

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY

SEPTEMBER 25, 2007

+ + + + +

The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C., 20001, pursuant to notice at 10:51 a.m., Ruthanne Miller, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

RUTHANNE G. MILLER Chairperson
CURTIS ETHERLY, JR. Vice Chairperson
MARC LOUD Board Member
SHANE DETTMAN Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

GREGORY JEFFRIES Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY Secretary
BEVERLY BAILEY Sr. Zoning Specialist
ESTHER BUSHMAN Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

MATT JESICK
STEPHEN MORDFIN
STEPHEN RICE
ARTHUR JACKSON

The transcript constitutes the minutes from the Public Hearing held on September 25, 2007.

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P R O C E E D I N G S

(10:51 a.m.)

CHAIRPERSON MILLER: This hearing will please come to order.

Good morning, ladies and gentlemen. This is the September 25th morning public hearing of the Board of Zoning Adjustment of the District of Columbia.

My name is Ruthanne Miller. I'm Chair of the BZA. To my right is Mr. Curtis Etherly, who is the Vice Chair. To his right is Mr. Greg Jeffries from the Zoning Commission. To my left is Mr. Marc Loud, a mayoral appointee; Mr. Shane Dettman, representing the National Capital Planning Commission; and to his left is Clifford Moy from the Office of Zoning; Lori Monroe, Office of Attorney General; and Beverly Bailey, Office of Zoning.

Copies of today's hearing agenda are available to you and are located to my left in the wall bin near the door.

1 Please be advised that this
2 proceeding is being recorded by a court
3 reporter and is also Webcast live.
4 Accordingly, we must ask you to refrain from
5 any disruptive noises or actions in the
6 hearing room.

7 When presenting information to the
8 Board, please turn on and speak into the
9 microphone, first stating your name and home
10 address. When you're finished speaking,
11 please turn your microphone off so that your
12 microphone is no longer picking up sound or
13 background noise.

14 All persons planning to testify
15 either in favor or in opposition are to fill
16 out two witness cards. These cards are
17 located to my left on the table near the door
18 and on the witness tables. Upon coming
19 forward to speak to the Board, please give
20 both cards to the reporter sitting to my
21 right.

22 The order of procedure for special

1 exceptions and variances is, one, statement
2 and witnesses of the Applicant;

3 Two, government reports, including
4 Office of Planning, Department of Public
5 Works, DDOT, et cetera;

6 Three, report of the Advisory
7 Neighborhood Commission;

8 Four, parties or persons in
9 support;

10 Five, parties or persons in
11 opposition;

12 Six, closing remarks by the
13 Applicant.

14 Pursuant to Sections 3117.4 and
15 3117.5, the following time constraints will be
16 maintained. The Applicant/Appellant, persons
17 and parties, except an ANC, in support,
18 including witnesses, 60 minutes collectively.
19 Appellees, persons and parties, except an ANC,
20 in opposition, including witnesses, 60 minutes
21 collectively. Individuals, three minutes.

22 These time restraints do not

1 include cross-examination and/or questions
2 from the Board. Cross-examination of
3 witnesses is permitted by the applicant or
4 parties.

5 The ANC within which the property
6 is located is automatically a party in a
7 special exception or variance case.

8 Nothing prohibits the Board from
9 placing reasonable restrictions on cross-
10 examination, including time limits and
11 limitations on the scope of cross-examination.

12 The record will be closed at the
13 conclusion of each case, except for any
14 material specifically requested by the Board.
15 The Board and the staff will specify at the
16 end of the hearing exactly what is expected
17 and the date when the persons must submit the
18 evidence to the Office of Zoning. After the
19 record is closed, no other information will be
20 accepted by the Board.

21 The Sunshine Act requires that the
22 public hearing in each case be held in the

1 open before the public. The Board may,
2 consistent with its rules of procedure and the
3 Sunshine Act, enter executive session during
4 or after the public hearing on a case for
5 purposes of reviewing the record or
6 deliberating on the case.

7 The decision of the Board in these
8 contested cases must be based exclusively on
9 the public record. To avoid any appearance to
10 the contrary, the Board requests that persons
11 present not engage the members of the Board in
12 conversation.

13 Please turn off all beepers and
14 cell phones at this time so as not to disrupt
15 these proceedings.

16 The Board will now consider any
17 preliminary matters. Preliminary matters are
18 those which relate to whether a case will or
19 should be heard today, such as requests for
20 postponement, continuance or withdrawal or
21 whether proper and adequate notice of the
22 hearing has been given.

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

5 Does the staff have any
6 preliminary matters?

7 MS. BAILEY: Madam Chair, members
8 of the Board, to everyone, good morning.
9 Board member Dettman, congratulations.

10 There is, and it has to do with
11 Application 17665, Jamal Kadri. Mr. Dupont
12 has his hand raised. So that is your case,
13 sir?

14 CHAIRPERSON MILLER: Good morning.
15 Would you introduce yourself for the record,
16 please? You need to press it and the red
17 light will --

18 MR. DUPONT: Stephen Dupont.

19 We request a continuance on Case
20 17665, please, to the next scheduled meeting.

21 CHAIRPERSON MILLER: To the next
22 available date?

1 MR. DUPONT: Well, if that's what
2 it takes.

3 CHAIRPERSON MILLER: Okay.

4 MR. DUPONT: Soon.

5 CHAIRPERSON MILLER: What do you
6 mean by "the next available" meeting? How
7 soon do you want it?

8 MR. DUPONT: We would like to come
9 in -- we're trying to reduce the scope of our
10 request and make it a much simpler case. We'd
11 like to get it in as quickly as possible and
12 make it as short a presentation as possible.
13 So hopefully it will be at the next scheduled
14 meeting, whenever that is.

15 CHAIRPERSON MILLER: Is there
16 anybody else here on this case today?

17 MR. DUPONT: No.

18 CHAIRPERSON MILLER: You're not
19 aware of any opposition to your request, I
20 gather, for postponement.

21 MR. DUPONT: Oh, yes, there is --
22 there is --

1 CHAIRPERSON MILLER: For
2 postponement.

3 MR. DUPONT: No, no.

4 CHAIRPERSON MILLER: But nobody
5 else is here on the case. Okay.

6 MR. DUPONT: No. We're not really
7 prepared to go ahead today.

8 CHAIRPERSON MILLER: Okay. No,
9 that's fine. I was just trying to listen to
10 you to figure out how much smaller this case
11 is going to get.

12 MR. DUPONT: Well, we would like
13 to get rid of the use variance.

14 CHAIRPERSON MILLER: Okay. So
15 you'd hope to be seeking an area variance,
16 correct?

17 MR. DUPONT: Area and special
18 exceptions.

19 CHAIRPERSON MILLER: Okay.

20 MR. DUPONT: I think special
21 exceptions.

22 CHAIRPERSON MILLER: And there is

1 some opposition in this case now; is that
2 correct or no?

3 MR. DUPONT: Not from the
4 neighborhood, but there is technical
5 opposition.

6 CHAIRPERSON MILLER: I'm sorry.

7 MR. DUPONT: There's technical
8 problems with the case that create opposition,
9 but it's no opposition from the neighborhood.
10 Well, there is one, one person.

11 CHAIRPERSON MILLER: Okay. So
12 you're hoping to actually have little or no
13 opposition.

14 MR. DUPONT: We're trying to make
15 the case more straightforward and eliminate
16 the opposition, the technical problem.

17 CHAIRPERSON MILLER: Okay, okay.
18 I'm sorry. Did you say how soon you would be
19 ready to come back?

20 MR. DUPONT: As soon as possible.
21 When's the next scheduled meeting?

22 CHAIRPERSON MILLER: We meet every

1 Tuesday.

2 MR. DUPONT: I probably need two
3 weeks. One week is a little quick. You know,
4 if it's possible. If it's unreasonable,
5 that's understandable.

6 CHAIRPERSON MILLER: We're
7 scheduled out through March, but, no, I'm not
8 saying you have to wait until March. So what
9 we're doing up here --

10 MR. DUPONT: I'm aware.

11 CHAIRPERSON MILLER: -- is we're
12 looking at the calendar to see where we might
13 be able to fit you in.

14 MR. DUPONT: A month might be
15 good.

16 (Pause in proceedings.)

17 CHAIRPERSON MILLER: Now about
18 November 27th in the afternoon?

19 MR. DUPONT: Isn't that
20 Thanksgiving?

21 CHAIRPERSON MILLER: I think it's
22 after Thanksgiving. Let me -- that's what Mr.

1 Moy says.

2 MR. DUPONT: That's fine with me.
3 It's awfully close to Thanksgiving. I don't
4 know if I can schedule that for everybody else
5 involved.

6 CHAIRPERSON MILLER: Thanks giving
7 is November 22nd.

8 MR. DUPONT: Really?

9 CHAIRPERSON MILLER: That's
10 Thursday. So it would be the following
11 Tuesday, the next week.

12 MR. DUPONT: That should be okay.

13 CHAIRPERSON MILLER: That should
14 be okay. Please should be back and
15 everything. That's really, you know, unless
16 you want to go further down there road. We
17 couldn't really see another space.

18 MR. DUPONT: No, that's fine.

19 CHAIRPERSON MILLER: Okay. So
20 then will you be filing something beforehand
21 that might amend?

22 MR. DUPONT: Yes.

1 CHAIRPERSON MILLER: Okay. Is
2 there a deadline that we need to set for the
3 filing in advance of the November 27th date or
4 what?

5 MS. BAILEY: If the Applicant will
6 be filing something that's going to amend the
7 application, we would like to know that as
8 soon as possible so we will be able to
9 readvertise it if that's necessary.

10 MR. DUPONT: Within a couple of
11 weeks.

12 MS. BAILEY: Thank you.

13 CHAIRPERSON MILLER: Ms. Bailey,
14 what are the dates that he needs at least to
15 be aware of if he needs to readvertise in
16 order to hear it on the 27th? Do you know?

17 MS. BAILEY: You said a couple of
18 weeks, Mr. Dupont? Two weeks, would that be
19 sufficient or would you prefer three weeks?

20 MR. DUPONT: Well, let's shoot for
21 two.

22 MS. BAILEY: October the 15th

1 would be a good date.

2 CHAIRPERSON MILLER: Okay.

3 MR. DUPONT: Thank you.

4 CHAIRPERSON MILLER: Okay.

5 Anything else?

6 MR. DUPONT: We understand the
7 inconvenience. We just don't want to be
8 wasting our time when we finally do present.

9 CHAIRPERSON MILLER: No, that's
10 fine. That's a good reason for continuance,
11 and sometimes after you file it and you work
12 with Office of Planning, different issues come
13 to light, and so I think that that's fine.
14 That's no problem.

15 MR. DUPONT: Thank you very much.

16 CHAIRPERSON MILLER: Okay. Thank
17 you.

18 Ms. Bailey, do we have any other
19 preliminary issues?

20 MS. BAILEY: Swearing in the
21 witnesses, Madam Chair.

22 CHAIRPERSON MILLER: Okay. Would

1 all those who plan to testify either in
2 support or opposition of any application today
3 please rise to take the oath?

4 MS. BAILEY: Would you please
5 raise your right hands?

6 (Whereupon, the witnesses were
7 duly sworn.)

8 MS. BAILEY: Thank you.

9 The first case is Application No.
10 17662 of Doug Damron, pursuant to 11 DCMR
11 3104.1, for a special exception to allow the
12 construction of a spiral staircase from the
13 second floor to a new roof deck serving a
14 flat. The property is located in the R-4
15 District, and the Applicant is requesting
16 relief under Section 223 of Section 406. It's
17 located at 936 S Street, N.W. The property is
18 also known as Square 363, Lot 73.

19 CHAIRPERSON MILLER: Good morning.

20 MR. MARTIN: Good morning.

21 CHAIRPERSON MILLER: Would you
22 introduce yourself for the record, please?

1 MR. MARTIN: Yes. I am Jim
2 Martin. I live at 938 S Street. I'm the
3 agent and architect for the owner, Doug
4 Damron; also the one most affected by the
5 project.

6 Pardon me?

7 CHAIRPERSON MILLER: What does
8 that mean?

9 MR. MARTIN: Well, because the
10 area way that's in question abuts my house.

11 CHAIRPERSON MILLER: Oh, okay.

12 MR. MARTIN: Because I'm right
13 next door. Other than the homeowner, I guess.

14 It seems fairly straightforward.
15 We're simply adding a spiral staircase inside
16 the area way, which is nonconforming to a new
17 roof deck rather than having a stairwell in
18 the back yard that goes all the way down to
19 the ground level. It controls access to the
20 roof. Also it keeps it out of sight from the
21 neighbors for the most part. It makes it less
22 obtrusive. Because it's only from the second

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1 floor to the roof, it's a nonconforming court,
2 but in essence it seems as though we're not
3 making it less nonconforming because it's only
4 from the second floor to the roof.

5 CHAIRPERSON MILLER: Okay. That
6 really takes us to where the Board is
7 somewhat interested, and that is why do you
8 need this relief. You had a nonconforming
9 open court. You're putting a staircase in it.
10 Why do you need relief from the closed court?

11 That's what I think you were
12 seeking.

13 MR. MARTIN: Well, the intention
14 is not to create a closed court. It's a
15 nonconforming court as it is. My assumption
16 is that when they looked at the plans, they
17 thought we were creating a closed court when,
18 in fact, it's only from the second floor up,
19 not from the ground up.

20 Does that answer your question?

21 CHAIRPERSON MILLER: Okay. So, I
22 mean, basically you were referred by the

1 Zoning Administrator, correct?

2 MR. MARTIN: Correct. That's
3 correct.

4 CHAIRPERSON MILLER: And you
5 didn't get any other explanation as to why the
6 Zoning Administrator thought you needed this
7 relief?

8 MR. MARTIN: I can read you their
9 letter if that would be helpful.

10 CHAIRPERSON MILLER: Is that in
11 the record?

12 MR. MARTIN: It should be in the
13 record, their documents.

14 CHAIRPERSON MILLER: Is that their
15 memorandum dated August 31st?

16 MR. MARTIN: Yes.

17 CHAIRPERSON MILLER: It seems to
18 me it says that this relief is needed to
19 permit aggregate increase in nonconforming of
20 existing open court, becoming closed court,
21 set forth in Section 406.1 for single family
22 dwelling row structure in the R-4 residential

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1 zoned district.

2 MR. MARTIN: Well, and I guess my
3 question is do you interpret it as a closed
4 court when the staircase actually goes from
5 the second floor to the roof rather than from
6 the ground floor up to the roof.

7 MS. MONROE: Madam Chair, can I
8 interject for a second?

9 CHAIRPERSON MILLER: Sure.

10 MS. MONROE: All I'm doing is
11 looking at the definitions, and a closed court
12 is a court that's surrounded on all sides of
13 a building or by the exterior walls of a
14 building and either side or rear lot lines or
15 alley lines. So whether or not you're coming
16 from the first floor or the ground floor is
17 irrelevant basically. I mean a court can
18 start at a higher level and continue up and be
19 closed or open.

20 MR. MARTIN: Right, right. That's
21 correct.

22 MS. MONROE: But I still don't

1 know whether your particular plan is creating
2 a closed court. It would have to be
3 surrounded on all four sides by either wall or
4 lot line, and if not, it may still be an open
5 court.

