they
23 had no idea about the overall opposition to

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1 the case, and so, to me, I'm looking at this
2 as really --

3 MEMBER LOUD: I don't feel that
4 their knowledge of a pro or a con vote is
5 really relevant here. You, as a board, are
6 expected to take a vote at the conclusion of
7 this hearing on the merits, and there wouldn't
8 be an opportunity to present additional
9 information, short of applying for a
10 continuance, and, in fact, if I remember
11 correctly, though they did make a formal
12 presentation at the June 2007 meeting, it was
13 as early as a 2006 meeting, that they informed
14 the ANC that they were considering such a
15 facility in the area, and that they would like
16 to make a presentation to the ANC.

17 And they were advised to work with
18 the ANC and develop what their concept was,
19 and then make their formal presentation, which
20 culminated in June, but to the best of my
21 knowledge, I wasn't an Advisory Neighborhood
22 Commissioner at the time. I don't know if
23 there was any interaction between the Finn's

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1 and the ANC, between that initial request in
2 06, and I think a review of the ANC minutes,
3 under community concerns, would in fact
4 illustrate when they first voiced their
5 intention to proceed with this project.

6 And again, the request for a
7 continuance will not alter the underlying
8 philosophical argument here of should a
9 single-family residential unit be granted
10 special exemption, particularly when there are
11 a significant number of other nonresidential
12 uses within a 500 to 1000 foot radius.

13 Those facilities are not going
14 away. So to ask for a continuance is not
15 going to change that inherent premise of our
16 opposition.

17 CHAIRPERSON MILLER: I think that
18 the point is, though, it's not what's going to
19 change the ANC's position. The point is
20 there's a proceeding before the BZA and we
21 have to make a decision on what to do
22 procedurally. We're not even talking about
23 the merits of the case, because if I look at

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1 this file I see very serious problems, and I
2 could look at this and say I don't know if a
3 continuance is going to solve any of these
4 problems.

5 But I think the issue is, you
6 know, well, the argument is that they didn't
7 have counsel before and now they have counsel
8 who understand zoning, and they want a chance
9 to perhaps modify their application, take a
10 look at it, and have just one more chance to
11 do that before they go forward.

12 So I understand that in many
13 instances, when you have continuances like
14 this, there is an inconvenience to the other
15 party that is prepared to go, and that's a
16 factor we need to consider.

17 We have to weigh that against the
18 other side, which I think is somewhat
19 compelling, that they just got counsel.
20 Whether they should have gotten counsel
21 before, yeah, maybe, but whether that means we
22 should proceed when they're not ready -- you
23 know. I would say that if we do go for a

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1 continuance, it's not like the previous case.

2 The previous case was a case that
3 was very well-put-together, looked like a
4 rule-on-the-record case. This case is not
5 that way. We cannot squeeze it in at the next
6 available date.

7 So what we would be looking at
8 would be the next available slot for almost
9 like a new case basically, and that is much
10 further down the road. So let me just take a
11 moment with my board members.

12 [Pause]

13 CHAIRPERSON MILLER: Okay. We
14 have a request from the Applicant for a
15 continuance, and it's not in the form of a
16 motion, exactly, but I'm going to treat it as
17 motion, and then I would move to grant the
18 continuance on a date that the board will
19 decide at this hearing.

20 Is that a second?

21 COMMISSIONER JEFFRIES: Second.

22 MEMBER LOUD: Madam Chair, I just
23 wanted to "weigh in" a little bit, having

1 thought about what both the Applicant and the
2 parties are saying.

3 First, I just wanted to note that
4 at least to my way of thinking, the Applicant
5 missed a golden opportunity to create some
6 good will with the parties, the ANC and the
7 civic association, and to further the dialogue
8 by leadership of the ANC that had, in my mind,
9 bent over backwards to accommodate the
10 Applicant, and did not have to because they
11 had already voted on it in June, apparently,
12 and added further insult to it by not
13 appearing at the September hearing or even
14 notifying the ANC that they were not going to
15 appear.

16 That being said, and at the same
17 time, the Applicant did testify that they
18 tried to get counsel over the summer, that
19 they were not successful, that one of the
20 reasons they were not successful was that they
21 were trying to get someone competent and
22 qualified in what is a very niche area of law,
23 and one can understand that. This is not

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1 something that every lawyer in the phone book
2 is competent to do.

3 Additionally, it appears to me at
4 least, that the prejudice to the ANC at this
5 point, since this house does not currently, as
6 I understand it, have 30 kids in it, would
7 weight against the equities of allowing the
8 Applicant to prepare his case, suggests to me,
9 in any event, that I will support your motion.

10 MS. BALDWIN: I just wanted to
11 make the board aware that the Applicant had
12 sent a letter to the ANC on September 1st,
13 which was Friday, before their meeting, that
14 they were going to be unable to attend, and
15 that they were hoping, I understand, to seek
16 a continuance.

17 CHAIRPERSON MILLER: Okay.

18 MS. BALDWIN: Whether or not the
19 letter was received, I don't know, but they
20 had sent a letter.

21 CHAIRPERSON MILLER: Okay. Let me
22 just say this. We're in deliberations, so I
23 really don't want o hear from the parties. I

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1 think we have heard a lot and we understand
2 the positions of both sides, and, in fact, as
3 Mr. Loud was saying, we are just weighing the
4 equities, and it's not necessarily that easy
5 but my motion would be, you know, to give the
6 Applicant just that one more chance, because
7 he's just retained counsel, and it would be in
8 the -- you know -- to take a look at this case
9 by someone who is familiar with zoning law.

10 Okay. All those in favor say aye.

11 [Chorus of ayes]

12 CHAIRPERSON MILLER: All those
13 opposed.

14 [No response]

15 CHAIRPERSON MILLER: Okay. When
16 we were off the record conferring, we were
17 just looking at our schedule to see where we
18 could fit this case, and a date that we came
19 up with is December 11th. Does anybody have
20 any problems with that date? It would be in
21 the afternoon.

22 MR. WHATLEY: We may have a
23 conflict with the December 11th. There are

1 about to be some changes to the ANC Commission
2 itself. So the Commissioners who are present
3 here may not be here, but there'll be other
4 representatives sent from the ANC. Will that
5 be sufficient? For example, I know that I may
6 not be here, and I know Commissioner Lang may
7 not be here. But we have other ANCs that are
8 aware of the situation and are parties to the
9 discussion. They may come in our stead.

10 Will a letter from me suffice to
11 do that?

12 CHAIRPERSON MILLER: Okay. This
13 is what I would say to that. I mean, whoever
14 is the Chair can automatically represent the
15 commission, I believe, but is usually
16 authorized to, in any event.

17 However, you all can work it out
18 however you like. I mean, for instance, if
19 you have more knowledge about the facts in
20 this case, that you would want to testify to,
21 you could always testify as a witness for the
22 ANC. Or your Chair could always designate
23 you, or your commission could vote to

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1 authorize you, whoever they want to authorize
2 to participate. Because we certainly don't
3 want your ANC to be, you know, prejudiced by
4 the continuance, in any way. Okay.

5 Any other? So --

6 MR. WHATLEY: Is that morning or
7 afternoon?

8 CHAIRPERSON MILLER: Afternoon.
9 It would be third in the afternoon, and we
10 have established parties in this case, so I
11 would say to the Applicant, that if you modify
12 your application in any way, that you should
13 serve the parties to this case, and we expect
14 that you would use this time to work with the
15 Office of Planning and the community on your
16 application, and we'll see what happens with
17 it. Okay. Yes?

18 MR. LETZKUS: I'm sorry. I have a
19 procedural question. You started this by
20 saying, this whole hearing, by saying that
21 anything that needed to be in the record
22 needed to be filed today.

23 Do you need our testimony, or

1 backup, or will we do that then?

2 CHAIRPERSON MILLER: I don't
3 recall saying that.

4 MR. LETZKUS: Okay.

5 CHAIRPERSON MILLER: I did say
6 that in the interim, any papers that are going
7 to be filed need to be filed on all the
8 parties now that have been established, which
9 I just said.