6 The other question that has to be
7 considered is if it's a nonconforming open
8 court and you're enlarging, increasing
9 nonconformity.

10 MR. MARTIN: Right.

11 MS. MONROE: That's the other
12 question I don't know.

13 MR. MARTIN: Right. I guess the
14 question would be is the stair considered an
15 edge that creates a court, and I don't know
16 the answer to that, to be honest.

17 CHAIRPERSON MILLER: This is also
18 an open staircase, right?

19 MR. MARTIN: It is an open
20 staircase. It's a spiral staircase.

21 COMMISSIONER JEFFRIES: It's not
22 enclosed from the second floor up.

1 MR. MARTIN: That's right.

2 COMMISSIONER JEFFRIES: It's open.

3 MR. MARTIN: That's correct.

4 COMMISSIONER JEFFRIES:

5 Absolutely. I don't know how it's a court.

6 CHAIRPERSON MILLER: Maybe we
7 should go right to the Office of Planning, if
8 it's all right with the Applicant. Usually
9 you do your whole full thing, but this is an
10 important threshold question. Okay.

11 MR. MORDFIN: Good morning. I'm
12 Stephen Mordfin with the Office of Planning.

13 And this application is in
14 conformance with the provisions of Section 223
15 in that it's an addition to a flat and is on
16 a district in which the use is permitted as a
17 matter of right, R-4. Light and air will not
18 be unduly affected because the addition of the
19 spiral staircase only between the second floor
20 and the roof.

21 Privacy and use and enjoyment of
22 neighboring properties will not be unduly

1 affected because the proposed staircase will
2 be located entirely within an existing open
3 court and will not extend across the windows
4 of any adjoining properties.

5 The addition will be visible from
6 the public alley only and Historic
7 Preservation Office did not view the addition
8 as having an impact on the historic district.

9 Architectural drawings were
10 submitted as a part of the application, and a
11 lot occupancy of 50 percent is proposed, less
12 than the maximum 70 percent permitted.
13 Therefore, the Office of Planning recommends
14 approval of the application as submitted the
15 Applicant.

16 Thank you.

17 CHAIRPERSON MILLER: Thank you.

18 I guess I have a threshold
19 question for you though. Do you believe that
20 relief is required?

21 MR. MORDFIN: Well, we base the
22 relief on what we've gotten from the Zoning

1 Administrator. It does have two walls of the
2 existing house, plus a third is a lot line.
3 I guess the fourth would be the open
4 staircase, and I guess the question is: is an
5 open staircase a wall or not?

6 And while I was reviewing this I
7 had just assumed that because we had gotten
8 the letter from the Office of the Zoning
9 Administrator that they had determined that
10 this did count as a wall. So we assumed that
11 they had assumed that it was going to count as
12 the fourth side.

13 It is open, you know, which is
14 part of the reason why we recommended
15 approval, because it's not going to
16 significantly add to the bulk of the property
17 and, you know, adversely affect light and air
18 or anything like that because it's an open
19 structure.

20 As for whether it meets the
21 definition of wall, I did not look that up in
22 the zoning regulations. I see you have it

1 open over there.

2 You have the definition of wall?

3 CHAIRPERSON MILLER: Well, a lot
4 line. An enclosing wall constructed
5 immediately adjacent to a side lot line but
6 not a party wall. Oh, that's a lot line wall.

7 But it talks about enclosed, and
8 that's my impression of closed court, that
9 it's enclosed. So this is open, and I think
10 that's part of the reason why there isn't any
11 adverse impact or whatever. It doesn't look
12 like it's increasing a nonconformity because
13 you're not increasing this open court. You're
14 kind of filling it partially in.

15 COMMISSIONER JEFFRIES: Just
16 putting an element inside of a nonconforming
17 use. I mean, if it's not increasing it, I
18 don't -- yeah.

19 MR. MORDFIN: It is altering a
20 nonconforming situation.

21 CHAIRPERSON MILLER: Altering a
22 nonconforming situation. Is that -- where is

1 that found in the regs.?

2 MR. MORDFIN: Well, under Section
3 2001, does it speak of --

4 CHAIRPERSON MILLER: There is
5 increasing a nonconformity, but it's not
6 really increasing a nonconformity here, is it?

7 MR. MARTIN: I don't know that it
8 is if it's not really adding a wall and it's
9 not making it into a closed court. It's not
10 increasing. It's not increasing anything
11 unless it counts towards the lot occupancy.

12 MR. MORDFIN: Except that the area
13 way already is small enough that it
14 contributes to lot occupancy anyway.

15 MR. MARTIN: It's less than five
16 feet wide to the entire --

17 MR. MORDFIN: Right. So it's
18 already considered.

19 CHAIRPERSON MILLER: So it doesn't
20 add to the lot occupancy.

21 MR. MORDFIN: That's right.

22 CHAIRPERSON MILLER: Okay. Okay.

1 Well, we've been in this situation before.
2 You know, there's transition in the Zoning
3 Administrator's office and stuff, and I don't
4 know. This may be one of those cases where
5 relief may not be necessary.

6 So I guess I'm inclined to think
7 so at this point, but other Board members?

8 (Pause in proceedings.)

9 CHAIRPERSON MILLER: Go ahead.

10 COMMISSIONER JEFFRIES: So I'm
11 really, Madam Chair, just really looking at
12 the direction from the Zoning Administrator to
13 permit aggregate increase in nonconformity
14 with existing open court. I don't see where
15 this is increasing a nonconformity, and I'm
16 not also clear as to how this particular
17 configuration is a court, a closed court.

18 So you know, I think that it might
19 be wise that, you know, at least from this
20 Board that we provide some level of direction
21 to the Zoning Administrator as to how to go
22 forward.

1 CHAIRPERSON MILLER: I was just
2 double checking the regulations with respect
3 to nonconformities, and 2001.3 says
4 enlargements or additions may be made to the
5 structure. This could be an addition, the
6 staircase, provided (a) the structure shall
7 conform to percentage of lot occupancy
8 requirements, which is does; it's not
9 increasing that; (b) the addition or
10 enlargement itself shall conform to use and
11 structure requirements; and (2) either
12 increase or extend any existing nonconforming
13 aspect of the structure nor create any new
14 nonconformity of structure and addition
15 combined.

16 COMMISSIONER JEFFRIES: Wait.
17 What's an addition?

18 CHAIRPERSON MILLER: Well, the
19 staircase could be an addition. Could there
20 be an addition to the area?

21 I mean, even if it is, it's
22 allowed. It says it's allowed.

1 COMMISSIONER JEFFRIES: Yeah.

2 CHAIRPERSON MILLER: So, yeah, I
3 would be inclined to dismiss this case saying
4 that no relief is required, and do that with
5 an order that the Applicant could take to the
6 Zoning Administrator as to why we don't
7 believe relief is required.

8 COMMISSIONER JEFFRIES: Yeah.

9 CHAIRPERSON MILLER: Is that the
10 consensus of the Board?

11 Okay. So I guess we can vote on
12 that. All those in favor say aye.

13 (Chorus of ayes.)

14 CHAIRPERSON MILLER: Those
15 opposed?

16 (No response.)

17 CHAIRPERSON MILLER: All those
18 abstaining?

19 (No response.)

20 CHAIRPERSON MILLER: Would you
21 call the vote, please?

22 MS. BAILEY: Madam Chair, the vote

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1 is five, zero, zero to dismiss the
2 application. Ms. Miller made the motion, and
3 who seconded?

4 COMMISSIONER JEFFRIES: I
5 seconded.

6 MS. BAILEY: Thank you, sir.

7 Ms. Miller made the motion. Mr.
8 Jeffries seconded. Mr. Dettman, Mr. Etherly,
9 and Mr. Loud support the motion.

10 CHAIRPERSON MILLER: Okay, and I
11 would suggest that this be by somewhat of a
12 summary order, but with a little bit of
13 explanation in there so that the Applicant
14 could get this order fairly quickly and take
15 it to the Zoning Administrator with an
16 explanation of why we find no relief is
17 required.

18 Okay. Thank you.

19 We're ready for the next case, Ms.
20 Bailey whenever you are.

21 MS. BAILEY: Application No.
22 17664, that is, of 2321 Shannon Place, S.E.,

1 LLC, pursuant to 11 DCMR 3104.1, for a special
2 exception to construct five new single family
3 dwellings under Section 353. The property is
4 zoned R-5-A, and it's located at 2321 Shannon
5 Place, S.E., Square 5787, Lot 812.

6 COMMISSIONER JEFFRIES: The
7 drawings that you have are too close. Can you
8 make them much further away? Just kidding.

9 (Laughter.)

10 COMMISSIONER JEFFRIES: No,
11 closer. Thank you.

12 CHAIRPERSON MILLER: Good morning.
13 Would you like to introduce yourselves for the
14 record?

15 MR. KEARNEY: Good morning, Madam
16 Chair. I'm Paul Kearney, Commissioner 8A-05.

17 CHAIRPERSON MILLER: Sorry.
18 What's your last name?

19 MR. KEARNEY: Kearney.

20 CHAIRPERSON MILLER: Kearney?
21 Okay.

22 MR. MUHAMMAD: Good morning, Madam

1 Chair. I'm ANC Commissioner, Chair of ANC-8A,
2 Anthony Muhammad.

3 MS. TOBE: I'm Brenda Tobe of 2321
4 Shannon Place, LLC.

5 MR. TOBE: Good morning. I'm John
6 Tobe of 2321 Shannon Place, LLC.

7 CHAIRPERSON MILLER: Okay. I just
8 want to be clear about the relief you're
9 seeking because I think you've changed it
10 somewhat, right?

11 MS. TOBE: Yes, we have.

12 CHAIRPERSON MILLER: So perhaps
13 you can start with that.

14 MS. TOBE: Okay. What we're --
15 first is a special exception. Initially our
16 application was for five row dwellings which
17 has been reduced to three, primarily because
18 of difficulties that we encountered in the
19 lot.

20 The other exception is that, well,
21 one of the things that we discovered on the
22 lot was an unrecorded easement by Pepco which

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1 reduced the amount of buildable space.

2 As a result, the three units are
3 compressed into an area. We do meet the eight
4 yard minimum side requirement, but because of
5 the 40 foot height of the building, we would
6 require a ten foot side yard for Lot 3, and we
7 are, therefore, requesting a variance to allow
8 us to build with an eight foot side yard for
9 Lot 3 instead of a ten.

10 CHAIRPERSON MILLER: Am I correct
11 you didn't advertise for that variance?

12 MS. TOBE: Yes, we did.

13 CHAIRPERSON MILLER: You did
14 advertise.

15 MS. TOBE: Yes.

16 CHAIRPERSON MILLER: So you --

17 MS. TOBE: We advertised and we
18 notified all of the residents within 200 feet.

19 CHAIRPERSON MILLER: About the
20 variance?

21 MS. TOBE: For the yard.

22 CHAIRPERSON MILLER: When your

1 plans changed you notified them?

2 MS. TOBE: Yes.

3 CHAIRPERSON MILLER: Okay. Is
4 that in the record?

5 MS. TOBE: I don't know, but one
6 of our neighbors is here who has a letter
7 announcing that.

8 We also went to the ANC with it
9 and notified them, and it was a part of the
10 sign that was posted.

11 CHAIRPERSON MILLER: So you
12 basically followed the normal notice
13 requirements again?

14 MS. TOBE: Yes, we did.

15 CHAIRPERSON MILLER: You notified
16 residents, you posted, and you went to the
17 ANC?

18 MS. TOBE: Yes.

19 MR. TOBE: Yes.

20 CHAIRPERSON MILLER: Okay. And
21 the ANC is -- okay.

22 MS. TOBE: And there should be a

1 letter in the record from the ANC.

2 CHAIRPERSON MILLER: Okay, good.

3 MS. TOBE: To that effect.

4 CHAIRPERSON MILLER: Okay. Good.

5 I wanted to make sure there weren't any notice
6 problems. Okay.

7 Can you also just bring to my
8 attention -- I'm sorry -- where you amended
9 your application, or do you need to do that
10 here?

11 You're saying you sent notices
12 around that you were amending it.

13 MS. TOBE: At each time, because
14 we initially started out with five units, and
15 at the instruction of the Board staff, BZA
16 staff, we reduced the number to four.

17 After reducing it to four, we
18 discovered the undisclosed easement, and we
19 had to redraw and resubmit, which we
20 submitted. I do have letters of different
21 dates in which the updated information was
22 submitted to the BZA office.

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1 Then we thought that we did not
2 need a variance, that we only needed a special
3 exception, but Mr. Rice in the Office of
4 Zoning with all his diligence determined that
5 even though we met the eight foot minimum
6 requirement, that for each three inches --
7 three inches of side yard is required for each
8 foot in height, and since our building, the
9 decorations at the top project up to 40 feet,
10 then we would be required to have a ten foot
11 side yard for Lot 3. We meet it for the Lot
12 1. Lot 2 doesn't have a side yard
13 requirement. Lot 3 is the only lot at issue.

14 And we do have the eight foot
15 minimum, but we are requesting a variance for
16 allowing us to proceed with that instead of
17 ten.

18 CHAIRPERSON MILLER: Okay. You
19 know, we were looking at the record, and we
20 just didn't want you to have any problems, and
21 we want to get it right. First of all, I
22 mean, the original application I have is for

1 a special exception to construct four row
2 dwellings and one single family detached
3 dwelling under Section 353.

4 Okay, and then I see that there's
5 various correspondence to the Office of Zoning
6 saying that, like you said, okay, because of
7 the Pepco easement we're only going to be
8 building three. It's a letter, okay, and then
9 we don't need a variance.

10 And there's another letter that
11 says, oh, we're going to request a variance
12 from the side yard. Okay?

13 So there are all of these kind of
14 incremental letters, and so first of all I
15 just want to get it straight here, exactly the
16 relief. If you want to amend your application
17 officially, we can do it right now here and
18 get it right.

19 MS. TOBE: Okay.

20 CHAIRPERSON MILLER: But then also
21 after we do that, I want to go back and just
22 hear from you again what it is you actually

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1 told -- is this what you told the ANC and the
2 neighbors and, you know, where is that?

3 And then Mr. Jeffries happened to
4 be pointing out that it looked like a letter
5 from Department of Transportation was
6 evaluating the project based on special
7 exception.

8 COMMISSIONER JEFFRIES: And not a
9 variance.

10 CHAIRPERSON MILLER: And not a
11 variance.

12 Okay. Let's just take it one by
13 one.

14 MS. TOBE: Okay.

15 CHAIRPERSON MILLER: Let's just
16 get it right here. You're amending your
17 application to be seeking a special exception
18 for three, to build three townhouse -- what is
19 it?

20 MS. TOBE: What are we requesting
21 right now?

22 CHAIRPERSON MILLER: Yes.

1 MS. TOBE: A special exception to
2 build three townhouses.

3 CHAIRPERSON MILLER: Okay.

4 MS. TOBE: And a variance to
5 construct with an eight foot side yard for Lot
6 3 instead of a ten foot side yard.

7 CHAIRPERSON MILLER: Okay. Now,
8 that's what I thought you were seeking.
9 That's fine, based on the correspondence.

10 Now, just -- and I think the ANC
11 is going to say they didn't have any problem,
12 but just so that we know, is there somewhere
13 in the record where you said that to the ANC
14 and your neighbors?