10 MR. LETZKUS: Right.

11 CHAIRPERSON MILLER: We did say
12 that we were looking for some documentation of
13 your authorization to represent --

14 MR. LETZKUS: Right, but before
15 that, you had said procedurally, this was the
16 time to put in things for the record.

17 CHAIRPERSON MILLER: I don't
18 recall saying that. Is there something that
19 --

20 MR. LETZKUS: That's what I heard.
21 I misheard, I --

22 CHAIRPERSON MILLER: Is there
23 something you have in mind, that you wanted to

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1 put in?

2 MR. LETZKUS: I just wondered
3 whether we're going to have an opportunity to
4 submit petitions from the neighbors, and that
5 sort of thing, at the hearing in December.

6 CHAIRPERSON MILLER: Yes;
7 absolutely. As a party, you have the right to
8 present a case, and present witnesses and
9 evidence, and so you'll have opportunities to
10 do that then.

11 MR. LETZKUS: Okay. That's what I
12 needed to know.

13 CHAIRPERSON MILLER: Okay.
14 Anything else?

15 MR. FINN: Thank you, Madam
16 Chairman.

17 CHAIRPERSON MILLER: Thank you.

18 MS. ROSE: The last case of the
19 morning is 17654, the application of Chen's
20 Gourmet Carryout, LLC, pursuant to 11 DCMR
21 3103.2, for a use variance to operate a fast-
22 food restaurant under subsection 701.4(q), in
23 the C-1 District at premises 5117 MacArthur

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1 Boulevard, N.W., Square 1419, Lot 50.

2 CHAIRPERSON MILLER: Good morning.

3 MS. CHEN: Good morning.

4 CHAIRPERSON MILLER: Could you
5 identify yourselves for the record, please.

6 MS. CHEN: Suchen Chen. 5112
7 MacArthur Boulevard, N.W., Washington, D.C.

8 MR. GOLFMAN: I'm Robert Golfman.
9 I'm at 5112 MacArthur Boulevard, N.W. That's
10 where we live. Washington, D.C. We live
11 across the street from the --

12 CHAIRPERSON MILLER: Okay.

13 Ms. Gates.

14 MS. GATES: I didn't know if you
15 wanted me to introduce myself.

16 CHAIRPERSON MILLER: I do.

17 MS. GATES: Alma Gates, ANC 3D.

18 CHAIRPERSON MILLER: We've read
19 the file and I know you're applying for a use
20 variance. I just want to ask you a couple
21 factual questions before we get -- cause this
22 is somewhat of a -- it's a legal factual
23 issue.

1 You're operating under a temporary
2 certificate of occupancy; is that correct?
3 Could you just lay that out for me.

4 MR. GOLFMAN: That's correct.
5 What happened was the case came about as a
6 result of a change in the entity from a sole
7 proprietorship to an LLC, on the advice of
8 legal counsel, to a limited liability company.
9 Suchen is the owner of that, and when we went
10 down to get the new C of O and the business
11 license, and everything, it caused the zoning
12 inspector to come out and declare the
13 restaurant a carryout.

14 It was listed as a restaurant on
15 the C of O with 14 seats, and he said no,
16 there's only two seats inside, so it's
17 declared a carryout and you can't operate a
18 carryout in a C-1 District. So she said I'll
19 give you a one year C of O, and then you go to
20 the Board of Zoning Adjustment and request a
21 variance to be able to operate this business
22 here, and so that's why we're here.

23 CHAIRPERSON MILLER: But the one

1 year C of O, what's it for? What does it say
2 on it? Does it say restaurant? Does it say
3 carryout? What does it say? I'm not sure.
4 That might be in the record but I'm not
5 positive.

6 MR. GOLFMAN: It is in the record.

7 CHAIRPERSON MILLER: Is it? It
8 should be there. There's a copy of it right
9 there. Change in ownership. That's why. Was
10 restaurant.

11 CHAIRPERSON MILLER: Good morning,
12 Mr. Rice. I'd love if you want to jump in
13 here.

14 MR. RICE: Good morning, Madam
15 Chair. The 06 C of O does say restaurant, as
16 does D02 C of O.

17 CHAIRPERSON MILLER: What about
18 this -- what's this temporary one?

19 MR. RICE: I assume the temporary
20 one was issued to reflect what was on the 02,
21 which was a restaurant. Prior to that, in
22 '86, it was a carryout. And I can explain it
23 all a little better, if you're ready.

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1 CHAIRPERSON MILLER: I just want
2 to get certain facts straight before we get
3 into the legal discussions and the history.

4 Do we have in the record the copy
5 of the temporary C of O that's been referred
6 to in the record?

7 MR. RICE: There's a little copy
8 of it in my report.

9 CHAIRPERSON MILLER: That's it?
10 Is the temporary on the April 27th, 2006, C of
11 O?

12 MR. RICE: That's correct.
13 There's a note at the bottom that says it's
14 temporary.

15 CHAIRPERSON MILLER: So it's
16 expired; is that right?

17 MR. RICE: As of 4-27-07; yes. It
18 was for a year.

19 CHAIRPERSON MILLER: Okay. So
20 they don't have a C of O right now? Just to
21 get the facts; not to get you nervous. I just
22 want to know --

23 MR. GOLFMAN: No; no. We don't.

1 CHAIRPERSON MILLER: Okay. I
2 mean, we've read the file, thoroughly. Just
3 some of these facts, we wanted to get
4 straight. I mean, I understand, and all the
5 board members understand, that you've been
6 operating continuously, with the same type of
7 operation, and is that a carryout, fast-food,
8 would you characterize it as either one, or
9 both?

10 MR. GOLFMAN: We classify it as a
11 carryout.

12 CHAIRPERSON MILLER: Carryout.

13 MR. GOLFMAN: You have three
14 criteria in the zoning regs that define that.

15 CHAIRPERSON MILLER: Under 199?

16 MR. GOLFMAN: I believe that is --
17 it's about 80 percent of the space is used for
18 queuing, waiting in line. The second one was
19 the use of disposal materials, you know, forks
20 and knives and disposable containers.

21 CHAIRPERSON MILLER: Okay. When
22 I'm looking at that, it's just 199, it looks
23 like it's saying fast food, just to be, just

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1 to get the terms that they're using right.

2 Now you may think that it is a
3 carryout, and it sounds like a carryout.
4 That's fine. There may not be a definition in
5 our regs that reference carryout and it may
6 reference fast food, and I just want to be
7 clear, whether there was any -- and we'll go
8 to Mr. Rice very shortly -- but, you know, to
9 your knowledge -- but when I look at the regs,
10 and they're under, they're going to be
11 reissued in a different form, very shortly,
12 but we're dealing with the regs that are here
13 today.

14 They talk about restaurant and
15 they talk about restaurant, common, fast food.
16 I know on your C of O's in the past it has
17 said carryout, but I don't know if that
18 carryout is really defined or referenced in
19 our regulations.

20 So if you have a comment to that,
21 that's fine. Otherwise, I'll ask Mr. Rice
22 about this particular legal question.

23 MR. GOLFMAN: We don't have a

1 comment on that.

2 CHAIRPERSON MILLER: Okay. Mr.
3 Rice, under the regs that are in effect today,
4 you know, under 199, isn't the differentiation
5 between restaurant and restaurant/fast food,
6 as opposed to restaurant and carryout?

7 MR. RICE: My understanding is
8 that there -- I haven't found a definition for
9 carryout, where there's a distinction between
10 fast food and carryout, but there is a
11 distinction between a full service restaurant
12 and a fast food restaurant, and I would say
13 that this does fall under the fast food,
14 although it does function as what we would
15 call a carryout.

16 If there is one, I'm not aware of
17 a specific carry.

18 COMMISSIONER JEFFRIES: We mean
19 general people.

20 MR. RICE: I'm sorry.

21 COMMISSIONER JEFFRIES: When you
22 said carryout, I mean, where are you getting
23 that definition?

1 MR. RICE: That's my point. I
2 don't have a specific definition for carryout.
3 But we do have one for fast food.

4 COMMISSIONER JEFFRIES: Yes. I
5 was just dealing with the word, you know, we
6 look at it as a carryout, and, you know, it
7 seems that there's really no defined term as
8 carryout, that's in the regs, and so --

9 CHAIRPERSON MILLER: And sometimes
10 those terms are used somewhat interchangeably,
11 and that's what I guess I'd like to ask you,
12 Mr. Rice. I mean, it seems, from the record,
13 that certainly, way back in 1971 it was
14 operated as a pizza place, and it said pizza
15 and carryout perhaps on the C of O.

16 In your opinion, does that fall
17 within the fast food category?

18 MR. RICE: Yes, it does.

19 CHAIRPERSON MILLER: Okay. And
20 then I guess I'm looking at my dates, May
21 13th, 1985, there was a change in the
22 regulations, and that actually set forth the
23 distinction, I believe, with respect to fast

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1 food and made it a nonconforming use in this
2 zone?

3 MR. RICE: Yes; that's correct.
4 In '85, when the fast food definition was
5 amended into the zoning regulations, it did
6 prohibit fast food from the C-1 District.

7 CHAIRPERSON MILLER: And then in
8 1986, then, when the Applicant got their
9 certificate of occupancy for carryout, there
10 wasn't a definition in our regs for carryout
11 at that point; is that correct?

12 MR. RICE: Not for carryout but
13 for fast food. But it was grandfathered --
14 well, I assume it was grandfathered in because
15 it was the same use prior to the new amendment
16 in '85.

17 CHAIRPERSON MILLER: Right; okay.
18 And that use has continued, uninterrupted,
19 until the present; is that correct?

20 MR. RICE: Yes.

21 CHAIRPERSON MILLER: So has the
22 only change been that the zoning administrator
23 issued a certificate of occupancy for a

1 restaurant when the legal entity changed, but
2 the use didn't change?

3 MR. RICE: That's correct. In 02,
4 there was a change in ownership as far as the
5 title -- or it was essentially the same use
6 but a different owner. Same owner but a
7 different entity. But there was no change in
8 the use.

9 CHAIRPERSON MILLER: Okay.

10 MR. RICE: Neither was there a
11 change in the use in 06. So it's been the
12 same for the past 20-plus years or so.

13 CHAIRPERSON MILLER: And would you
14 say that as of May 13th, 1985, that use was a
15 legally nonconforming use under our
16 definitions, and that it was a legal use at
17 the time that the new regs went into effect?

18 MR. RICE: Yes; that's correct.
19 In '85 it was.

20 CHAIRPERSON MILLER: Ms. Gates,
21 I'm jumping around here, because I think that
22 the issue is very concise in this case. I'm
23 just going to ask your position here.

1 Number one, to your knowledge has
2 the use been the same since 1985, or since the
3 change in the regulations?

4 MS. GATES: Madam Chair, Chen's
5 Carryout Gourmet is in my single member
6 district. It's also in the neighborhood where
7 I live, and yes, it has been continuous since
8 it was established. The use has been
9 continuous.

10 CHAIRPERSON MILLER: Okay, and
11 since that date, have there been -- well, let
12 me go to the Chen's. Since you've been
13 operating, when you took over the operation
14 from the pizza place, did you make any
15 changes, such as expanding the kitchen or the
16 seating area, or anything to that effect?

17 MS. CHEN: No.

18 CHAIRPERSON MILLER: Okay. Is
19 there anything else you all want to tell us
20 that's, you know, not evident in the record,
21 or you want to highlight? I think we are
22 going to deliberate this. Basically, let me
23 just say this. I think where this board is

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1 coming from, and certainly where I am at this
2 point, is that when there's a change in the
3 regulations and there's been a use there, and
4 it all of a sudden becomes nonconforming, if
5 it continues without any change, it's a
6 legally nonconforming use under our
7 regulations and no variance would be required.

8 If there had been some
9 interruption for a period of, say, three
10 years, or something like that, our regs
11 provide for this discontinuance. But based on
12 the record here, it appears that there's been
13 no change in use throughout this whole period
14 of time, and the only thing that has happened
15 was a characterization by the zoning
16 administrator, which may or may not have been
17 an error.

18 They may have characterized it as
19 a restaurant because our regs aren't clear as
20 to how it should have been characterized.
21 There was no indication in the regs for a
22 carryout, and so, you know, I don't want to
23 second-guess that. But the law, as I

1 understand it, is that a C of O can be
2 presumptive evidence, you know, of a
3 situation, but it's not conclusive evidence.

4 You know, the C of O said it was a
5 restaurant, but, in actuality, if it really
6 has been a carryout, fast food, uninterrupted,
7 since the change in the regulations, then it's
8 a nonconforming use, and that's legal and
9 doesn't need a variance.

10 So do you have any other comments
11 you want to say before we go further with
12 this? Feel free. But I don't think we need
13 to, at this point, go through the whole
14 variance test. And we've also read, certainly
15 this is a separate issue, but I don't believe
16 the ANC has any concerns with the operations
17 of this establishment, that it hasn't had any
18 adverse impacts on the community, in fact is
19 a positive element in the community.

20 MS. GATES: We consider Chen's a
21 good neighbor.

22 CHAIRPERSON MILLER: Okay. Any
23 other comments for you?

1 MS. CHEN: I do agree. This
2 restaurant, I start there in 1986, and it's
3 been almost 21 years now, and I can say all
4 those neighborhood people really love this
5 restaurant, and I wish I can continue. Thank
6 you.

7 MR. GOLFMAN: There's been no
8 structural changes, or anything. The building
9 has stayed the same, as you can see from the
10 pictures. That's the way it was, you know, I
11 think even longer than 20 years ago.

12 All the equipment was existing
13 before it was walked into. That's all. Under
14 the pizza place, I guess. All right.

15 CHAIRPERSON MILLER: Let me ask
16 you this. I understand that it's certainly
17 carryout, which isn't defined under the regs.

18 Do you believe that it's fast food
19 as far as what's a proper, accurate
20 characterization of the operation?

21 MR. GOLFMAN: Fast food, according
22 to the way some of the major chains do -- no.
23 It's fresh food. You're not sitting down,

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1 dining. It's cooked and it takes the same
2 amount of time as it would in a major
3 restaurant; but, obviously, you're putting it
4 in a bag and walking away with it. So in that
5 respect, it's fast food.

6 CHAIRPERSON MILLER: Have you
7 looked at our definition? Do you have an
8 opinion of -- that's what we have to look at,
9 actually.

10 MR. GOLFMAN: It was the three
11 criteria. That's where, if you fail two out
12 of three, which we fail two out of three. The
13 one area is the food is not preprocessed, it's
14 all fresh cooked and fresh prepared. It's the
15 disposal containers and plastic forks, and the
16 80 percent of your standing area is used -- 80
17 percent of your major floor space is used for
18 standing in line. That's what differentiates
19 it, I believe, from a full service restaurant.

20 MS. GATES: But Madam Chair, I
21 also believe that in this case you don't walk
22 in and take -- someone doesn't hand you
23 something that's already prepared, as Mr.

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1 Golfman said. The food is prepared once you
2 order it. So in the sense, they can do it
3 fairly quickly, you could say it's fast food,
4 but it certainly doesn't meet the McDonald's
5 standards.

6 CHAIRPERSON MILLER: I just want
7 to say that we look at the regulations, and
8 from what I understand them saying is -- and
9 correct me if I'm wrong -- but that the
10 correct characterization under the regs that
11 are in existence at this time would be fast
12 food because they don't meet one of the three
13 criteria.

14 Whether or not it's fast food in
15 the context that the general public thinks of
16 fast food is not really the question. But I
17 hear what you're saying; yes.

18 Mr. Rice, I would certainly like
19 your comments. First of all, do you believe
20 that the proper characterization that should
21 go on a certificate of occupancy, under the
22 regulations that exist at this time, are -- I
23 mean, would be restaurant slash fast food as

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1 opposed to just restaurant?

2 MR. RICE: Based on the zoning
3 regulations now in the definition, this
4 establishment would be fast food restaurant.

5 CHAIRPERSON MILLER: And based on
6 the actual use and conditions of this
7 establishment, would it not be incorrect to
8 characterize it as a restaurant, and if so,
9 why?