15 MS. TOBE: Yes.

16 CHAIRPERSON MILLER: We're seeking
17 a special exception for three, plus a side
18 yard variance.

19 MS. TOBE: Yes.

20 CHAIRPERSON MILLER: Okay. Good.
21 Where is that?

22 MS. TOBE: I have -- here's a copy

1 of a letter that was sent to our neighbors.

2 CHAIRPERSON MILLER: That wasn't
3 in our record?

4 MS. TOBE: No.

5 CHAIRPERSON MILLER: Okay, and the
6 ANC has seen it? Do you want to show it to
7 them?

8 Okay. If you could give that to
9 Ms. Bailey, I think that would be good for our
10 record.

11 MS. TOBE: And then other --

12 CHAIRPERSON MILLER: What's the
13 date of that letter?

14 MR. TOBE: September 6th.

15 CHAIRPERSON MILLER: Okay.

16 MS. TOBE: And then there are
17 other letters, the letters that I sent to Mr.
18 Nero I also sent to Commissioner Muhammad and
19 Commissioner Paul Kearney.

20 CHAIRPERSON MILLER: Okay. Those
21 letters that are in our record about reducing
22 it to three and the side yard.

1 MS. TOBE: Yes.

2 CHAIRPERSON MILLER: Okay, okay.
3 And the ANC is nodding. So okay. So we're
4 okay on that.

5 The only think we're not maybe is
6 DDOT may have not evaluated the variance.
7 Office of Planning has I know.

8 Okay. It's just for the record.
9 I mean, it may, you know -- they just may not
10 have. That may not have been given to them,
11 the variance to DDOT. It doesn't kill the
12 case.

13 MS. TOBE: Okay.

14 CHAIRPERSON MILLER: I just want
15 to clarify.

16 MS. TOBE: I believe I did, but I
17 don't have a letter here.

18 CHAIRPERSON MILLER: Oh, okay.

19 MS. TOBE: And I might have also
20 done it by E-mail.

21 CHAIRPERSON MILLER: Okay, and
22 Office of Planning may have discussed it with

1 DDOT as well. We'll find out. Okay. I just
2 wanted to find out.

3 MS. TOBE: Okay.

4 CHAIRPERSON MILLER: So we're set.
5 We know what you're seeking and that you have
6 notified those you needed to notify. Okay.

7 I think we've gotten the
8 procedural matters out of the way. If you
9 want to now go forward and present your case.

10 MS. TOBE: Okay. We have drawings
11 here showing what the proposed development is
12 and the proposed lots. These are the three
13 lots.

14 CHAIRPERSON MILLER: You need to
15 go on microphone.

16 MS. TOBE: Okay.

17 CHAIRPERSON MILLER: Could I say
18 one more thing to you?

19 MS. TOBE: Sure.

20 CHAIRPERSON MILLER: You're seeing
21 two types of relief here. One is special
22 exception, and one is variance, and in your

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1 presentation basically you don't have to tell
2 -- it's not like everything. I want you to
3 kind of just be focused to the different tests
4 under them, but basically a special exception
5 test, as you know, no adverse impacts to your
6 neighbors and harmony with regulations.

7 Variance, I don't think you
8 addressed this, but I think Office of Planning
9 did. You need to say with respect to that
10 side yard what about the property is
11 exceptional or unique that gives rise to a
12 practical difficult in complying with the
13 regulations, and in your case it would be the
14 practical difficulty of having the bigger side
15 yard or whatever, and then why there's no
16 adverse impact.

17 MS. TOBE: Okay.

18 CHAIRPERSON MILLER: Okay.

19 MS. TOBE: In terms of the special
20 exception, the regs do allow for low density
21 row dwellings, and this meets that test.

22 In terms of the variance, well,

1 there's no -- another reason that it does no
2 detriment to the neighbors is that we do have
3 adequate parking. There are two spaces with
4 each unit.

5 The building conforms with the
6 existing neighborhood. it has a 20 foot
7 setback of the front yard, as others do. It
8 has more than adequate space on one side yard.

9 Now, the difficulty that would be
10 presented if we meet the reg. requirements is
11 that we would have to reduce the size of each
12 of these units. That would severely alter the
13 floor plan and make the houses less desirable
14 because they would be more narrow.

15 We have had to reduce them some.
16 Initially the drawings were for 16 foot
17 structures, and we were able to reduce them to
18 15 and a quarter feet without doing major
19 redesign.

20 In order to meet the requirements,
21 we would either have to build only two units
22 or we would have to reduce the height of the

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1 units. In either instance, it would be a
2 hardship in terms of the economic feasibility
3 of doing this, as well as to the desirability
4 of the units.

5 We think that these are some very
6 attractively designed town homes that will be
7 an asset to the neighborhood, and we don't see
8 that -- in fact, we had heard from neighbors
9 from both sides who they called me and we
10 faxed plans to Mr. Poole, the neighbor
11 adjoining Lot 3, and he has indicated that he
12 does not have any difficulty with this as long
13 as the variance is in our side of the lot.

14 His concern when he read the
15 notice was that were we talking about coming
16 over to his land, which we were not. So he
17 has no problems with it.

18 And Mr. Dixon to our right
19 certainly has no problems with it, and we have
20 gotten other expressions from the
21 neighborhood. The person directly across the
22 street from us, Mr. Madhani, who has that lot,

1 has said that he supports it, and that he
2 hoped to either write a letter or to be here
3 today.

4 CHAIRPERSON MILLER: Okay.

5 MS. TOBE: And we have presented
6 it to the ANC, to the full neighborhood, and
7 our ANC members we're happy to say are
8 supportive of this and the variance.

9 CHAIRPERSON MILLER: Let me just
10 follow up with you because variances are a
11 harder test than a special exception. Okay?
12 So when you mention economic feasibility, can
13 you elaborate more so that the Board can weigh
14 it?

15 MS. TOBE: Okay. We haven't done
16 the figures, but we purchased this lot with
17 the understanding that this was usable,
18 buildable space in order to make it work for
19 the price at which we purchased it.

20 To now have a third of that lot so
21 that it can't be built on and then if we would
22 have to reduce this structure so that there

1 were only two, we would seriously have to
2 weigh whether it would be worth proceeding.

3 CHAIRPERSON MILLER: How about the
4 height? How much less desirable would they be
5 if you had to come down in height in order to
6 not have --

7 MS. TOBE: Well, we would have to
8 knock out a floor, and as it is, at the
9 basement floor level, that can be finished or
10 unfinished as living space, and the other
11 thing is that on the top level we have an open
12 terrace on the back, which would allow views
13 of the area, and that is something that we
14 think would be very desirable.

15 We do not block any views because
16 behind us there's a wooded area and 295, and
17 in front of us at present, there are vacant
18 lots. It's a vacant lot.

19 COMMISSIONER JEFFRIES: Excuse me,
20 ma'am.

21 MS. TOBE: Yes.

22 COMMISSIONER JEFFRIES: What's the

1 floor-to-floor height of the townhomes?

2 MS. TOBE: Floor to floor? It's
3 my understanding 40 foot.

4 COMMISSIONER JEFFRIES: Excuse me?

5 MS. TOBE: By floor --

6 COMMISSIONER JEFFRIES: Like floor
7 to ceiling or floor to floor from --

8 MS. TOBE: It will vary because a
9 portion of one -- from the second floor, a
10 part of that is an open area so that that part
11 would have like 15 foot ceilings.

12 COMMISSIONER JEFFRIES: Okay.

13 MS. TOBE: That is what reduces
14 the finished area.

15 COMMISSIONER JEFFRIES: Okay. So
16 if I were at the ground floor and I took --
17 not assuming I had double height space, just
18 basic floor to ceiling, what are we at per
19 floor?

20 MS. TOBE: I don't really know,
21 but I would expect typical is what, seven feet
22 or eight feet?

1 COMMISSIONER JEFFRIES: It would
2 probably be nine feet, I would assume.

3 MS. TOBE: Nine feet?

4 COMMISSIONER JEFFRIES: I mean
5 just floor to ceiling, and I was really asking
6 the question really floor to floor. I'm just
7 really dealing with just sort of how you
8 arrived at your general height, but --

9 MS. TOBE: Actually maybe Mr. Rice
10 could do that because he looked at the
11 drawings and came up with that it was 40 feet.

12 MR. RICE: Good morning, Board,
13 Madam Chair.

14 The floor-to-ceiling height, it
15 appears to be from the ground floor to the
16 second floor; the ground floor story is at
17 four and a half feet and it goes up to 14 and
18 a half. So it would be ten feet. I don't
19 know if that's measuring from the actual roof,
20 from the floor to the roof -- I mean to the
21 ceiling of the second floor or what's
22 considered it only showed from the exterior of

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1 the property, but it appears to be ten feet.

2 COMMISSIONER JEFFRIES: Yeah, I
3 mean, normally it's 11 feet floor to floor,
4 and then whatever mechanical MP would take in
5 the two feet, but okay.

6 I was just trying to determine,
7 Madam Chair, in terms of just adding those
8 floor to floors getting to what the general
9 height of the building was and whether there
10 was any room to pull it down. It sounds like
11 it's pretty standard.

12 CHAIRPERSON MILLER: I want to ask
13 you another question. I mean, I don't mean to
14 be probing, but we have to in order --

15 MS. TOBE: I understand.

16 CHAIRPERSON MILLER: If we want to
17 grant the relief, we have to make findings
18 that you meet the criteria. So with respect
19 to your purchase of the property, I think that
20 the unrecorded easement goes to the issue of
21 an exceptional situation for you, which is,
22 you know, a case like you didn't know it was

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1 there and you purchased it for a certain
2 amount based on your understanding that you
3 would have use of all this land and it's much
4 smaller use that you actually have because of
5 that easement.

6 Okay. That's the general concept
7 I understand. Again, I guess if you can be
8 any more specific as to like the circumstances
9 in which you purchase property without knowing
10 this, like, you know, how does that happen?

11 MS. TOBE: Well, when a title --
12 we had a title search conducted, and we have
13 title insurance, but it does not cover
14 necessarily unrecorded easements. It records
15 what's on the public record.

16 And as it happened, the city and
17 Pepco, they closed the street, and with the
18 closing of the street there was a -- there is
19 a -- what is it? -- a conduit that goes down
20 almost the center of that lot. Well, Pepco's
21 requirement is that you cannot build within
22 five feet of either side of that tunnel like.

1 We did not know about that. It
2 was only through calling Miss Utility and
3 having them to look at where the utilities
4 were located that we discovered it, and when
5 we contacted Pepco, they said they had no
6 intent to move it and that the city should
7 have informed them when they were closing the
8 street, and the last thing we wanted to do
9 because we knew it would be a losing battle is
10 to get into a fight between the city and
11 Pepco.

12 So what we end up with is our lot
13 that is less than what we thought it was, and
14 we're trying to make the best of a bad
15 situation.

16 CHAIRPERSON MILLER: And who was
17 the previous owner?

18 MS. TOBE: Derrick Smith.

19 CHAIRPERSON MILLER: So it was a
20 private owner.

21 MS. TOBE: Yes.

22 CHAIRPERSON MILLER: Did that

1 owner know about this easement?

2 MS. TOBE: He did not disclose it
3 to us if he knew.

4 MR. TOBE: And it seems like --

5 CHAIRPERSON MILLER: You're on
6 microphone?

7 MR. TOBE: Yes. It seems like
8 when they closed Talbott Street, because it
9 was a public area then, that nobody really
10 recorded this thing. They just did it by
11 right. When they closed it, they gave a piece
12 of it to this land and a piece of it to the
13 land next door where Mr. Dixon lived.

14 And on the land that we got,
15 evidently that's where Pepco had run the power
16 line, and the cost of removing it is
17 prohibitive to them. So it's impossible for
18 us.

19 CHAIRPERSON MILLER: Thank you.

20 MR. TOBE: And basically we're
21 trying to get a design that conformed, that
22 fit, that we think is conforming to where the

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1 city said it wanted to take development in the
2 Southeast Anacostia area, and we're just -- we
3 have the support of our neighbors and everyone
4 within the neighborhood that we are aware of,
5 and we're just seeking the variance because of
6 the undue modifications that we've had to do
7 thus far and the additional cost of going
8 through drawings might make us have to even
9 alter our entire development plan.

10 COMMISSIONER LOUD: I just want to
11 ask a couple.

12 Good afternoon.

13 MS. TOBE: Good afternoon.

14 COMMISSIONER LOUD: How are you?

15 I want to ask a couple of
16 questions about the actual project, and then
17 if you could just on the map point out to me
18 where this underground conduit is.

19 MS. TOBE: Okay.

20 COMMISSIONER LOUD: First, can you
21 just walk me through the different lots that
22 we're talking about and where the side yard

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1 would be?

2 MS. TOBE: Okay.

3 COMMISSIONER LOUD: And then where
4 this -- it's an underground Pepco conduit with
5 dead wires?

6 MS. TOBE: Live wires.

7 COMMISSIONER LOUD: Live wires.
8 Okay. All right. So go ahead and walk me
9 through.

10 MS. TOBE: Okay. This is Lot 1.
11 This is the lot line that borders our neighbor
12 to the left. Here are some 20 feet probably
13 into the lot is the Pepco line. There's a
14 manhole out here, and there's a manhole at the
15 rear of the property back here.

16 In five feet of that, the first
17 structure begins, or within so many feet.

18 Then Lot 2, that would be the one
19 that's in the middle. So there is no side
20 yard requirement, and then Lot 3 goes from
21 here over to the far lot line.

22 Within that space, there is an

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1 eight foot side yard. That's Lot 3.

2 COMMISSIONER JEFFRIES: Excuse me.

3 Are there four lots or three lots?

4 MS. TOBE: Three.

5 MR. TOBE: There are three lots.

6 COMMISSIONER JEFFRIES: Oh, so the
7 first lot where the conduit is, that is not an
8 actual lot.

9 MS. TOBE: That is a part of Lot
10 1.

11 COMMISSIONER JEFFRIES: Okay,
12 great.

13 MS. TOBE: Because there will be
14 fee simple houses. Each lot will be deeded to
15 its owner, and so all of that will be Lot 1.

16 MR. TOBE: And as it relates to
17 the four lots, originally there was five.
18 That was the plan. When we found out about
19 the underground, we were trying to get within
20 the rules dealing with the underground with
21 four. Then we hear from the architect that
22 no, we can't do four. All you can do is three

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1 and really be in compliance, and so we said
2 fine.

3 Then all of a sudden there was
4 this slight variance in floor to height that
5 required an additional two feet. What do you
6 call that?

7 MS. TOBE: Side yard.

8 MR. TOBE: Side yard that is
9 required in a development, and that's where it
10 is in terms of this special exception. That
11 will require the variance.