10 MR. RICE: Incorrect to
11 characterize it as a restaurant?

12 CHAIRPERSON MILLER: Yes; just a
13 restaurant.

14 MR. RICE: Yes, it would, because
15 two of the three steps, I would say are not
16 met. As the Applicant has stated, 80 percent
17 of the floor space is used for queuing
18 customers, and the food is served with
19 disposable containers. So it would in fact
20 not be a restaurant but a fast food
21 restaurant.

22 CHAIRPERSON MILLER: I guess my
23 other question is, and I thought this was

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1 somewhere in the record, was that there wasn't
2 enough space on the premises to have a sit-
3 down restaurant there.

4 MR. RICE: Oh, yes. The way the
5 floor, the space is laid out, a large majority
6 of it is used for a kitchen, is the kitchen
7 itself. Upon entering the building, there's
8 a narrow aisle which leads, which corners
9 around the counter, which goes straight to the
10 kitchen. There's only one table inside. It's
11 very small. Two chairs.

12 CHAIRPERSON MILLER: I want to ask
13 the Applicant: Was there something in the
14 record that said it couldn't be used as a
15 restaurant because it was too small? That
16 somebody consulted with a realtor to see
17 whether or not they could get other uses in
18 there such as a restaurant. Is that correct,
19 or no?

20 MR. GOLFMAN: That was in the
21 application but that was an opinion. I don't
22 think that was fact. I mean, that was what a
23 realtor had said -- you really can't use it as

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1 a restaurant.

2 CHAIRPERSON MILLER: Okay, but
3 based on the use that's been going on
4 continuously since 1971, it is evident as a
5 fast food, not a sit-down restaurant; correct?

6 MR. GOLFMAN: Correct.

7 CHAIRPERSON MILLER: Okay.

8 MS. MONROE: Madam Chair, can I
9 interject for a second since you're discussing
10 the definitions, and the definition of
11 restaurant doesn't fit here because it says,
12 "Any facilities for carryout shall be truly
13 subordinate to the principal use of preparing
14 food for consumption on the premises," and
15 it's not a restaurant because you have to
16 consume on the premises for a restaurant. It
17 is a fast food restaurant according to the
18 zoning regulations, although I'm not saying
19 it's fast food, or you might take hours to
20 cook.

21 But according to the definition --
22 and it would be basically a nonconforming fast
23 food restaurant use, because it was already

1 there, which is as OP said. That's probably
2 what the category that it would fall in, and
3 as you said, I don't think a use variance
4 would be necessary because it would be
5 considered nonconforming.

6 And fast food is a category that's
7 defined currently.

8 CHAIRPERSON MILLER: Thank you. I
9 mean, I think it's interesting that you have
10 actually found the word carryout in the
11 definition, but, you know -- no, she did --
12 because it has to be subordinate to the
13 principal use, and, you know, in the
14 definition and stuff we see restaurant, we see
15 fast food, and I'm wondering well, where's
16 carryout. Well, here's carryout as Ms. Monroe
17 has found, and actually the carryout in this
18 case was never subordinate to a principal use
19 as a restaurant. It's always been the
20 principal use; is that correct?

21 MR. GOLFMAN: Correct.

22 CHAIRPERSON MILLER: Okay. Thank
23 you. Any final comments before the board

1 deliberates on your application?

2 MR. GOLFMAN: We would like to
3 request a decision today, if we could get one,
4 if possible. Thank you.

5 CHAIRPERSON MILLER: Mr. Rice, we
6 have one more question for you. It sounds as
7 if you agreed with the scenario that there's
8 been a legally nonconforming use of this
9 premises as a carryout/fast food restaurant
10 since 1971, and so the question is do you
11 think a variance would be required, as it
12 seems like the position you took in your
13 report, or did you just not consider it from
14 the angle that the board's considering it,
15 that no relief may be required at all since
16 it's a legally nonconforming use.

17 MR. RICE: It was assumed that a
18 variance would be required, and if that was
19 the case, we do -- you know, OP would support
20 it. I didn't take it from the approach that
21 the board has taken it today. We took it from
22 the approach of a variance.

23 CHAIRPERSON MILLER: And do you

1 have any concerns with the approach the board
2 may be taking?

3 MR. RICE: No. I don't.

4 CHAIRPERSON MILLER: Okay. The
5 board is ready to move on this matter.

6 I'm going to move to dismiss
7 Application No. 17654 of Chen's Gourmet
8 Carryout LLC for a use variance to operate a
9 fast food restaurant under subsection 701.4(q)
10 at premises 5117 MacArthur Boulevard, N.W.,
11 and ask for a second.

12 COMMISSIONER JEFFRIES: Second.

13 CHAIRPERSON MILLER: The grounds
14 for the dismissal would be that no relief is
15 required, that the premises are operating as
16 a legally nonconforming use under our
17 regulations, that the evidence and the record
18 supports that the premises have been used as
19 a fast food restaurant in which -- well, fast
20 food restaurant under our regulations since
21 1971, that it's been continuing, and there has
22 not been a discontinuance of three years, that
23 would stop the effect of a legally

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1 nonconforming use, and therefore no release is
2 required, they don't need a variance, and I
3 believe that the zoning administrator should
4 issue a certificate of occupancy for a
5 restaurant/fast food under our regulations
6 that are in effect at this time.

7 Do I have further comments on
8 this?

9 MS. GATES: I have a comment.

10 CHAIRPERSON MILLER: I don't think
11 you can have a comment. You can't have a
12 comment in the middle of our vote.

13 MS. GATES: I'm sorry.

14 CHAIRPERSON MILLER: What you can
15 do, though, is after we finish deliberation,
16 you can comment and then we can see if we need
17 to make any clarifications. But, you know, to
18 be clear, there's no use variance required
19 when there's a legally nonconforming use, and
20 that's what we find here, and that once the ZA
21 is aware of the board's position on that, then
22 I think that the ZA would then know the
23 appropriate steps to take with respect to

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1 issuing a certificate of occupancy, and in our
2 view, based on the definitions that are in
3 existence at this time, that would be a CO for
4 a restaurant, comma, fast food, and no relief
5 from this board would be required for that.

6 COMMISSIONER JEFFRIES: So Madam
7 Chair, what you've done is effectively laid a
8 blueprint in terms of, you know, how the
9 zoning administrator should act in terms of
10 granting the C of O. So, you know, from what
11 I understand, I think it's just a matter of
12 going through the appropriate steps after you
13 leave here today, so --

14 CHAIRPERSON MILLER: Any other
15 comments before we vote?

16 MEMBER LOUD: I think you already
17 clarified, that we've agreed for a summary
18 decision that would be issued immediately, or
19 I guess today, or whatever the normal
20 turnaround is for a summary decision.

21 CHAIRPERSON MILLER: We didn't get
22 to that one yet. I think we could vote on the
23 motion and then decide on the order.

1 MEMBER LOUD: Okay.

2 CHAIRPERSON MILLER: How's that?

3 Are we ready to vote on the motion?

4 MEMBER LOUD: Yes.

5 CHAIRPERSON MILLER: Okay. All

6 those in favor say aye.

7 [Chorus of ayes]

8 CHAIRPERSON MILLER: All those

9 opposed? All those abstaining?

10 Would you call the vote, please.

11 MS. ROSE: Staff will record the
12 vote as three to zero to two, with Ms. Miller,
13 Mr. Loud and Mr. Jeffries to dismiss the
14 application, Mr. Etherly and the other board
15 member not present, not voting.

16 CHAIRPERSON MILLER: Okay, and
17 then there is no opposition in this case, so
18 that we could issue a summary order, if that
19 is the consensus of the board. Okay. And
20 that is the consensus of the board. That is
21 a pretty quick order. I'm not sure whether I
22 can guarantee it today; but it's pretty quick.
23 It's within a few days at the most.