12 COMMISSIONER LOUD: I think I
13 understand a little bit better. You had to
14 push everything eastward because you were not
15 able to build at all on that lot --

16 MR. TOBE: Correct.

17 COMMISSIONER LOUD: -- that's on
18 the --

19 MS. TOBE: That portion of that
20 lot, yes.

21 COMMISSIONER LOUD: And I think
22 you've answered this question in your

1 pleadings as well as testimony, but if that
2 underground easement were not there, what
3 would you have done with the lot right there?

4 MS. TOBE: We would have had four
5 16 foot wide townhomes, and we would have
6 space to have them that size and to bring them
7 further on this side so that we would have
8 whatever yard requirement would be needed on
9 the other side.

10 COMMISSIONER LOUD: Okay. So
11 effectively you're trying to recapture your
12 costs through three available lots to build on
13 now instead of the originally planned four.

14 MR. TOBE: Five.

15 COMMISSIONER LOUD: Five? Well,
16 it sounds like four.

17 MR. TOBE: It was originally five.

18 MS. TOBE: We did have one in the
19 back here detached.

20 COMMISSIONER LOUD: In the rear.
21 Okay. All right. Thank you.

22 COMMISSIONER DETTMAN: Madam

1 Chair.

2 CHAIRPERSON MILLER: Yes.

3 COMMISSIONER DETTMAN: May I have
4 a couple of questions for clarification?

5 The first question relates to the
6 side yard, and it's just for my own curiosity.
7 The property immediately to the -- looking at
8 the front of your building it would be to the
9 right; is that building built to the lot line?

10 MS. TOBE: No.

11 COMMISSIONER DETTMAN: It's not?

12 MS. TOBE: No.

13 MR. TOBE: No.

14 MS. TOBE: It's a large side yard.

15 MR. TOBE: It's a huge side yard.

16 COMMISSIONER DETTMAN: So you're
17 proposing an eight foot side yard on your
18 property and then maybe a little bit of space
19 exists between the property line and the next
20 building?

21 MR. TOBE: Oh, a lot of space.

22 COMMISSIONER DETTMAN: Okay. The

1 last couple of questions I have relate to the
2 height of the building, the proposed heights.
3 I'm looking at one of your submissions,
4 Exhibit 28, and I'm looking at the front
5 elevation, and this is the last exhibit or the
6 last submission that you have with the
7 proposed heights labeled on it. And it looks
8 to me that the basement measuring from the
9 ground has a height of four and a half feet.

10 And I believe according to the
11 regs. if it's above four feet, in Chapter 4,
12 if it's above four feet it would contribute to
13 the height of the building. So the regs. say
14 40 feet or three stories, and the way this
15 plan is reading it looks like it's a four
16 story structure.

17 MS. TOBE: So you're saying if
18 it's four and a half feet it contributes to
19 it?

20 COMMISSIONER DETTMAN: That's
21 right.

22 MS. TOBE: If it's less than four

1 feet it doesn't.

2 COMMISSIONER DETTMAN: That's
3 right.

4 MS. TOBE: So we would need to
5 clarify it, what that height is.

6 COMMISSIONER DETTMAN: Correct.
7 Is that a basement unit? Is there a basement
8 unit?

9 MS. TOBE: Yes.

10 COMMISSIONER DETTMAN: So how far
11 does the basement unit extend above the grade?
12 And what the regs. say is that if it's above
13 four feet, it would be added to the height of
14 the structure.

15 MS. TOBE: I can't answer that.

16 COMMISSIONER DETTMAN: Okay.

17 MR. TOBE: Let me see.

18 COMMISSIONER JEFFRIES: So in
19 going along with Board Member Dettman's
20 comments, I'm curious about what the dimension
21 is for the dormer at the top. And again, I
22 think just trying to get a sense of what is

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1 the height of this building, and I think the
2 other thing that Board Member Dettman
3 commented on, and it would have been helpful
4 to me, is when you're doing these things, you
5 really need to put it in context. You know,
6 we need to see the next door structures and so
7 forth.

8 Mostly I'm just seeing the site
9 plan, and that's good, but it could be very
10 helpful, you know, just in the future just
11 putting the next door buildings in place so
12 that we get a sense of just the general
13 context.

14 MS. TOBE: If you look at the
15 pictures that were submitted --

16 COMMISSIONER JEFFRIES: Yeah.

17 MS. TOBE: -- this is the side
18 that we're requesting a variance.

19 COMMISSIONER JEFFRIES: You know,
20 I realize that. I'm just in terms of just
21 illustrations, architectural illustrations,
22 but thank you.

1 VICE CHAIRPERSON ETHERLY: See,
2 unfortunately, for some of my colleagues --
3 this is me over here chiming in -- some of my
4 colleagues don't have the blessings of having
5 been into Ward 8 as frequently as I do. My
6 colleagues know that any time there's a case
7 vaguely close to Ballou Senior High School, my
8 alma mater, I have to mention that, but I do
9 have some familiarity with the street. So I
10 have a sense of kind of that area.

11 But Mr. Jeffries' question is
12 helpful in terms of knowing what I know about
13 kind of the neighboring neighborhood and, in
14 particular, having visited Mr. Dixon's place.
15 I'm familiar with kind of how big that
16 structure is and the side yards around it.

17 But I'm kind of struggling trying
18 to get a sense of how close does this get to
19 his particular property. So, again, the
20 context piece would be helpful.

21 But coming back to Mr. --

22 COMMISSIONER JEFFRIES: Jeffries.

1 VICE CHAIRPERSON ETHERLY: Thank
2 you.

3 -- Mr. Jeffries' question, trying
4 to get a sense of what's -- I just love to
5 kind of needle him at times -- trying to get
6 a sense of what's happening with those dormers
7 would be very helpful on that height issue
8 that Mr. Dettman raised.

9 MS. TOBE: Okay.

10 COMMISSIONER JEFFRIES: So, Mr.
11 Etherly, that was a disclosure?

12 (Laughter.)

13 VICE CHAIRPERSON ETHERLY: No, not
14 at all. I'm not using any of that outside
15 knowledge in this particular case here, but,
16 again, just acknowledging the shortcoming of
17 my colleagues. You know, they just aren't
18 blessed with being in Ward 8 as much as I have
19 grown up there, went to school there.

20 There we go.

21 MS. TOBE: But there are ample
22 side yards, the other houses, the adjoining

1 houses.

2 VICE CHAIRPERSON ETHERLY: But in
3 terms of what's happening with that dormer
4 area upstairs --

5 MS. TOBE: With the dormer area I
6 can't -- I can't give any more information on
7 it now.

8 VICE CHAIRPERSON ETHERLY: Got
9 you. Is that livable? Is that livable or
10 usable space upstairs?

11 MS. TOBE: No.

12 VICE CHAIRPERSON ETHERLY: It's
13 just essentially architectural.

14 MS. TOBE: It's architectural, and
15 there's a setback because the rear deck takes
16 a good portion of that in the back.

17 VICE CHAIRPERSON ETHERLY: Okay.

18 MS. TOBE: And then that is to
19 give it the architectural appearance in the
20 front.

21 VICE CHAIRPERSON ETHERLY: Got
22 you.

1 MR. TOBE: (Speaking from an
2 unmiked location.)

3 CHAIRPERSON MILLER: I don't know
4 if they got you. Did you get him? No.

5 You have to be on a microphone to
6 get into the record.

7 MR. TOBE: It's just architectural
8 design for conformity to try to keep in
9 context of the designs in the city.

10 MS. TOBE: We could probably meet
11 the requirement by making it a flat roof, but
12 it would certainly lose a lot of its aesthetic
13 appeal.

14 COMMISSIONER JEFFRIES: I'm
15 certainly not looking for you to get rid of
16 the dormer. It's just really, you know,
17 making certain that the Board is clear about
18 what the height of this building is and being
19 clear about whether we've got a cellar here or
20 an actual floor on the ground level and so
21 forth.

22 MS. TOBE: That's just a dormer.

1 It's not livable space.

2 COMMISSIONER JEFFRIES: Okay.

3 CHAIRPERSON MILLER: Any other
4 questions right now?

5 (No response.)

6 CHAIRPERSON MILLER: Do you have
7 anything further right now?

8 MS. TOBE: No, I do not.

9 CHAIRPERSON MILLER: Okay. Does
10 the ANC have any questions for the Applicant?

11 MR. KEARNEY: Going on record,
12 Madam Chair, we took on two occasions,
13 Tuesday, September 4th at our public meeting,
14 as well as on --

15 CHAIRPERSON MILLER: Wait. I hate
16 to do this, but we have this process where the
17 Applicant goes first and then if there are any
18 questions you can ask questions, and then we
19 go to Office of Planning and then we go to the
20 ANC for your thing. So if you're about to,
21 you know, talk about your position and stuff,
22 you can wait. You should wait until after

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1 Office of Planning.

2 But if you had a question based on
3 Applicant's presentation, you could offer --

4 MR. KEARNEY: We have no questions
5 right now, Madam Chair.

6 CHAIRPERSON MILLER: Okay. So
7 we'll get back to you.

8 MR. KEARNEY: Thank you.

9 CHAIRPERSON MILLER: So that we
10 stay in the right order.

11 Good morning, Mr. Martin.

12 MR. RICE: Good morning again. My
13 name is Stephen Rice with the Office of
14 Planning.

15 CHAIRPERSON MILLER: Sorry. I
16 mean Mr. Rice.

17 MR. RICE: So many Stephens.

18 The Office of Planning does
19 support approval for this special exception
20 and the variance. I think one thing that
21 should be noted is that there's a two-story
22 property on the site now that will be

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1 demolished and replaced with the three story,
2 three unit row houses.

3 This project does have history.
4 We've met with Brenda several times. Well,
5 I've spoken with her several times, and I've
6 met with her.

7 The original plan was, of course,
8 to do five units, and that was reduced to four
9 and now three due to the Pepco easement
10 situation.

11 The Office of Planning does not
12 have any objections to the building
13 arrangement, but does believe that the side
14 yard relief is needed, and this was sort of a
15 revelation to us, too, and I think the
16 confusion or the misunderstanding surfaced
17 from the fact that the regs. say that eight
18 feet of width is needed at minimum, and I
19 think that was probably misunderstood as that
20 was the bare minimum, but it is also based on
21 the height of the building.

22 So since the height of the

1 building is essentially 40 feet, those three
2 inches -- well, there's three inches per foot.
3 So it results into ten feet of width that's
4 needed, and that was something that I don't
5 think we -- the Applicant sort of picked up
6 initially, and we didn't have any issues with
7 that. In fact, the uniqueness or the
8 situation that causes the need for this side
9 yard relief is due to something that's beyond
10 the Applicant's control.

11 And we do think, given the sort of
12 narrowness of those units already, they were
13 reduced from 16 feet to 15 and a quarter, that
14 if she were to make it any narrower, it would
15 be a hardship to the Applicant, especially
16 given that, you know, the original plan was to
17 do five units.

18 And that, you know, strict
19 application would not result in any, you know,
20 substantial detriment to the public good.

21 Adequate recreation space will be
22 provided to all of the units. All three units

1 have rear yards plus the terrace space on the
2 third floors. Proper landscaping is proposed
3 that you can see in the details of the
4 drawings.

5 The Applicant does meet the one-
6 to-one parking requirement. In fact, two
7 parking spaces will be provided for each unit.

8 The comp. plan map does designate
9 this area as a moderate density residential
10 area, and this project is not inconsistent
11 with that designation.

12 The proposal is also consistent
13 with the neighborhood infield development and
14 the infield housing development policies
15 outlined in the comp. plan for this area.

16 The Office of Planning did receive
17 a letter, a written statement from DPDCPS
18 stating that the local neighborhood schools
19 would be able to absorb any possible student
20 that would live in these units. At the time
21 of drafting my report, I had not received
22 letters from the ANC, but we do know that ANC-

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1 8A does support the application, and I had not
2 received any statements from any other
3 agencies at the time, but DDOT does support.

4 And I would also say although,
5 DDOT didn't make note of the variance that's
6 needed, in this case I don't think it would
7 change their opinion about supporting this
8 project. I think that's something that should
9 be noted based on the question that you had
10 asked earlier.

11 So the Applicant has met the
12 burden of proof pursuant to Section 353, and
13 the Office of Planning does support also the
14 needed variance for the side yard relief.

15 Thanks.

16 CHAIRPERSON MILLER: I wanted to
17 ask you, Mr. Rice, just to clarify. You know,
18 Mr. Dettman brought up the point that this was
19 a basement, not a cellar, because of the
20 height. It's over four feet. And in your
21 report I think that it is described as three
22 stories plus basement anyway.

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1 So I just want to clarify that
2 there's no problem with the number of stories,
3 whether it's considered four stories or three
4 stories plus basement in this zoned district.

5 MR. RICE: No, the office of
6 planning does not have any issues with the
7 stories or in this case the height. In fact,
8 the dormers -- and I know you were asking
9 about the cellars -- the dormers will not be
10 occupiable space, as you can see from the side
11 elevations. They're only to serve as
12 aesthetic, visual benefits to the structure.

13 But the Office of Planning does
14 not have any issues with the stories.

15 CHAIRPERSON MILLER: Is it your
16 point, Mr. Rice, that it's not -- that area is
17 not counted towards the height of the building
18 if it's not usable space? It's attic space or
19 something like that that's not counted or
20 what?

21 MR. RICE: It shouldn't be counted
22 because it's --

1 CHAIRPERSON MILLER: Architectural
2 detail or what is it?

3 MR. RICE: Architectural detail
4 because it's not -- it's clearly not space
5 that can be used.

6 COMMISSIONER JEFFRIES: Is that
7 accurate?

8 MS. MONROE: I'm trying to
9 understand this. It seems to me that -- are
10 you talking about the height of buildings,
11 architectural embellishments kind of thing?
12 The height of buildings, are you talking about
13 under the regulations?

14 CHAIRPERSON MILLER: The
15 regulation, I think, as to how we measure,
16 what's measured.

17 COMMISSIONER JEFFRIES: How we
18 measure.

19 CHAIRPERSON MILLER: What's
20 included in the height.

21 COMMISSIONER JEFFRIES: I mean,
22 going on what Mr. Rice has said, then we would

1 be taking a dimension from the ground to the
2 top of what's usable space on the third floor,
3 and my question was do you count what one
4 might consider an architectural embellishment
5 with the dormer? Is that counted in terms of
6 determining building height.

7 MS. MONROE: Well, what it says
8 here is this is the definition. The vertical
9 distance measured from the level of the curb
10 opposite the middle of the front of the
11 building to the highest point of the roof or
12 parapet, which I would include any
13 architectural type of, you know, attraction.

14 Whether it's usable, that's kind
15 of a different issue, habitable space, attic
16 space. That's an interior issue, but I think
17 it would be included in height.

18 COMMISSIONER JEFFRIES: Excuse me.

19 MR. TOBE: I'm trying to get
20 educated in this process also. So the dormer
21 would be considered a part of the roof is
22 what --

1 COMMISSIONER JEFFRIES: It would
2 be in terms of measuring the height of the
3 building -- you would include the peak of that
4 dormer as part of determining that's --

5 MS. MONROE: Let me interject.
6 Mr. Rice may be right. It says in the next
7 paragraph --

8 CHAIRPERSON MILLER: Ms. Monroe,
9 where are you reading from exactly?

10 MS. MONROE: I'm sorry. The
11 definition of building height, height of the
12 building.

13 CHAIRPERSON MILLER: Under
14 building.

15 MS. MONROE: And we're in the
16 District with a 40-foot height limit, and it
17 specifies in those districts in which the
18 height of the building is limited to 40 feet,
19 the height of the building may be measured
20 from the finished grade at the middle of the
21 front of the building to the ceiling of the
22 top story.

1 COMMISSIONER JEFFRIES: Ah, okay.

2 MS. MONROE: Which would then
3 corroborate what you said. It leaves out --

4 MR. RICE: Oh, great. What's the
5 section? Could you give me the section
6 number?

7 MS. MONROE: It is actually not a
8 section. It is "building, height of."

9 CHAIRPERSON MILLER: Look under B
10 instead of H, building, comma, height of.

11 MS. MONROE: It's 199.

12 MR. RICE: Oh, great, great.

13 MS. MONROE: But I do want to
14 point out that doesn't negate the story issue.

15 COMMISSIONER JEFFRIES: Oh, no,
16 no, no, no. That was going to be my next
17 question for Mr. Rice, and that is you were
18 very confident about the ground floor -- I
19 mean that being a basement or being a cellar,
20 I guess.

21 CHAIRPERSON MILLER: No. I'm
22 sorry. I didn't get that impression. I mean,

1 I think he said it was a basement and three
2 stories, but that was allowable in this zone.

3 MR. RICE: That's my
4 understanding.

5 COMMISSIONER JEFFRIES: So the
6 dimension between ground floor and the top --
7 let me just be clear here.

8 (Pause in proceedings.)

9 CHAIRPERSON MILLER: Okay. Hold
10 on one minute. We're just checking the regs.
11 on this.

12 Okay. What the Board was doing
13 was just checking the regulations with respect
14 to height and stories. Pardon me? The
15 regulations? We can give you a copy of that.

16 Oh, okay. There is Section 400.1,
17 has a chart in it, and it says that the
18 maximum height for this District, as well as
19 some others, but this is the R-5-A district;
20 it says, "Maximum height, 40," which is what
21 we've been working with, and then it says
22 "stories, three." And the rule as we

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1 understand it is that it counts as a story if
2 the basement exceeds four feet.

3 Well, maybe somebody else can
4 explain it better, but the issue here then is
5 is there also then something that either needs
6 to change or needs relief. That's what we're
7 looking at.

8 COMMISSIONER JEFFRIES: Yeah, and
9 you know, I live in an R-5-A, and all of the
10 buildings are nonconforming for this very
11 reason, you know. I mean, it's fairly
12 typical, but, Madam Chair, are you saying that
13 there might need to be -- I mean, what are we
14 saying? If in fact this is a four story --

15 CHAIRPERSON MILLER: All I'm
16 really saying is that if it's not in
17 compliance with the regulation, then either,
18 one, you could change your drawings or
19 whatever, or if that's a great practical
20 difficulty, again, that's the same situation
21 as the side yard. Then you would be adding
22 variance relief for an additional story,

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1 correct?

2 Whatever is not in accordance with
3 the regulation.

4 COMMISSIONER JEFFRIES: But, Madam
5 Chair, could they not somehow alter the
6 basement unit without screwing around with the
7 drawing? Because I think the buildings are
8 actually quite handsome. Is there some other
9 way?

10 I mean, it's just one
11 configuration here.

12 MR. RICE: Yeah, and it seems
13 really minimum because the ground floor
14 appears to be four and a half feet and the
15 threshold is four feet. So hopefully possibly
16 if you --

17 COMMISSIONER JEFFRIES: An
18 embankment.

19 MR. RICE: -- you know, drain that
20 half a foot or something. I don't know if
21 that's an option, but it seems like the most
22 reasonable way to solve this.

1 CHAIRPERSON MILLER: Could you get
2 on a microphone?

3 MS. TOBE: -- necessitate our
4 having to --

5 VICE CHAIRPERSON ETHERLY: Revise
6 your plans.

7 MS. TOBE: And come back at a
8 later date. Just how much time are we talking
9 about?

10 CHAIRPERSON MILLER: No. You
11 don't necessarily have to come back for a
12 hearing. I mean, we had this in a case
13 earlier this morning. If you plans need to be
14 revised in accordance with what goes on here
15 today, that you could just revise your plans,
16 and then we'll issue our decision based on the
17 revised plans. You won't need to have another
18 hearing.

19 MS. TOBE: As long as it doesn't
20 exceed four feet.

21 MR. TOBE: The basement is not
22 above the ground four feet.

1 MR. RICE: Correct.

2 VICE CHAIRPERSON ETHERLY: You've
3 got it. As we look at the elevations, your
4 ground floor elevation reads four and a half
5 feet, at least the one I'm looking at. So
6 when you look at the elevation here, the
7 ground floor reads four and a half feet in
8 height.

9 So if that's the case, then it has
10 to be counted as a story, which would make
11 your structures four stories instead of three.
12 So --

13 COMMISSIONER JEFFRIES: which is
14 not conforming.

15 VICE CHAIRPERSON ETHERLY: Which
16 is nonconforming, and if you wanted to keep it
17 that way, that would require another variance.
18 So it would be an additional test.

19 MS. TOBE: Could the Board
20 consider that variance today?

21 VICE CHAIRPERSON ETHERLY: Well,
22 as the chair indicated earlier, variance test

1 is very difficult. It means arguing in the
2 same way you argued the side yard variance,
3 you'd have to argue what -- you know, you'd
4 have to make the case for why you need that
5 additional story.

6 So it makes it -- I hate to use
7 words -- tougher or harder, but it's another
8 test that you would have to satisfy.

9 As the Applicant -- and I want to
10 be very careful because the Board doesn't get
11 this far into guidance -- but it's your option
12 to consider that and take that course or --
13 and the Board is not telling you to change it
14 and make it shorter -- that's an option, too.

15 But based on the drawings, we're
16 identifying this additional issue, four
17 stories instead of three, and as the Chair
18 indicated, 400.1, which is the section, says
19 that only three stories are applicable in this
20 area.

21 MR. TOBE: I'm still a little
22 confused. The ground floor, second floor, and

1 third floor constitute three stories, right?

2 COMMISSIONER JEFFRIES: The first,
3 the second, and the --

4 MR. TOBE: And the ground floor
5 can't be how tall?

6 MR. RICE: The basement.

7 MR. TOBE: Oh, the basement.
8 We're dealing with the basement.

9 COMMISSIONER JEFFRIES: Right,
10 right. We're dealing with the basement.
11 Yeah, we're looking at the basement as a
12 story, as an additional story, and as if we
13 count that as an additional story, you've got
14 four stories, which is nonconforming to an R-
15 5-A, which would mean you'd have to come and,
16 you know, notice, go through another hurdle to
17 deal with in terms of seeking relief.

18 VICE CHAIRPERSON ETHERLY: And the
19 reason it's a story, the reason the basement
20 is a story is because it's at four and a half
21 feet above the ground.

22 MR. TOBE: Instead of four.

1 VICE CHAIRPERSON ETHERLY: So if
2 the basement were shorter --

3 COMMISSIONER JEFFRIES: But Madam,
4 she knows. She understands, I think.

5 COMMISSIONER JEFFRIES: Okay. I
6 understand. I've got it. So I think we
7 normally don't like tell you exactly where to
8 go and what to do. I think that between
9 myself and Board Member Etherly, we've thrown
10 some things out, but you know, it's your call
11 in terms of how you want to address the issue.

12 But there's an easier way to do it
13 and a harder way.

14 MS. TOBE: Do we do that now?
15 What we would like to do, what we would like
16 for you to do is grant relief now, but if you
17 don't see fit to do that, we would like -- we
18 would modify our plans for the six centers and
19 we could submit that, and it wouldn't require
20 a hearing. You would review it and come to a
21 decision without a hearing?

22 CHAIRPERSON MILLER: Yeah. I

1 mean, basically there are two choices, but as
2 we were saying the variance test you have to
3 explain why it's practically difficult for you
4 to comply, and so we've seen your case with
5 the side yard. Okay? this new issue has come
6 up, and it's a question of, you know, six
7 inches or so. Can you alter the basement?

8 So if you wanted to make your
9 variance argument today, you could, but you
10 recall that you have to say why that would be
11 difficult for you to do, and if you don't have
12 a strong argument that way, what we're saying
13 is that we've heard the whole case in general
14 today, and if you're just going to come into
15 compliance we don't need to have a hearing on
16 that. You would just submit your revised
17 plans as soon as you can, and we would very
18 quickly issue our decision in this case. So
19 it wouldn't be a long delay because you don't
20 need another hearing.

21 MR. TOBE: Very good.

22 COMMISSIONER JEFFRIES: How fast

1 can you?

2 MS. TOBE: Probably within a week
3 to two weeks to have the plans redrawn.

4 COMMISSIONER JEFFRIES: I mean, I
5 think that, you know, given that Madam Chair
6 has stated that we can just look at the
7 drawings, she gave you some comfort that, you
8 know, your case looks pretty good at this
9 point to us.

10 MS. TOBE: All right.

11 VICE CHAIRPERSON ETHERLY: And if
12 I may, Madam Chair, I mean, it perhaps goes
13 without saying for the purposes of the ANC
14 representatives, clearly we run through a lot
15 of stuff that has emerged as we've gone
16 through the deliberation. I don't want to
17 throw another wrench into the plan.

18 Obviously the ANC is now aware of
19 potential changes that may occur, you know.
20 To an extent, they're de minimis. I don't
21 want to downplay them because obviously you're
22 changing your structure potentially,

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1 considering that, but it's a fairly de minimis
2 piece, but I just wanted to make sure the ANC
3 was kind of clear on this direction that the
4 conversation has moved in and understand
5 what's kind of contemplated now.

6 MR. MUHAMMAD: Yes, I'm crystal
7 clear, and I would argue the case. I'm losing
8 two buildings. I'm spending more money,
9 losing more money. I would argue the case for
10 a variance.

11 CHAIRPERSON MILLER: I guess --

12 MR. MUHAMMAD: For a half inch, I
13 would argue the case.

14 COMMISSIONER JEFFRIES: And I
15 really don't like R-5. I don't like R-5, and
16 I am an alma mater with him.

17 (Laughter.)

18 COMMISSIONER JEFFRIES: I don't
19 know if that helps you.

20 CHAIRPERSON MILLER: I guess I
21 want to make a few points. One is if you
22 wanted to amend your application to add

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1 another variance, we would then consider
2 whether that needed to be advertised or not.
3 Okay? That would be the first, the threshold
4 thing.

5 Then the second thing is you would
6 have to make the practical difficulty
7 argument, which is different from the side
8 yard practical difficulty, and we would want
9 to hear from Office of Planning whether it
10 would be practically difficult to comply with
11 bringing that into conformance.

12 So at this point, if you would
13 like to think about this a little longer, we
14 could finish up the case here and then you
15 could decide on that.

16 MS. TOBE: Well, rather than have
17 it go --

18 CHAIRPERSON MILLER: What do you
19 want to do?

20 MS. TOBE: -- through multiple
21 reviews again, we'll alter the plans.

22 CHAIRPERSON MILLER: Okay. Then

1 you won't be needing any relief on that.
2 Correct. Good. Okay.

3 COMMISSIONER JEFFRIES: So you're
4 going to circle back with the Office of
5 Planning and figure out. Okay. That's great.

6 CHAIRPERSON MILLER: Again, Office
7 of Planning, you finished your presentation,
8 I think, or no?

9 MR. RICE: Yeah, that was pretty
10 much the sum of it.

11 CHAIRPERSON MILLER: Okay. Are
12 there any other questions for the Office of
13 Planning from the Board members?

14 (No response.)

15 CHAIRPERSON MILLER: Any questions
16 from the Applicant to the Office of Planning
17 based on their report and testimony? Yes.

18 MR. TOBE: We're going to change
19 these drawings to get the exception or to get
20 the variance or get both?

21 CHAIRPERSON MILLER: Okay. We're
22 going to back up a little bit. What I

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1 understood was if you changed your documents
2 to fall within the four feet for the basement
3 height of the ceiling, whatever, you will be
4 in compliance. You won't need any relief.

5 MR. TOBE: Good.

6 CHAIRPERSON MILLER: You will be
7 in compliance.

8 MR. TOBE: Okay. I understand
9 that.

10 CHAIRPERSON MILLER: Okay.

11 MS. TOBE: And today you will do
12 the consideration for the variance, the side
13 yard variance. You'll rule on that today?

14 CHAIRPERSON MILLER: I don't think
15 so. We can discuss that, but what I would say
16 is if we don't rule on that today, we will
17 rule on it expeditiously after you submit your
18 revised plans. That's most likely what we
19 would do, which would be about the same. It's
20 the same time because you wouldn't have orders
21 issued with plans.

22 MS. TOBE: Well, I thought the

1 reason for us not -- for us modifying the
2 plans is because it would basically close the
3 issue because we presented all of the
4 information, made the case for the side yard
5 variance. So I don't see why there's no
6 closure to day. I mean, I can understand the
7 six foot difference, but --

8 MR. TOBE: Six inches.

9 MS. TOBE: I mean six inch
10 difference, and we're agreeing to comply with
11 that.

12 If we resubmit those drawings and
13 that's the only issue is one thing. If
14 everything is still open, then it's just
15 that --

16 CHAIRPERSON MILLER: Let me just
17 clarify this so that we haven't finished this
18 proceeding yet. When we finish today, the
19 record will be closed except unless we hear
20 something that we haven't heard yet. The
21 record will be closed except to receive those
22 plans, period.

1 No order would issue from this
2 Board without the plans that we're approving.
3 So as soon as we get those plans, we will
4 schedule you for the next available date just
5 for our meeting to decide it. So there's no
6 delay. Is that clear?

7 MS. TOBE: Yes.

8 CHAIRPERSON MILLER: Okay. All
9 right. And do you have any questions for
10 Office of Planning?

11 MS. TOBE: No.

12 CHAIRPERSON MILLER: Okay. Does
13 the ANC have any questions for the Office of
14 Planning?

15 MR. KEARNEY: No, we don't, Madam
16 Chair.

17 CHAIRPERSON MILLER: Okay. In
18 which case let's turn to the ANC and hear from
19 you.

20 MR. KEARNEY: Good afternoon, once
21 again. Paul Kearney, Commissioner 8A-05.

22 Madam Chair, we met in general

1 session on Tuesday, September 4th, in which
2 Shannon Place, LLC did their presentation, and
3 there was enough questions among the ANC in
4 attendance that we decided to table it and
5 meet in executive session to go through the
6 plans, and Shannon Place, LLC resubmitted some
7 other plans.

8 We went through all of those. We
9 looked at the variances, which were requested.
10 We voted to approve the variance at that time,
11 and we submitted a letter on September 18th.
12 I mailed it out to Richard Nero, Deputy
13 Director, the Board of Zoning Adjustment.

14 At this time we once again agree
15 with the plans to develop the said site with
16 three townhomes, not five, nor four, and we
17 understand the problem with the Pepco
18 easement, which put the wrench or the dilemma
19 in the development.