1 Okay. At which point, Ms. Gates
2 has something you want to ask us?

3 MS. GATES: I just want to
4 comment, that I find this rather unfortunate,
5 that Ms. Chen has been put through the ordeal
6 of having to file, pay a fee for that, and
7 then come down here, when it appears that
8 there is some misunderstanding at DCRA.

9 CHAIRPERSON MILLER: The only
10 thing I want to say to that is, I mean, yes,
11 that is unfortunate, whatever, you know, she's
12 had to do; but it's almost similar to an
13 appeal where sometimes the ZA doesn't exactly
14 do maybe what the board determines would be
15 the correct course of action, and that
16 happens.

17 And, you know, and our regs aren't
18 all that clear, and so sometimes, you know,
19 it's in good faith, that the ZA reads them a
20 certain way.

21 Anyway, is there any other
22 comments?

23 MR. GOLFMAN: We'd like to thank

1 you very much, and we're not really sure what
2 the next step is. Do we receive a letter, or
3 what happens?

4 CHAIRPERSON MILLER: Okay. What
5 we were referring to was a summary order,
6 which is a pretty quickly-written order,
7 compared to some of our orders can take
8 months. This one will take days, a day or two
9 or three at the most, and you can check with
10 the Office of Zoning on that, if they don't
11 check with you.

12 You'll have an order in hand that
13 will say that the board says no relief is
14 required, and, you know, and you can then take
15 whatever that order says, that you can then
16 take that order to the ZA for your certificate
17 of occupancy.

18 MR. GOLFMAN: Thank you very much.

19 CHAIRPERSON MILLER: You're
20 welcome. Good luck to you.

21 Ms. Rose, is there any other
22 business for the morning?

23 MR. ROSE: No, Madam Chair.

1 CHAIRPERSON MILLER: Okay. Then
2 this hearing's adjourned.

3 [Whereupon, at 11:54 a.m., the
4 morning session of the BZA was concluded]

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

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[1:39 P.M.]

CHAIRPERSON MILLER: This hearing will please come to order.

Good afternoon, ladies and gentlemen. This is the September 11th afternoon public hearing of the Board of Zoning Adjustment of the District of Columbia.

My name is Ruthanne Miller. I'm the Chair of the BZA.

To my right is Mr. Michael Turnbull representing the Zoning Commission on the BZA. To my left is Mr. Marc Loud, mayoral appointee on the BZA. And further on down, next to Mr. Loud is Mr. Clifford Moy with the Office of Zoning, Tracey Rose with the Office of Zoning, and Lori Monroe with the Office of Attorney General.

Copies of today's hearing agenda are available to you and are located to my left in the wall bin near the door. Please be aware that this proceeding is being recorded by a court reporter and is also Webcast live.

Accordingly, we must ask you to

1 refrain from any disruptive noises or actions
2 in the hearing room. When presenting evidence
3 to the board, please turn on and speak into
4 the microphone, first stating your name and
5 home address. When you're finished speaking,
6 please turn your microphone off, so that your
7 microphone is no longer picking up sound or
8 background noise.

9 All persons planning to testify
10 either in favor or in opposition are to fill
11 out two witness cards.

12 These cards are located to my left
13 on the table near the door and on the witness
14 table.

15 Upon coming forward to speak to
16 the board, please give both cards to the court
17 reporter sitting to my right.

18 I believe since we just have an
19 appeal today, I'm going to read the order of
20 procedure for appeal applications, and that is
21 as follows. One, statements and witnesses of
22 the Appellant. Two, the Zoning Administrator
23 or other government officials' case. Three,

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1 case for the owner, lessee or owner or
2 operator of the property involved, if not the
3 Appellant. Four, the ANC within the property
4 is located. Five, intervenor's case, if
5 permitted by the board. Six, rebuttal and
6 closing statement by Appellant.

7 Pursuant to section 3117.4 and
8 3117.5, the following time constraints will be
9 maintained. The Appellant, persons, and
10 parties, except an ANC, in support, including
11 witnesses, 60 minutes, collectively.
12 Appellees, persons and other parties, except
13 an ANC in opposition, including witnesses, 60
14 minutes, collectively, individuals, three
15 minutes. These four individuals are permitted
16 to participate in an appeal.

17 These time constraints do not
18 include cross examination and/or questions
19 from the board. Cross examination of
20 witnesses is permitted by the Applicant or
21 parties.

22 The ANC within which the property
23 is located is automatically a party in a

1 special exception or variance case. Nothing
2 prohibits the board from placing reasonable
3 restrictions on cross examination, including
4 time limits and limitations on the scope of
5 cross examination.

6 The record will be closed at the
7 conclusion of each case, except for any
8 material specifically requested by the board.
9 The board and the staff will specify at the
10 end of the hearing, exactly what is expected,
11 and the date when the persons must submit the
12 evidence to the Office of Zoning.

13 After the record is closed, no
14 other information will be accepted by the
15 board.

16 The Sunshine Act requires that the
17 public hearing on each case be held in the
18 open before the public. The board may,
19 consistent with its rules of procedure and the
20 Sunshine Act, enter executive session during
21 or after the public hearing on a case for
22 purposes of reviewing the record or
23 deliberating on the case.

1 The decision of the board in these
2 contested cases must be based exclusively on
3 the public record. To avoid any appearance to
4 the contrary, the board requests that persons
5 present not engage the members of the board in
6 conversation.

7 Please turn off all beepers and
8 cell phones at this time, so as not to disrupt
9 these proceedings.

10 The board will make every effort
11 to conclude the public hearing as near as
12 possible to 6:00 o'clock p.m. If the
13 afternoon cases are not completed at 6:00
14 p.m., the board will assess whether it can
15 complete the pending case or cases remaining
16 on the agenda.

17 At this time, the board will
18 consider any preliminary matters. Preliminary
19 matters are those that relate to whether a
20 case will or should be heard today, such as
21 requests for postponement, continuance or
22 withdrawal, or whether proper and adequate
23 notice of the hearing has been given.

1 If you're prepared to go forward
2 with a case today, or if you believe that the
3 board should not proceed, now is the time to
4 raise such a matter.

5 Does the staff have any
6 preliminary matters?

7 MS. ROSE: No, Madam Chair, the
8 staff doesn't, but I think that the parties
9 do. Would you like me to call the case?

10 CHAIRPERSON MILLER: Okay. I
11 believe we just have one case in the
12 afternoon, so we'll hear it with that case.

13 Why don't we start with your
14 administering the oath to anybody who is going
15 to be giving any testimony today and then
16 we'll move to the first case.

17 MS. ROSE: Please rise to take the
18 oath. Please raise your right hand.

19 [Witnesses were duly sworn]

20 MS. ROSE: Please be seated.

21 CHAIRPERSON MILLER: Would you
22 call the case, please.

23 MS. ROSE: Yes, ma'am. The only

1 case on the afternoon today is the appeal
2 17667 of Minshall Stewart Properties LLC,
3 pursuant to 11 DCMR section 3100 and 3101,
4 from the April 20, 2007, decision of the
5 Zoning Administrator, that the buildings on
6 the subject single lot constitute two
7 buildings for zoning purposes in the C-3-C and
8 R-5-E Districts at premises 2175 K Street,
9 N.W., and 1099 22nd Street, N.W., Square 73,
10 Lots 83, multiple condo lots, 883 and 884.

11 CHAIRPERSON MILLER: Okay. I
12 think at this point we have some parties that
13 are automatically parties to the case, and
14 then we have some applications for party
15 status.

16 So I'd first ask that those who
17 are parties to the case come forward at this
18 time. That would be the Appellant and I
19 believe DCRA, and would you introduce
20 yourselves for the record.

21 MR. EPTING: Good afternoon,
22 members of the board. I'm John Epting with
23 Pillsbury Winthrop Shaw Pittman, and Dave

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1 Avitabile is with me today.

2 MR. LEGRANT: I'm Matthew LeGrant,
3 the acting zoning administrator for the
4 District of Columbia.

5 MS. PARRIS: Good afternoon. Lori
6 Parris, deputy general counsel, Department of
7 Consumer and Regulatory Affairs.

8 CHAIRPERSON MILLER: Okay. let me
9 just ask you this first. We have before us,
10 I believe, a motion of DCRA for a continuance,
11 and I believe that's what you will be seeking
12 today; is that correct?

13 MS. PARRIS: That's correct, Your
14 Honor. We filed a motion, an original with
15 the court, just moments ago, and we also faxed
16 over a copy earlier today. Mr. Taylor, who is
17 the assigned assistant attorney general in
18 this matter, suffered an injury on Sunday and
19 is seriously ill and is unable to walk. He's
20 currently receiving treatment this morning at
21 the hospital.

22 And based on that, I contacted
23 counsel of record and requested their

1 continuance, for a short continuance for two
2 weeks. I'm not prepared at this point to go
3 forward. I don't have a command, a complete
4 command of all of the matters. I have an idea
5 concerning the issues but not command enough
6 to go forward with the full hearing, and we
7 are only asking for a brief continuance, and
8 I do apologize to the court for the late
9 notice. I was out of the office yesterday,
10 spoke with Mr. Taylor late in the evening
11 yesterday, and filed it as soon as I got into
12 the office this morning.

13 So I do ask the court's
14 indulgence. But I do apologize to the parties
15 for this continuance.

16 CHAIRPERSON MILLER: Okay. Well,
17 what I want to ask as a preliminary question
18 is that we have some applications for party
19 status, and I'd like to know whether DCRA has
20 any objection to the board's considering the
21 application for party status at this time.

22 MS. PARRIS: No, Your Honor.

23 CHAIRPERSON MILLER: You don't

1 have to call me Your Honor.

2 MS. PARRIS: It's just a habit. I
3 apologize.

4 CHAIRPERSON MILLER: Okay. So
5 DCRA has no objection to that. And how about
6 the Appellant?

7 MR. EPTING: I have no objection.

8 CHAIRPERSON MILLER: Okay. Then
9 what I'd rather do then, procedurally, is
10 consider the applications for party status and
11 they weigh in on the motion for continuance.

12 MR. EPTING: Sure.

13 CHAIRPERSON MILLER: Okay. So
14 would those individuals who have requested
15 party status, or their counsel, come forward
16 at this time.

17 MR. HITCHCOCK: Thank you, Madam
18 Chair. "Con" Hitchcock. I'm appearing here
19 on behalf of the West End Place Condominium
20 Association. With me at the table is Stephen
21 Gell, who is representing Florence Harman and
22 Tom Schultz, who are two residents. The
23 association, Ms. Harman and Mr. Schultz were

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1 previously granted party status in the
2 variance case, 17667, which is pending before
3 the board. I'm sorry. 17594, the variance
4 case. And we have been working together in
5 preparation of that one as well as this one.

6 CHAIRPERSON MILLER: So you're
7 representing the West End Place Condominium
8 Association, though?

9 MR. HITCHCOCK: That's correct.

10 CHAIRPERSON MILLER: And did they
11 seek party status in the variance case?

12 MR. HITCHCOCK: They sought -- yes
13 -- and the board granted party status for the
14 association, Ms. Harman and Mr. Schultz, at
15 the earlier proceeding. There are three
16 individuals who live across the street, that
17 the board deferred on until that hearing.

18 For today's purposes, for purposes
19 of this appeal, the association, Ms. Harman
20 and Mr. Schultz, are the only parties seeking
21 intervenor status in this appeal.

22 CHAIRPERSON MILLER: Okay. And
23 two questions. Are you seeking, are they

1 seeking individual party status, and you're
2 joining together in your briefings or are you
3 seeking party status as one party?

4 MR. HITCHCOCK: We are seeking to
5 have the association and the two individuals
6 each made a party and we will collaborate. We
7 filed a joint motion. We filed a joint brief.
8 We would do only one cross examination, that
9 sort of thing. So there would not be
10 duplication.

11 CHAIRPERSON MILLER: Okay, and
12 could you address, then, separately, why each
13 Applicant should be granted party status in
14 the appeal.

15 MR. HITCHCOCK: Sure. The
16 association and the two individuals are -- the
17 association is the building that is claimed to
18 be part of the same building. It is adjacent
19 to. There is a space dividing the two
20 buildings. Mr. Schultz and Ms. Harman live on
21 the 10th floor of the building. They live
22 immediately adjacent to where the three floors
23 and the penthouse would go up. Their unit is

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1 right flush with the property line.

2 So they are affected more directly
3 than anyone else. I would daresay it's very
4 rare to have an Applicant come in and say no,
5 we are not part of the same building, which is
6 what the Appellant's argument is here.

7 In terms of the individuals and
8 the association generally, there are 67 unit
9 owners. Adding three floors and a penthouse
10 would have a negative effect in terms of the
11 light, air, and enjoyment of the units.

12 CHAIRPERSON MILLER: So are the
13 individuals in this case members of the West
14 End Place Condominium Association as well as
15 --

16 MR. GELL: Perhaps I should answer
17 that. Yes, they members of the association.
18 However, their interests are perhaps a little
19 bit greater than the association as a whole.
20 At least they're more particular, because it's
21 their rooftops and their windows, and so
22 forth, that will be most shadowed by the
23 addition of three more stories.

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1 So it was suggested to them, that
2 even though they're all on the same side, that
3 at some point in the future, it's possible
4 that the interests might diverge, and since
5 they had a greater interest, they were advised
6 that they ought to get their own counsel, and
7 that's where I came into the picture.

8 But we have not had that
9 diversion, we don't expect to, but they would
10 ask for separate party status for purposes of
11 participating in this case, in the application
12 and subsequent appeals, if necessary.

13 CHAIRPERSON MILLER: Okay. If I
14 understand you correctly, then you're saying
15 that as individuals they are more affected,
16 maybe more affected by the decision in this
17 case than the rest of the association, but
18 that they intend to participate together in
19 the same way, for the same purpose; is that
20 correct?

21 MR. HITCHCOCK: That's right.

22 CHAIRPERSON MILLER: Okay.

23 MR. HITCHCOCK: It's the same

1 approach that the board adopted in the
2 variance case. I mean, the membership of the
3 association is more directly affected than the
4 residents of any other building and Mr.
5 Schultz and Ms. Harman are more directly
6 affected than any other members of the
7 association, because they are on the top floor
8 where the construction would occur.

9 MR. GELL: And I might just say
10 that Mr. Hitchcock and I have been very
11 careful not to duplicate efforts, to assign
12 different tasks, and to come together and to
13 review each other's work, and so forth, so
14 that we can present a combined effort.

15 The same would be true with the
16 hearing.

17 CHAIRPERSON MILLER: And am I
18 correct that the West End association, is it
19 an association of all the condominium owners
20 of that, of the residential part of this
21 building, of the residential building,
22 whatever --

23 MR. HITCHCOCK: That is correct,

1 Madam Chair.

2 CHAIRPERSON MILLER: Okay. Other
3 questions?

4 Mr. Epting, do you have any
5 objection to --

6 MR. EPTING: Actually, I don't
7 object. I think they are aggrieved. If
8 they're successful, a portion of their
9 building we believe will violate the height
10 act and have to come down. So I think they
11 are definitely aggrieved. So we would say
12 they should be a party.

13 CHAIRPERSON MILLER: Let me just
14 ask you this preliminary question.

15 i think you're coming before the
16 board saying that it's one building --

17 MR. EPTING: That's correct.

18 CHAIRPERSON MILLER: -- for
19 zoning purposes.

20 MR. EPTING: That's correct.

21 CHAIRPERSON MILLER: If it's one
22 building and there are two parts of it, why
23 aren't they -- aren't they owners? Aren't

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1 they part-owners of this one building, and
2 would they need to -- why do you need them to
3 even prosecute this appeal?

4 MR. EPTING: Because there's a
5 difference between zoning lots, record lots,
6 and assessment and taxation lots. So the
7 building is one record lot, which is a zoning
8 lot, and the two structures are on that record
9 lot. And it's also combined into separate
10 assessment and taxation lots.

11 So there's one for the residential
12 structure, and there's actually two for the
13 office structure. There's the office building
14 itself and then the retail component actually
15 has a little separate assessment and taxation
16 lot.