20 CHAIRPERSON MILLER: I was just a
21 little confused about your letter. Did you,
22 after you went into executive session, was

1 there then a public meeting at which you
2 voted?

3 MR. KEARNEY: No, we did not,
4 Madam Chair. At the public meeting, the first
5 public session, the members of the community
6 were informed, as well as they asked
7 questions, and actually they agreed. We were
8 the issue. The Commission was the issue.
9 Some of the members of the Commission wanted
10 to see and understand more. The public was
11 certainly in agreeance (phonetic) with the
12 developer and what they wanted to do and the
13 plans that they had submitted.

14 So after our executive session and
15 everything was revealed during that time, the
16 quorum then agreed, voted and agreed to accept
17 and approve the variance.

18 CHAIRPERSON MILLER: Okay. I
19 mean, the Board always cares what the ANC says
20 and listens to the ANC, but with respect to
21 the technical great weight requirement, it is
22 my understanding that it needs to be voted in

1 public. Is that your understanding?

2 MR. KEARNEY: Yes, that's our
3 understanding and our executive meeting is
4 open to the public and advertised as such.

5 VICE CHAIRPERSON ETHERLY: I mean,
6 maybe just for clarification, occasionally --
7 well, not occasionally -- we will oftentimes
8 use the terminology "executive session" which
9 for us means we're back in the room there. So
10 for you when you took your vote, it was during
11 the course of a public meeting.

12 MR. KEARNEY: Correct.

13 VICE CHAIRPERSON ETHERLY: Which
14 had been noticed, and you had a quorum.

15 MR. KEARNEY: Absolutely.

16 VICE CHAIRPERSON ETHERLY: And you
17 voted to approve.

18 MR. KEARNEY: Yes, absolutely,
19 absolutely.

20 VICE CHAIRPERSON ETHERLY:
21 Understood.

22 CHAIRPERSON MILLER: So what's the

1 difference? Why do you say you voted in
2 executive session if you weren't at a public
3 meeting?

4 MR. KEARNEY: Madam Chair, maybe I
5 used the wrong terminology, but certainly in
6 all of our executive session meetings, they
7 are open to the public, and even though the
8 general meeting is called just that, the
9 general meeting, and our executive session
10 meeting is called just the executive session,
11 not for just the commissioners, but it is
12 definitely open to the public. So all of the
13 meetings are open to the public.

14 CHAIRPERSON MILLER: All of the
15 meetings are open to the public, but are they
16 all necessarily noticed to the public? For
17 instance, if you have an executive meeting,
18 it's open, but do you, you know, post it on
19 the Internet, et cetera? You do?

20 MR. KEARNEY: Yes, Madam Chair.

21 CHAIRPERSON MILLER: So what's the
22 difference? Oh, you don't have --

1 MR. KEARNEY: I'll let the chair
2 answer that.

3 CHAIRPERSON MILLER: Okay.

4 MR. MUHAMMAD: For the executive
5 session, we actually plan for the next meeting
6 for the public and make the agenda.

7 CHAIRPERSON MILLER: So okay. Let
8 me ask you this then just to get specific
9 here. With respect to this vote on this issue
10 on this application, was that publicly noted
11 to the public, general public, that you would
12 be taking a vote on this?

13 MR. KEARNEY: Yes.

14 CHAIRPERSON MILLER: Oh, okay.
15 Thank you.

16 MR. MUHAMMAD: And since the ANCs
17 always come for things that they're against,
18 we made it our business to come for something
19 that we were for instead of having the norm.

20 MR. KEARNEY: Thank you.

21 MR. MUHAMMAD: I'm sure you're
22 used to the norm.

1 COMMISSIONER JEFFRIES: So noted.

2 MR. MUHAMMAD: And since you have
3 that great asset, Mr. Dettman, who brought out
4 this, so he's a real credit to your Board.

5 CHAIRPERSON MILLER: We're very
6 happy to have him on board, yes.

7 Okay. Any questions? Any
8 questions for the ANC from Board members?

9 (No response.)

10 CHAIRPERSON MILLER: From the
11 Applicant?

12 (No response.)

13 CHAIRPERSON MILLER: Okay. Is
14 there anybody else here in the audience that's
15 here to testify either in support or
16 opposition to this application?

17 (No response.)

18 CHAIRPERSON MILLER: Okay. Does
19 the Applicant have any final closing remarks
20 they'd like to make?

21 MS. TOBE: We're glad that you
22 have approved the variance and that this

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1 follow-up issue will be handled expeditiously,
2 and I don't know if we'll receive a written
3 notice or not, but it's my understanding that
4 we are to provide you with drawings. You look
5 puzzled. Did I say --

6 CHAIRPERSON MILLER: I'm sorry. I
7 don't know if I heard you correctly, but we
8 didn't make any decisions yet today.

9 MS. TOBE: Okay.

10 CHAIRPERSON MILLER: But I think
11 you've gotten somewhat of a favorable
12 response, but what I've said was and we'll
13 give you a date or you can tell us when you
14 can provide the revised drawings that
15 basically the record is closed, except for
16 your revised drawings, which will show
17 compliance with the regulation affecting the
18 stories.

19 And then the Board will soon
20 thereafter schedule this case for our
21 deliberation.

22 MS. TOBE: Okay. Now, it was my

1 understanding we have to be at one of your
2 meetings.

3 CHAIRPERSON MILLER: No, you do
4 not have to be at the meeting, though we are
5 -- when I say that, we're Webcast live, which
6 means if you want to listen to our
7 deliberation on your case, you can go to the
8 Zoning Website and listen or you could come
9 here. We'll give you notice as to when that
10 would be, and that would be very shortly after
11 you submit the revised plans because any order
12 that we'll issue will go with the plans. The
13 plans, you know --

14 MS. TOBE: Okay.

15 CHAIRPERSON MILLER: -- those are
16 the plans we're approving, and that's why we
17 would be waiting for your revised plans.

18 MS. TOBE: So if we get them to
19 you within a week, it's conceivable that we
20 could -- it could be -- your decision would be
21 made within two weeks from now?

22 CHAIRPERSON MILLER: Okay. What

1 we're going to do is we're going to look at
2 our calendar and set a date for our decision
3 making today.

4 MS. TOBE: Okay.

5 CHAIRPERSON MILLER: And you tell
6 us when you're going to have the plans in, and
7 then we're going to tell you. Okay. We're
8 going to look at our calendar. We've got
9 those plans in hand. Then we're going to
10 decide your case on either, you know, which
11 Tuesday thereafter.

12 MS. TOBE: Give us a week.

13 CHAIRPERSON MILLER: It's up to
14 you. Do you want a week? Do you want two
15 weeks?

16 MS. TOBE: A week.

17 CHAIRPERSON MILLER: A week.
18 Okay. And now we're just going to look at our
19 calendar and decide the date for your
20 decision.

21 MS. TOBE: Okay. Thank you.

22 (Pause in proceedings.)

1 CHAIRPERSON MILLER: Okay. We
2 want to ask you one thing. This is a pretty
3 simple change in the plans, you know, from
4 what we're expecting. Six inches are going to
5 come off. If you were able to have -- provide
6 that to the Board, the Office of Zoning by
7 Monday, we have a decision meeting scheduled
8 for the following Tuesday. We could decide it
9 next Tuesday.

10 If that's pushing you too much,
11 we'll set it off for another Tuesday, but I
12 wanted to give you that option.

13 MS. TOBE: I'm not sure that I can
14 make that option, but could we take that one
15 and if we don't make it make the next?

16 CHAIRPERSON MILLER: Yeah. What
17 you can do is we'll tentatively put it on the
18 calendar for next Tuesday.

19 MS. TOBE: Okay.

20 CHAIRPERSON MILLER: If there's a
21 problem just let Mr. Moy know, Office of
22 Zoning, when they would be coming in, and then

1 we'll reschedule it. So we'll announce it
2 next Tuesday as to the date it's going to be
3 rescheduled. It may be for the following
4 Tuesday, but it may -- I don't know. We have
5 to look at our calendar and make sure that we
6 have time to do it.

7 MS. TOBE: Okay.

8 MR. TOBE: Just if you receive it
9 by Friday?

10 CHAIRPERSON MILLER: Monday.

11 MR. TOBE: Monday? Oh, great.

12 CHAIRPERSON MILLER: Monday,
13 because we think this is pretty -- it's pretty
14 simple. We just have to have it.

15 MS. TOBE: Wonderful.

16 CHAIRPERSON MILLER: Otherwise
17 we'll put it off again.

18 MS. TOBE: Okay.

19 CHAIRPERSON MILLER: But we'd like
20 to get this moving as quickly as possible.

21 MS. TOBE: We would, too.

22 (Laughter.)

1 CHAIRPERSON MILLER: Okay.

2 MS. TOBE: Yes. Thank you very
3 much.

4 CHAIRPERSON MILLER: Okay. Thank
5 you.

6 Ms. Bailey, do we have anything
7 else on the agenda for this morning?

8 MS. BAILEY: No, Madam Chair.

9 CHAIRPERSON MILLER: Okay. We
10 will return then in an hour, approximately
11 1:30.

12 (Whereupon, at 12:36 p.m., the
13 public meeting was recessed for lunch, to
14 reconvene at 1:30 p.m., the same day.)

1 proceeding is being recorded by a court
2 reporter and is also Webcast live.
3 Accordingly, we must ask you to refrain from
4 any disruptive noises or actions in the
5 hearing room.

6 When presenting information to the
7 Board, please turn on and speak into the
8 microphone, first stating your name and home
9 address. When you're finished speaking,
10 please turn your microphone off so that your
11 microphone is no longer picking up sound or
12 background noise.

13 All persons planning to testify
14 either in favor or in opposition are to fill
15 out two witness cards. These cards are
16 located to my left on the table near the door
17 and on the witness tables. Upon coming
18 forward to speak to the Board, please give
19 both cards to the reporter sitting to my
20 right.

21 The order of procedure for special
22 exceptions and variances is, one, statement

1 and witnesses of the Applicant;

2 Two, government reports, including
3 Office of Planning, Department of Public
4 Works, DDOT, et cetera;

5 Three, report of the Advisory
6 Neighborhood Commission;

7 Four, parties or persons in
8 support;

9 Five, parties or persons in
10 opposition;

11 Six, closing remarks by the
12 Applicant.

13 Pursuant to Sections 3117.4 and
14 3117.5, the following time constraints will be
15 maintained. The Applicant/Appellant, persons
16 and parties, except an ANC, in support,
17 including witnesses, 60 minutes collectively.
18 Appellees, persons and parties, except an ANC,
19 in opposition, including witnesses, 60 minutes
20 collectively. Individuals, three minutes.

21 These time restraints do not
22 include cross-examination and/or questions

1 from the Board. Cross-examination of
2 witnesses is permitted by the applicant or
3 parties.

4 The ANC within which the property
5 is located is automatically a party in a
6 special exception or variance case.

7 Nothing prohibits the Board from
8 placing reasonable restrictions on cross-
9 examination, including time limits and
10 limitations on the scope of cross-examination.

11 The record will be closed at the
12 conclusion of each case, except for any
13 material specifically requested by the Board.
14 The Board and the staff will specify at the
15 end of the hearing exactly what is expected
16 and the date when the persons must submit the
17 evidence to the Office of Zoning. After the
18 record is closed, no other information will be
19 accepted by the Board.

20 The Sunshine Act requires that the
21 public hearing in each case be held in the
22 open before the public. The Board may,

1 consistent with its rules of procedure and the
2 Sunshine Act, enter executive session during
3 or after the public hearing on a case for
4 purposes of reviewing the record or
5 deliberating on the case.

6 The decision of the Board in these
7 contested cases must be based exclusively on
8 the public record. To avoid any appearance to
9 the contrary, the Board requests that persons
10 present not engage the members of the Board in
11 conversation.

12 Please turn off all beepers and
13 cell phones at this time so as not to disrupt
14 these proceedings.

15 The Board will make every effort
16 to conclude the public hearing as near as
17 possible to 6:00 p.m. If the afternoon cases
18 are not completed at 6:00 p.m., the Board will
19 recess whether it can complete the pending
20 case or cases remaining on the agenda.

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

1 matters are those that relate to whether a
2 case will or should be heard today, such as
3 requests for postponement, continuance or
4 withdrawal or whether proper and adequate
5 notice of the hearing has been given.

6 If you are not prepared to go
7 forward with a case today or if you believe
8 that the Board should not proceed, now is the
9 time to raise such a matter.

10 Does the staff have any
11 preliminary matters?

12 MS. BAILEY: Madam Chair, members
13 of the Board, to everyone good afternoon.
14 Yes, and it concerns Application No. 17653.
15 There is a request for this case to be
16 postponed until January of 2008. It was
17 originally discussed by the Board on September
18 11th, 2007.

19 CHAIRPERSON MILLER: Thank you.

20 Yes, are you here on that case?
21 Yes, okay. Why don't you just take a seat and
22 just introduce yourself for the record. Okay.

1 COMMISSIONER JEFFRIES: Turn the
2 mic on, please.

3 MS. PRAVETI: And we indicated at
4 that point that we were still going back and
5 forth with the Historic Review Board, and we
6 are still in that process, and we're expecting
7 that's going to take some time.

8 COMMISSIONER JEFFRIES: Excuse me.
9 I'm sorry. Can you restate your name?

10 MS. PRAVETI: I'm Donna Praveti.
11 Sorry. I'm one of the owners, property
12 owners.

13 CHAIRPERSON MILLER: We remember
14 your case. So I gather there's no opposition
15 to your request for continuance. Okay.

16 And I believe that your paper said
17 something like January 2008; is that correct?

18 MS. PRAVETI: Yes.

19 CHAIRPERSON MILLER: Okay, and we
20 actually are scheduled, I think, through
21 March, but we will see where we can fit you
22 in. We'll do that right now.

1 MS. PRAVETI: Okay.

2 CHAIRPERSON MILLER: We'll do it
3 right now. So hold on a minute.

4 Mr. Moy, do you have a date?

5 MR. MOY: My suggestion for the
6 Board would be, without impacting the regular
7 scheduled dates, the earliest being February
8 12th. In the afternoon we have two variance
9 type cases, but I think this may fit on the
10 afternoon of February 12th as the first
11 option.

12 After that we're looking at March,
13 and if we're looking at March I would say --

14 MS. PRAVETI: Can I?

15 CHAIRPERSON MILLER: Can you even
16 do the 12th?

17 MS. PRAVETI: I can, and can I
18 just sort of say something?

19 CHAIRPERSON MILLER: Okay.

20 MS. PRAVETI: I mean just last
21 week we just sort of indicated that there's no
22 opposition, and so it would be really quick.

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1 I mean, the expectation is that it would be a
2 very quick case.

3 CHAIRPERSON MILLER: Right, okay.
4 I think for that reason then, the 12 okay with
5 the Board?

6 Okay. So we'll slide you into the
7 12th, and that would be in the afternoon. Am
8 I correct, Mr. Moy?

9 MR. MOY: Yes, ma'am. That would
10 be the third case in the afternoon.

11 CHAIRPERSON MILLER: Okay. Okay.
12 We are just consulting, whether to put you
13 first instead of third. Since as you
14 represented yours should be very quick, I
15 think we're going to put you first in the
16 afternoon. Okay?

17 MS. PRAVETI: Okay.

18 CHAIRPERSON MILLER: So that's at
19 one o'clock.

20 MS. PRAVETI: Thank you very much.

21 CHAIRPERSON MILLER: Okay. Thank
22 you.

1 Ms. Bailey, am I correct that
2 that's all for preliminary matters at least?
3 We only have one other case in the afternoon
4 anyway.

5 MS. BAILEY: Just one other case
6 and swearing in the witnesses.

7 CHAIRPERSON MILLER: Okay. So why
8 don't you swear in the witnesses?

9 Anyone here who is going to be
10 testifying either in support or opposition in
11 the application today, please rise and Ms.
12 Bailey will administer the oath.

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

15 (Whereupon, the witnesses were
16 duly sworn.)

17 MS. BAILEY: Thank you.

18 Application No. 17656 of Alley Cat
19 Mews, LLC, pursuant to 11 DCMR 3103.2, for a
20 variance to allow the construction of a
21 detached single family dwelling on an alley
22 lot that does not directly abut an alley that

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1 is at least 30 feet in width and not directly
2 accessible from a public street along an alley
3 or allies of not less than 30 feet in width,
4 under Subsection 2507.2. The property is
5 zoned R-1-B on an alley lot at the rear of
6 Reno Road, Chevy Chase Parkway, and Harrison
7 Street, N.W. It is also known as Square 1877,
8 Lot 37.

9 CHAIRPERSON MILLER: Thank you.

10 Would the parties in the case
11 please come forward? I know we have some
12 party applicants, too.

13 First of all, I want the parties
14 to introduce yourselves first and then we'll
15 deal with party status. You're all one party;
16 is that correct? Okay. Why don't you just
17 start introducing yourselves for the record.

18 MR. HUGHES: Good afternoon, Madam
19 Chair. For the record, my name is Dennis
20 Hughes with the firm of Holland and Knight,
21 LLP, joined today by Jeff Johnson of Holland
22 and Knight.

1 Do you want me to introduce our
2 team or just that's the party?

3 CHAIRPERSON MILLER: I think you
4 can wait for your team when you put on your
5 case.

6 MR. HUGHES: Okay. And we're here
7 on behalf of Kenneth Woodring, who is the
8 contract purchaser of the property from Alley
9 Cat Mews, LLC.

10 CHAIRPERSON MILLER: Okay. Now, I
11 see Mr. Nettler is here. He's representing a
12 party applicant. Why don't you come to the
13 table?

14 I'm wondering if we're going to
15 have room for all of the Applicant people in
16 the --

17 MR. NETTLER: I think there are
18 only two other who --

19 CHAIRPERSON MILLER: Two other
20 party Applicants?

21 MR. NETTLER: -- have party
22 status, right.

1 CHAIRPERSON MILLER: Okay. Then
2 they're fine. Okay. Why don't you all come
3 to the table then and we'll take you one at a
4 time.

5 Okay. I think we have three party
6 status applications; is that correct? Okay.
7 Why don't we start with you, Mr. Nettler,
8 because you are representing several
9 individuals?

10 MR. NETTLER: Correct.

11 CHAIRPERSON MILLER: Okay. Could
12 you introduce yourself and then who you're
13 representing?

14 MR. NETTLER: My name is Richard
15 Nettler. I'm with the law firm of Arent Fox,
16 and as I said, in our application request for
17 party status, we represent both an entity
18 called Greenpeace Park, LLC, and its members
19 who own property around the square that's
20 surrounds the site that's in question, and
21 those are listed in the first portion of our
22 request for party status, which is -- if you

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1 want me to go through all of them -- Connie
2 Wylan, Robin Broadfield, Douglas and Diana
3 Wolfire, Nancy Stanley, Mr. and Mrs. Flanders.
4 Carl and Judith Naddler, Barbara and Robert
5 Liotta, Alan and Mary Joaquin, David Shoe and
6 Ruth Price, Theresa Redding, and Punita and
7 Sunali Sani, not all of whom are here, but as
8 you see, there are quite a few people who are
9 here.

10 CHAIRPERSON MILLER: Right, okay.
11 Yes, and you have submitted what's known as
12 Exhibit 29, request for party status and
13 statement in opposition to the application.

14 Is this Greenpeace entity just
15 named for the individuals who participate in
16 this group or was it an entity that existed
17 outside of this.

18 MR. NETTLER: It was an entity
19 that was created as a consequence of the
20 proposed development of the site. It is a
21 limited liability company, but its members are
22 those whom I've listed.

1 CHAIRPERSON MILLER: And its
2 purpose is to participate in this?

3 MR. NETTLER: Well, its initial
4 purpose was to purchase the, as I stated in my
5 request for party status, to purchase the
6 alley lot to maintain it as a green space in
7 the condition that it is today.

8 CHAIRPERSON MILLER: Okay.
9 Because part of what we're interested in is
10 how your group differs from the other two that
11 we'll see, and is one of those ways that those
12 individuals in your group actually attempted
13 to purchase the property?

14 MR. NETTLER: That's correct in
15 one respect, and also in terms of the impact
16 on them of having the lot developed. As
17 you'll hear, I'm sure, from the other two,
18 there are differences in terms of how the
19 impact -- in terms of that impact. I won't go
20 into their cases, applications for party
21 status, but there is a distinction between how
22 they're impacted both in terms of whether it's

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1 a purchase issue or whether the relationship
2 between the proposed development and the
3 individual houses that are part of Greenpeace
4 LLC and my request for party status.

5 CHAIRPERSON MILLER: Okay. We are
6 just debating whether to just ask you
7 questions before we go on. Okay, but today
8 you have submitted a full party status
9 application, and it's very clear how you
10 intend to participate in this case.

11 Does the Applicant have any
12 objections to this application for party
13 status?

14 MR. HUGHES: Madam Chair, just a
15 couple of clarifications.

16 CHAIRPERSON MILLER: Do you have
17 some questions? Okay.

18 MR. HUGHES: My understanding is
19 that Greenpeace Park, LLC does not own
20 property in Square 1877 or any real property,
21 for that matter; is that correct?

22 CHAIRPERSON MILLER: I think you

1 should ask Mr. Nettler.

2 MR. HUGHES: Is that correct?

3 MR. NETTLER: He's making an
4 objection? It does not own. That's correct.
5 Its members own the property. It is a limited
6 liability company, and that's treated as a
7 partnership under the limited liability
8 company rules and the limited liability
9 company members themselves own the properties
10 that they are -- which are circling this
11 property, this proposed development site.

12 MR. HUGHES: And just to follow
13 up, does the listing on your application
14 include all members of the LLC?

15 MR. NETTLER: It does not include
16 all the members, no.

17 MR. HUGHES: And is Mr. Hanover
18 not also a member of the LLC?

19 MR. NETTLER: Mr. Hanover?

20 MR. HANOVER: I am a member of the
21 LLC.

22 MR. HUGHES: Is Mr. Eads a member

1 of the LLC?

2 MR. EADS: Yes.

3 MR. HUGHES: That's the extent of
4 my questions, Madam Chair, is that I think we
5 don't have necessarily an objection to the
6 members, the surrounding property owners
7 participating as parties. We have an
8 objection to an LLC that doesn't own property
9 participating on its own, and we think that
10 the Board should consolidate these
11 applications based on the coordination
12 between --

13 CHAIRPERSON MILLER: Okay. I
14 think before we rule on the party status we
15 are going to hear from the other two and then
16 we can take a look at the big picture.

17 The party status applicant, Mr.
18 Nettler, is this LLC company or --

19 MR. NETTLER: And its members.

20 CHAIRPERSON MILLER: And its
21 members.

22 MR. NETTLER: Individually. It's

1 both. That's correct.

2 CHAIRPERSON MILLER: So the LLC
3 authorized --

4 MR. NETTLER: Yes, there was a
5 letter that was submitted to the Board with my
6 request for party status.

7 CHAIRPERSON MILLER: No, I mean we
8 don't know how many members aren't -- they
9 said that not all members of this company,
10 this corporation, whatever it is, are
11 participating in this proceeding.

12 MR. NETTLER: Only because I
13 couldn't -- some of the members were not
14 available to sign the authorization for me to
15 act on their -- submit this on their behalf.
16 So rather than provide you with a -- and
17 because two other members as you will hear
18 have different interests and are affected
19 differently -- those members were not included
20 in the individual component of the request for
21 party status.

22 CHAIRPERSON MILLER: Okay, and

1 could you just refresh my memory? Is it the
2 entity authorized you to represent them or
3 these members?

4 MR. NETTLER: Both.

5 CHAIRPERSON MILLER: Both.

6 MR. NETTLER: Correct. The
7 authorization letter is signed by both the
8 individuals and the managing member of the
9 LLC.

10 CHAIRPERSON MILLER: Okay, and the
11 members that you're representing, are they a
12 majority of this LLC?

13 MR. NETTLER: Yes.

14 CHAIRPERSON MILLER: Okay. Any
15 other questions for Mr. Nettler?

16 VICE CHAIRPERSON ETHERLY: Thank
17 you very much, Madam Chair. I think it's
18 fairly straightforward, but just to put a pin
19 in the issue of ownership, all of the
20 principal members of the LLC are property
21 owners that are adjacent and abut the property
22 in question today?

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1 MR. NETTLER: That's correct.

2 VICE CHAIRPERSON ETHERLY: Thank
3 you.

4 Thank you, Madam Chair. No
5 further questions.

6 CHAIRPERSON MILLER: Okay. By
7 don't we go on down the line and go to the
8 next party status applicant and then we'll
9 make our decision? Okay?

10 MR. HANOWER: Good afternoon. My
11 name is Lawrence Hanower. I lived at 5116
12 Chevy Chase Parkway, N.W., which is one of the
13 houses that abut the alley network that
14 surrounds the lot in question. So I'm a
15 neighbor of the property and would be a
16 neighbor of the house that's proposed to be
17 built.

18 And I wanted to speak separately
19 because what I wanted to do in my presentation
20 is really make a case for the personal impact
21 on the neighbors and the neighborhood, and
22 particularly those of us with children, which

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1 not all of the members of the LLC have. So
2 the interests are slightly distinct.

3 CHAIRPERSON MILLER: Okay. I
4 think that the Applicant brought this up, the
5 question of consolidation, and we'll get to
6 you also, but with the rest of the group
7 that's being represented by Mr. Nettler, did
8 you consider being a part of that group and
9 testifying as a witness for that group?

10 MR. HANOWER: I did consider that,
11 and I thought that I would be able to better
12 make the -- better explain the impact that the
13 development would have on some of the
14 neighbors with children if I were able to
15 speak separately.

16 CHAIRPERSON MILLER: Okay. You
17 know, this is something you would have to talk
18 about with Mr. Nettler, but being a party is
19 more than giving testimony or speaking out
20 what you want to say. It's participating in
21 the proceedings fully as a party, cross-
22 examining witnesses, calling witnesses.

1 MR. HANOWER: And I do intend to
2 call one witness actually to emphasize some of
3 the points that I'm trying to make.

4 CHAIRPERSON MILLER: Okay. Well,
5 let me just ask you this, and I don't -- it's
6 certainly not anything to pressure you to go
7 one way or another. It's often more efficient
8 if members share the same point of view that
9 they coordinate because in general if you were
10 listening at all to what I was reading before
11 about 60 minutes collectively for the
12 opposition, and so you've got to share your
13 time and coordinate anyway.

14 So sometimes that's not possible
15 because you're going to take some point of
16 view that's a little bit different and maybe
17 the other side doesn't want to take that point
18 of view with you. Do you know what I'm
19 saying?

20 MR. HANOWER: Right.

21 CHAIRPERSON MILLER: But sometimes
22 if it's just like testifying to a certain

1 aspect of the same general point of view, then
2 it's efficient to work as one party.

3 MR. HANOWER: Well, I understand,
4 and in fact, one, I suppose, positive
5 consequence of the Applicant's initiative is
6 that all of the neighbors who surround this
7 lot have actually gotten to be quite a bit of
8 a stronger community, and so we have all
9 coordinated about our efforts to purchase the
10 lot from the Applicant, as well as to
11 coordinate and prepare for this hearing.

12 So I believe all of my neighbors
13 are aware of my request to get separate party
14 status and speak separately.

15 CHAIRPERSON MILLER: Okay. So if
16 you want separate status, I guess I need you
17 to put on the record again like what makes you
18 different from the other members, how you're
19 going to be impacted.

20 MR. HANOWER: Sure. Well, the
21 individual members of the LLC are a wide range
22 of people who, I guess, reflect the make-up of

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1 the city. They are retirees, there are single
2 people, there are married couples without
3 children, married couples with children,
4 single people with children, and so I wanted
5 to insure that the perspective of those
6 residents with young children who might be
7 impacted by some of the safety concerns that
8 the development raises is heard because I feel
9 that the development does raise some serious
10 safety concerns that affect all of us, I
11 suppose, but affect those of us with children
12 in particular.

13 CHAIRPERSON MILLER: So nobody in
14 the other group has children?

15 MR. HANOWER: Again, several of
16 the members of the LLC do have children.

17 CHAIRPERSON MILLER: How are yours
18 more impacted?

19 MR. HANOWER: Well, Mr. Nettler is
20 representing the LLC, would represent a
21 diverse range of interests of which I supposed
22 people with children are one, but again, I

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1 think because the safety impact of this
2 development has a particularly important
3 impact for children that it deserved extra
4 emphasis and separate testimony.

5 CHAIRPERSON MILLER: Okay. You're
6 Mr. Hanower?

7 MR. HANOWER: Hanower, yes.

8 CHAIRPERSON MILLER: Hanower.
9 Okay. So your application is based on the
10 fact that you want to give more emphasis to
11 safety of children even though there are
12 others who are similarly situated who are
13 concerned about the safety of children, right?

14 It's not that you are more closely
15 located to the property? No.

16 MR. HANOWER: Not necessarily, no.

17 CHAIRPERSON MILLER: Okay. Any
18 questions? Does the Applicant have any
19 specific questions for him?

20 Is it still your position that you
21 object to his being an individual party or no?

22 MR. HUGHES: Applicant has no

1 objection. We just prefer to consolidate
2 based on the position stated earlier.

3 CHAIRPERSON MILLER: Okay. Is it
4 Mr. Eads?

5 MR. EADS: Yes. My name is George
6 Eads. My wife, sitting over there, and I live
7 at 3718 Harrison Street, N.W., but we also own
8 Lot 38, which is the lot immediately on the
9 north side of this property, and I want to
10 speak to concerns we have about the impact on
11 our particular lot, Lot 38.

12 CHAIRPERSON MILLER: So it is your
13 position that you're impacted differently from
14 the others because of your location?

15 MR. EADS: Yes. I mean, they may
16 be impacted. We may be impacted for similar
17 reasons by virtue of our location where our
18 house is. Our house is adjacent to the
19 triangle, but we own the lot that directly
20 abuts this, and we're concerned about damage
21 that we think may occur to our property
22 because of this construction and the location

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1 of this house on it, and that's what I want to
2 speak to, is those concerns only.