17 And the two lot systems are
18 completely different. And the board has found
19 this before, the record lots control zoning
20 regulations under 101.6 of the zoning regs,
21 and assessment and taxation lots are purely
22 for ownership and taxation, and you can have
23 multiple owners of one record lot.

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1 CHAIRPERSON MILLER: Okay, and I
2 don't -- you know, this isn't a hearing on the
3 merits but it is a hearing about who the
4 parties are.

5 MR. EPTING: Yes.

6 CHAIRPERSON MILLER: And, you
7 know, I hesitate to even bring it up because
8 I don't want to get too much into the merits.

9 But I thought that I read in your
10 pleadings that for zoning purposes, it was one
11 entity, and if it's one entity, it sounds like
12 it includes -- it's supposed to include both
13 buildings, so that --

14 MR. EPTING: That's correct, and
15 I'm saying that they should be a party.

16 CHAIRPERSON MILLER: Okay. Well,
17 we can get into this later. I think you
18 understand my point.

19 But is there objections to the
20 party applicants participating in this case as
21 a party? Okay.

22 And does DCRA have any objection?

23 MS. PARRIS: No objection.

1 CHAIRPERSON MILLER: Okay. Yes, I
2 know we're going to get into that whole
3 question, one building, two buildings. Okay.
4 So then by consensus of the board, then West
5 End Place Condominium Association, Florence
6 Harman and Tom Schultz, are granted party
7 status in this case and they will be separate
8 parties but coordinating together on this
9 case. They will be coordinating their --
10 okay. You got that. Okay.

11 So then we can proceed to the
12 question of continuance. Is there any
13 objection to the motion for continuance?

14 MR. EPTING: No, Madam Chair.

15 CHAIRPERSON MILLER: Okay.

16 MR. EPTING: Could I ask a
17 question first, and it may be our
18 misunderstanding, but there seemed to have
19 been several different filings dated September
20 5th, and at least one of them that we have
21 from Mr. Hitchcock, and Gell mentions, Foggy
22 Bottom Association, ANC 2A, and I didn't think
23 ANC 2A had taken a position on this. And I'm

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1 not hearing the Foggy Bottom Association being
2 involved, and I just wanted to get that
3 clarified. And I do have a copy of that
4 letter. It was filed with the Zoning
5 Commission. It's Exhibit 21. I just want to
6 be sure I know what the parties are.

7 CHAIRPERSON MILLER: That's a good
8 question. Would you like to address that.

9 MR. HITCHCOCK: Yes. I'd be happy
10 to respond to it. ANC 2A is a party in the
11 variance case, and it has, I believe it has a
12 statement on record there. I don't believe it
13 has adopted a resolution yet in this case.

14 Foggy Bottom Association I think
15 did file a statement, or plans to testify in
16 the variance case. It is not separately
17 seeking party status in this case but it is
18 supportive of the positions that are being
19 taken by the association, and that's what the
20 reference was to.

21 So in answer to Mr. Epting's
22 question, the association, Ms. Harman and Mr.
23 Schultz are parties to the case. The ANC will

1 speak for itself separately at the suitable
2 point.

3 MR. EPTING: Could I just have one
4 follow-up question, because page two of the
5 motion, it does say that Foggy Bottom
6 Association joins in this intervention, and so
7 I guess that's not correct.

8 MR. HITCHCOCK: I think you're
9 reading "intervention" too technically. It
10 joins in this intervention in the sense of
11 this statement.

12 MR. EPTING: Okay. All right.
13 I'm fine; thank you.

14 CHAIRPERSON MILLER: well, to
15 clarify that, Foggy Bottom Association is not
16 a party to the case.

17 MR. EPTING: Correct.

18 CHAIRPERSON MILLER: Okay. No, we
19 didn't grant them party status, so they're
20 not. Okay.

21 MR. EPTING: So I do consent to
22 the time extension. My only pleading would be
23 that not to delay this thing unduly, because

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1 we've been going at this since April.

2 CHAIRPERSON MILLER: Any comments?

3 MR. HITCHCOCK: The only comment
4 that we would have is when the schedule was
5 set, the idea was to decide the appeal first,
6 make a decision, and then have the variance
7 case, if it was needed. So from our
8 standpoint, that still makes sense as an
9 approach, because if the board rules one way
10 or another, that would determine whether the
11 parties need to prepare for the variance case.

12 So I'm not sure what your schedule
13 is but I think that the approach made sense.

14 MR. EPTING: And that's a concern
15 too. I think the variance case is November
16 20th. So we would like, you know, if
17 possible, to have this decision, and a
18 decision, you know, ahead of that. So that's
19 our time pressure.

20 CHAIRPERSON MILLER: Okay. Yes.
21 We're aware of that. So having gotten the
22 motion for association, the board did look at
23 some dates before coming out here, and that

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1 was part of our delay.

2 The first date we came up with was
3 September 18th, which would be next week, but
4 it sounds like that's too soon for DCRA; is
5 that correct?

6 MS. PARRIS: I hesitate to say
7 yes. I spoke with Mr. Taylor this morning and
8 he said two weeks, but the only option that I
9 could consider is maybe if I can speak to Mr.
10 Taylor today or tomorrow, and if it's possible
11 for the 18th, we can notify the court. I just
12 don't want to say yes and it's not available
13 for him.

14 CHAIRPERSON MILLER: We have one
15 other date. I mean, we did look at -- that was
16 the first one. The second one would be
17 October 9th. So why don't we just hear from
18 everyone and see what the reaction to either
19 of those dates are.

20 MR. HITCHCOCK: Madam Chair, I
21 will be on the West Coast from the 15th
22 through the 20th of September. October 9th
23 would be clear, preferably afternoon. I don't

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1 know what --

2 CHAIRPERSON MILLER: It would
3 third in the morning, though.

4 MR. HITCHCOCK: Okay. We'll work
5 with that.

6 CHAIRPERSON MILLER: Okay.

7 MR. EPTING: I am fine either one.
8 I'd prefer to go earlier, but I understand Mr.
9 Hitchcock's out of town.

10 CHAIRPERSON MILLER: Well, it
11 sounds like Mr. Hitchcock's out of town and
12 DCRA is a little bit precarious, whether they
13 could do the 18th. So we did have a
14 withdrawal of a case on October 9th, that's
15 why we could fit it in, so -- okay. I guess
16 that's the date that it's going to be.

17 Yes. I'm sorry, Mr. Gell.

18 MR. GELL: That's all right. I'm
19 fine with October 9th, for the record.

20 CHAIRPERSON MILLER: Okay; good.

21 MR. HITCHCOCK: A question for
22 clarification. Would it be the board's intent
23 to try to take up the matter at its meeting in

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1 early November, so we would know, in advance,
2 whether the hearing on November 20th, on the
3 variance, would still need to go forward? I'm
4 not sure what date your business meeting is in
5 November. I was assuming that the 9th would
6 probably be around the same time.

7 CHAIRPERSON MILLER: You know, it
8 depends how the case goes. If it's ready for
9 decision making, it would be, I believe,
10 November 6 would be the next decision meeting
11 date. It depends, it just depends how much
12 additional material might come into the
13 record. I mean, it looks like that could
14 probably work. I just can't guarantee it.

15 But in any event, we do believe
16 that it should be decided before the variance
17 hearing. So we'll make whatever adjustments
18 are necessary.

19 MR. EPTING: Thank you.

20 MR. HITCHCOCK: Thank you, Madam
21 Chair.

22 CHAIRPERSON MILLER: Okay.
23 Anything else?

1 MR. EPTING: No, ma'am.

2 MR. GELL: Madam Chair, the last
3 time we met, we had expressed a concern that
4 we hadn't received some shadow studies, which
5 had been mentioned at an ANC meeting, which
6 Mr. Epting said they would provide to us.

7 It looks now as if those won't get
8 provided, at least under their schedule, until
9 after November 6th at the earliest. If they
10 have them, I don't see why they don't turn
11 them over right now.

12 We certainly need to have some
13 time, I don't want to be asking the board for
14 an extension in order to deal with something
15 that just got to us a few days before a
16 hearing.

17 So I would ask the board to
18 instruct them to provide them within a week or
19 two weeks of this date, or at some other
20 reasonable time, to give us sufficient time to
21 analyze them, and be ready to go forward with
22 testimony.

23 CHAIRPERSON MILLER: Are these in

1 connection with the variance case or --

2 MR. GELL: They are in connection

3 --

4 CHAIRPERSON MILLER: Not the
5 appeal.

6 MR. GELL: -- with the variance
7 case. That's correct.

8 MR. EPTING: We have no problem
9 with that. In fact, in our letter, when we
10 filed our prehearing statement, two weeks ago,
11 we mentioned that, you know, well, assuming
12 that we have to go ahead with the variance
13 case, we file it well ahead of time, so since
14 this is being put off, we'll go ahead and file
15 it in about two weeks.

16 I just really wasn't trying to mix
17 up apples and oranges between the two cases.

18 COMMISSIONER TURNBULL:

19 [Microphone turned off]

20 MR. EPTING: In the original
21 variance case. Yes, sir.

22 COMMISSIONER TURNBULL:

23 [Microphone turned off]

1 MR. LEGRANT: Yes; they wanted to
2 see them from different angles.

3 COMMISSIONER TURNBULL:
4 [Microphone turned off]

5 MR. EPTING: It was additional
6 material that they said --

7 COMMISSIONER TURNBULL:
8 [Microphone turned off]

9 MR. HITCHCOCK: Beyond what was in
10 their original application. That's correct.

11 MR. EPTING: So we'll submit those
12 in two weeks. I just really was trying to
13 keep one case separate from the other case.

14 CHAIRPERSON MILLER: Right. I
15 think we should, though. We're all here. I
16 think that's why they raised it.

17 MR. EPTING: Right.

18 CHAIRPERSON MILLER: But I do have
19 a question now, based on that.

20 Are you going to be submitting any
21 plans for us to look at, in that there seems
22 be a factual question here with respect to
23 connection between two structures.

1 I mean, are we going to see
2 plans of the existing buildings?

3 MR. EPTING: We have plans showing
4 the existing connection as approved by the
5 BZA; yes.

6 CHAIRPERSON MILLER: Okay. Would
7 you be submitting that in the record?

8 MR. EPTING: Yes. We were going
9 to do it at the hearing.

10 CHAIRPERSON MILLER: You're going
11 to do it at the hearing?

12 MR. EPTING: Yes.

13 CHAIRPERSON MILLER: Can you do it
14 in advance, so the board can take a look at it
15 ahead of time?

16 MR. EPTING: Sure; we can do that.

17 CHAIRPERSON MILLER: And the
18 parties, so they can absorb it?

19 MR. EPTING: Sure.

20 CHAIRPERSON MILLER: Okay.

21 MR. EPTING: If that's the case,
22 maybe we'd like to see their materials ahead
23 a time too, cause I mentioned they --

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1 MR. LEGRANT: They mention that
2 architectural drawings and pictures will be
3 submitted under separate cover. To date, we
4 haven't seen those yet. So I think it would
5 be fair to have a mutual exchange.

6 CHAIRPERSON MILLER: I mean, we
7 have this extra time. Let's hear some
8 comments on that.

9 MR. EPTING: I mean the plans that
10 we have are I think the plans that are already
11 available. I think we could make them
12 available.

13 CHAIRPERSON MILLER: Okay. Maybe
14 we ought to set the date, then. Ms. Rose, is
15 it usually a week before the hearing, or so,
16 that they would submit these plans and
17 drawings that they intend to rely on?

18 MS. ROSE: Normally, it's two
19 weeks prior to the hearing.

20 CHAIRPERSON MILLER: Okay.

21 MS. ROSE: I don't know if you
22 need responses and that type of thing, or --

23 CHAIRPERSON MILLER: No. I don't

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1 think we need responses. No. Two weeks prior
2 to the hearing. So the Appellant would be
3 submitting the plans that would be showing the
4 connections germane to this appeal, and the
5 Intervenors would be submitting -- what is
6 that? What will you be submitting?

7 MR. HITCHCOCK: We will be
8 submitting the plans that we were preparing to
9 have as exhibits. I mean, it seems what the
10 board is saying is can both sides file the
11 exhibits they're going to use at the hearing
12 in advance, and I think we can do that.

13 CHAIRPERSON MILLER: Okay. I
14 mean, we don't usually mandate that, you know,
15 all exhibits be filed ahead of time, but we
16 have a legal factual question on appeal here,
17 and it seems like this isn't something that
18 should be hidden, that we should have a chance
19 to absorb what's on the drawings, and not do
20 that at the same time as we're trying to
21 listen to you all.

22 Okay. So it would be two weeks
23 prior to October 9th, which would be -- I

1 believe -- is that September 25th? Yes.
2 September 25th. And all parties would be
3 served. Okay.

4 MR. GELL: Yes; that's fine.
5 Thank you. Madam Chair, could I bring up one
6 additional point?

7 CHAIRPERSON MILLER: Sure.

8 MR. GELL: At the earlier hearing,
9 the board considered who the parties should be
10 in the variance case, and we did have
11 submissions from several of the people who
12 live nearby. Mr. and Mrs. Schumann were one
13 of those who asked to be made parties. They
14 are here today, and I think the board put off
15 the question of whether they should be parties
16 because they weren't present at the time.

17 As an extension of that earlier
18 decision, I wonder if the board could take up
19 their request to be parties, not in the appeal
20 case but in the variance case. If that's out
21 of order, then I withdraw it.

22 CHAIRPERSON MILLER: I don't think
23 we can because we didn't give notice to anyone

1 about the variance case. So I think that
2 would prejudice other people. They are going
3 to be seeking party status. Is that what
4 you're saying?

5 MR. GELL: Well, these are people
6 that already sought party status but weren't
7 available at the time that the board made its
8 decision on party status. The board simply
9 put off that question until they could be
10 present, to speak to why they should be made
11 parties. So I just raise it because they're
12 here.

13 CHAIRPERSON MILLER: No, I can't.
14 I can't. There hasn't been notice. We
15 haven't called that case. You know, that's a
16 legal issue in the case. I believe we may
17 have left the door open for them to come back
18 when we continue that particular case, the
19 variance case.

20 Okay. Anything else?

21 [No response]

22 CHAIRPERSON MILLER: Okay. Then
23 we will see you all on the 9th. Thank you

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1 very much.

2 [Discussion off the record from
3 2:10:49 p.m. until 2:12:55 p.m.]

4 CHAIRPERSON MILLER: Next week, we
5 have scheduled a decision making meeting in
6 the case of Pauline Ney. It's Case No. 17446-
7 A. It's a motion for reconsideration. We had
8 continued our decision making on that case
9 until next Tuesday, September 18th, because we
10 didn't have a quorum at the time it was
11 originally scheduled for decision making.

12 We were hoping that the NCPC
13 appointee, Mr. Shane Dettman, who will be
14 joining us, would be confirmed by that date;
15 however, he's still not confirmed yet, and so
16 out of caution, because there's no guarantee
17 he will be confirmed by next Tuesday, I
18 suggest that we move that decision meeting to
19 the following Tuesday, which would be
20 September 25th.

21 Okay. I would say that we ought
22 to do it in the morning and then proceed with
23 our hearings.

1 So do I have the consensus of the
2 board, then, to move this decision making to
3 September 25th, first item in the morning?

4 Okay. We have the consensus,
5 then, and Mr. Moy, I trust that you will also
6 notify the parties in the case.

7 MR. MOY Yes, ma'am. Staff will
8 take care of the public notice to all the
9 parties.

10 CHAIRPERSON MILLER: Okay. Great.
11 Then do we have anything else on the
12 afternoon's agenda?

13 MR. MOY: No, ma'am. That
14 completes the hearing session for this
15 afternoon.

16 CHAIRPERSON MILLER: Okay. Then
17 this hearing is adjourned.

18 [Whereupon, at 2:15 p.m., the
19 afternoon session of the BZA was adjourned]

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