3 CHAIRPERSON MILLER: And you are a
4 member -- excuse me, excuse me. No, it's
5 fine, but you need to be on mic, number one.

6 MS. EADS: I'll just talk loud.

7 CHAIRPERSON MILLER: I don't know.

8 MS. EADS: Okay. This is one
9 point of the triangle, as you can see.
10 However, the larger triangle of the whole
11 property goes back this way, then comes down
12 here and meets up here.

13 This area right here is woods at
14 this point. An alley is not through there.
15 We call it a paper alley. I don't know what
16 the legal term is or not.

17 Our lot is right here. Thanks.

18 MR. EADS: And then our house is
19 beyond the other alley, the real alley.

20 COMMISSIONER JEFFRIES: I'm sorry.
21 I didn't get what you just said. I'm sorry.
22 Can you repeat what you just said?

1 MR. EADS: Our house is beyond the
2 real alley.

3 COMMISSIONER JEFFRIES: Oh, yeah,
4 yeah. Okay.

5 MR. NETTLER: Maybe if I could
6 explain a little bit better.

7 VICE CHAIRPERSON ETHERLY: I think
8 we're clear.

9 MR. NETTLER: Oh, okay.

10 VICE CHAIRPERSON ETHERLY: It's
11 also an undeveloped space.

12 MR. NETTLER: Correct.

13 VICE CHAIRPERSON ETHERLY: You
14 reside off of Harrison Street, but you own the
15 undeveloped green space immediately north of
16 the subject property, and for the benefit of
17 my colleagues, the maps kind of in front of
18 Tab C in the Applicant's submittal -- and Mr.
19 Moy was kind enough to point out his
20 highlighted version -- kind of helps to put a
21 little bit of the property ownership into
22 perspective to get a sense of where all of the

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1 parties live, but I think it's fairly
2 straightforward.

3 You own property north of the
4 subject property, but your residence is a
5 little further more to the west.

6 CHAIRPERSON MILLER: Any other
7 questions by Board members, Applicant?

8 (No response.)

9 CHAIRPERSON MILLER: Okay.
10 Basically what the Applicant has said is he
11 doesn't object to the party status applicants,
12 but thinks that you ought to consolidate, and
13 it's usually a good idea to consolidated.
14 It's usually an efficient way for individuals
15 to get together and present a case, especially
16 when an attorney is handling the case, but you
17 know, basically you're still going to divide
18 your time so that it's not a big issue. I
19 just wanted to give you one more moment to
20 think about or whether maybe you've already
21 talked about this, you know, but the fact that
22 if basically the two of you are trying to

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1 present certain points that you're most
2 familiar with, whether or not you can do that
3 under the auspices of the other party status
4 applicant in that group, and if you feel you
5 can't, then we'll look at you individually.

6 But I just wanted to make sure
7 that you have fully considered that. Do you
8 have a response to that, either of you?

9 MR. HANOWER: I think you'll find
10 that actually the three presentations will
11 complement each other fairly well and would be
12 somewhat distinct. So.

13 CHAIRPERSON MILLER: Well, I mean,
14 it sounds like you are related, and it would
15 certainly complement each other and probably
16 fit very well within one presentation, but --

17 MR. EADS: Mr. Nettler does not
18 represent us as owners of this property.

19 CHAIRPERSON MILLER: That's
20 correct. He doesn't, but you have this
21 opportunity, have right now an opportunity to
22 come within that umbrella if you so choose,

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1 but if you don't, it just means that we will
2 be dealing, you know, logistically with three
3 different party opponents.

4 Is that how you wish to proceed?

5 Okay. Let me just ask the Board
6 then if they have any concerns with proceeding
7 this way.

8 (Pause in proceedings.)

9 VICE CHAIRPERSON ETHERLY: I'll
10 perhaps offer some comments. At the outset I
11 agreed with and to an extent I still agree
12 with the Chair's kind of soft guidance
13 regarding consolidation here because I think
14 what we will find in your testimonies will be
15 some overlap.

16 Clearly there are going to be some
17 shared issues as common property owners of
18 properties surrounding the site.

19 From a party status standpoint, I
20 understand the distinction in terms of the
21 family impact. Clearly as a property owner to
22 the immediate south of the subject property

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1 there are some impacts that you will
2 experience and perhaps that family aspect
3 might not necessarily come out in the overall
4 or general Greenpeace part presentation.

5 I understand it. I'm not sure if
6 it's compelling enough, and that's not to
7 minimize at all the issue of being a family.

8 From the standpoint of Mr. Eads,
9 I'm perhaps a little more inclined as the
10 immediate property owner just to the north of
11 the subject property. There are minor
12 distinctions perhaps on their face, but I
13 think somewhat important from the standpoint
14 of party status.

15 There are some concerns about the
16 unwieldiness of three separate parties and
17 conceivably three separate sets of cross-
18 examination. So there is a little bit of a
19 concern there.

20 I think we could perhaps work
21 through it. So I'm willing to compromise
22 pending comments from my fellow Board members,

1 and that's not to punt and put them on the
2 spot, but again, I hear, Mr. Hanower, your
3 point about wanting to emphasize the impacts
4 and considerations for families in the
5 immediate vicinity were this application to
6 move forward in a positive direction.

7 And clearly, Mr. Eads, from the
8 standpoint of your position as a property
9 owner just north of the subject property,
10 there's going to definitely be some
11 interaction between what happens on 37 with
12 respect to your ownership and interest at Lot
13 38.

14 Thank you, Madam Chair.

15 CHAIRPERSON MILLER: I appreciate
16 it, and I think we really need to go back to
17 the standard because it's just not that -- you
18 know, anybody who wants to testify can testify
19 in these proceedings, but it's not an
20 automatic to be a party, and perhaps part of
21 the rules are based on efficiency, and it has
22 been unwieldy in certain cases when you've got

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1 people who really don't have such different
2 interests each being a party in the case and
3 each cross examining and each presenting
4 witnesses.

5 And so that's why I believe that
6 we have this rule. So you know --

7 MR. HANOWER: Madam Chair, I'm
8 willing to, based on your expertise with how
9 to run the most efficient hearing, I can
10 withdraw my separate party status and serve as
11 a witness for Mr. Nettler and make my
12 explanation that way.

13 CHAIRPERSON MILLER: Okay.

14 MR. HANOWER: As long as I'm able
15 to get the points across, it doesn't
16 necessarily matter to me so much whether I'm
17 a separate speaker or a witness, as long as
18 the testimony is heard.

19 CHAIRPERSON MILLER: Exactly, and
20 that has been our experience. It has actually
21 worked out very effectively in case
22 presentation to be a part of a bigger party.

1 MR. HANOWER: I will defer to your
2 expertise for that.

3 CHAIRPERSON MILLER: Okay. Well,
4 let's go to Mr. Eads.

5 MR. EADS: What we would need to
6 ask you then is how are your interests so
7 different from the Greenpeace group?
8 Greenpeace?

9 MR. NETTLER: Greenpeace.

10 CHAIRPERSON MILLER: Group so that
11 you need to be a separate party? How are you
12 so differently impacted that you need to have
13 your own --

14 MR. EADS: Because we --

15 CHAIRPERSON MILLER: -- party
16 status?

17 MR. EADS: -- fear water intrusion
18 directly onto our property. These two
19 properties are right together. The land
20 slopes from Lot 37 to Lot 38. We fear that
21 with the area built on we're going to have
22 erosion through our property, and we've put a

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1 lot of money into building gardens there, and
2 they will be damaged.

3 We believe also we're concerned
4 about the height of the house and shading our
5 property so that some of the things that we've
6 put in won't grow.

7 We're also concerned about the
8 potential location of utilities that are going
9 to have to be built. Presently the house, the
10 property doesn't have water, sewer,
11 electricity or gas, and somehow they're going
12 to have to get there. There's no indication
13 in the application how that's going to be, and
14 we're concerned that they may want to come
15 across our property.

16 So my concerns, as I say, as the
17 owner in one of the houses around or similar
18 to the position Mr. Nettler is going to do,
19 but we own property that we believe is going
20 to be specifically damaged by the construction
21 of the place.

22 COMMISSIONER JEFFRIES: Madam

1 Chair, can you just engage me one second here?

2 Mr. Nettler, so I just want to be
3 clear. The members of the LLC, none of the
4 members have the same issues as Mr. Eads?

5 MR. NETTLER: That's correct.

6 COMMISSIONER JEFFRIES: Okay.
7 Completely?

8 MR. NETTLER: Completely separate
9 from. Nobody else owns a lot that is exactly
10 a neighbor to this lot.

11 COMMISSIONER JEFFRIES: Thank you.

12 CHAIRPERSON MILLER: Okay, and his
13 issues will not be covered in your
14 presentation.

15 MR. NETTLER: No.

16 CHAIRPERSON MILLER: Okay. Any
17 last words from the Applicant before we rule
18 on the party status applications?

19 MR. HUGHES: No opposition
20 necessarily, Madam Chair. Just one
21 clarification. This is -- Lot 37 and 38 are
22 not -- they don't share a property line. They

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1 are separated by a paper alley that's 20 feet
2 in width, just as all the other properties
3 that are represented by Mr. Nettler or most of
4 the properties. I'm not sure all of the
5 owners are adjoining, but that's all I have.

6 MR. NETTLER: Well, it's a paper
7 alley. It's not a paved alley. It's a paper
8 street, alley, whatever. It's not paved.
9 It's a green space, unlike the others which
10 are paved and vehicular use is made of them.

11 MR. EADS: In fact, there has been
12 some confusion throughout this whole thing
13 about exactly what the property was.
14 Originally when they put the property up for
15 sale, they put a for sale sign on our
16 property, and a lot of people who have been to
17 look at the property seemed to think that the
18 whole triangle is a single piece of property,
19 which it isn't .

20 CHAIRPERSON MILLER: Okay.

21 VICE CHAIRPERSON ETHERLY: Madam
22 Chair, with some of those caveats in mind, I

1 think it's appropriate to move forward with
2 Mr. Eads as a separate party, given both his
3 submittal and some of the specific points that
4 have been raised in writing and in his oral
5 testimony with respect to specific impacts as
6 they relate to his lot.

7 So I would move approval of Mr.
8 Eads as party status application and invite a
9 second.

10 COMMISSIONER JEFFRIES: Second.

11 COMMISSIONER LOUD: Madam Chair, I
12 would like to be heard on it very briefly. I
13 just wanted to ask Mr. Eads were there
14 interests apart from what you've testified to,
15 the water intrusion, the land sloping from Lot
16 37 to Lot 38, impacts to light that would
17 prevent certain growth. Are there other
18 interests that you have that are different
19 from the Greenpeace, LLC?

20 MR. EADS: I did mention a third.
21 That is a concern about damage through
22 construction of the utility access, and

1 there's another, namely, if the trees in this
2 paper alley are damaged or destroyed during
3 the construction of the house or they just
4 take them down, we think we will be damaged as
5 well.

6 COMMISSIONER LOUD: Okay.

7 MR. EADS: We want to preserve the
8 trees that are on the city-owned land.

9 COMMISSIONER LOUD: Then let me
10 offer this, and this is just personal, a
11 personal reflection, not necessarily a
12 guidance and doesn't reflect what other Board
13 members think.

14 But apart from the specific things
15 that you've outlined, your being conferred
16 party status means you get the opportunity to
17 cross examine witnesses, and to the extent
18 that the cross-examination that Mr. Nettler
19 will do will cover all of the other areas, the
20 overlapping areas where there's common
21 interest, just to consider the cross
22 examination that you will do focusing on the

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1 areas where there is a really clear
2 distinction between your interest and the
3 interest of your neighbors, the things that
4 you've spoken to, water intrusion, specific
5 property damage, damage to utility access and
6 so on and so forth.

7 So that moving to cross-exam there
8 isn't a tremendous amount of duplication, and
9 again, it's just personal gratuitous
10 editorial, but not to be taken as a directive
11 from the Board.

12 MR. EADS: Mr. Loud, I don't have
13 any intention of having cross-examination on
14 anything other than those particular issues
15 that I (pause) --

16 CHAIRPERSON MILLER: Okay. All
17 right. Okay. Then we have a motion. We can
18 vote on it, I guess, but I think --

19 COMMISSIONER JEFFRIES: I'm sorry,
20 Madam Chair. I have one more question, and
21 this is for Mr. Nettler once again.

22 CHAIRPERSON MILLER: Okay. Let's

1 step out of the whole motion thing then.
2 Okay.

3 COMMISSIONER JEFFRIES: Sorry.

4 So for Greenpeace Park, LLC, the
5 members of this LLC own homes that, you know,
6 surround this triangle.

7 MR. NETTLER: Correct.

8 COMMISSIONER JEFFRIES: But they
9 don't have some of the same concerns in terms
10 of what Mr. Eads has spoken about, but you do
11 have ownership in and around.

12 MR. NETTLER: Correct, but they
13 don't own as he does a lot that's adjacent to
14 the one that's being developed. They surround
15 the alleyways.

16 COMMISSIONER JEFFRIES: Okay.

17 Thank you.

18 CHAIRPERSON MILLER: I'm sorry.

19 Are there other questions, Board members?

20 (No response.)

21 CHAIRPERSON MILLER: Okay. Is it
22 the consensus of the Board then that we would

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1 admit Greenpeace, LLC, and Mr. Eads as two
2 separate parties in the case?

3 Okay. Then by consensus that's
4 done. Okay.

5 Next I want to make a suggestion.
6 We have briefings on this issue we're supposed
7 to hear. We have briefings by the Applicant
8 already in the case, and Greenpeace has a
9 filing addressing the variance test.

10 I don't know if the ANC has a
11 filing. Is the ANC here?

12 Oh, why don't you come forward?
13 You're a party in this case automatically.
14 Good afternoon. Would you introduce yourself
15 for the record please?

16 MR. FRUMBOLUTI: Okay. My name is
17 Chris Frumboluti. I am an architect here in
18 Washington, D.C. for 35 years, and I'm an ANC
19 Commissioner for 3G-07.

20 CHAIRPERSON MILLER: And I assume
21 you're authorized to represent the ANC in this
22 matter.

1 MR. FRUMBOLUTI: I am, yes.

2 CHAIRPERSON MILLER: Do we have
3 that in the record?

4 MR. FRUMBOLUTI: Yes, there's a
5 letter right here.

6 CHAIRPERSON MILLER: Okay. Good.
7 I'm sorry. I didn't know you were in the
8 audience. I'm sorry I didn't call you
9 earlier.

10 MR. FRUMBOLUTI: That's okay.

11 CHAIRPERSON MILLER: Do you have
12 any concerns about the party status
13 applications that we just granted?

14 MR. FRUMBOLUTI: No.

15 CHAIRPERSON MILLER: Okay. Thank
16 you.

17 MR. FRUMBOLUTI: It's a little
18 over my head to be honest with you.

19 CHAIRPERSON MILLER: Okay, good.
20 All right. So now we're going to get into the
21 substance.

22 So we have an application. It's

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1 for variance relief, and we have pleadings by
2 the parties addressing whether or not this
3 should be considered a use variance or an area
4 variance, and I thought before we proceeded it
5 might be useful to have the parties address
6 that issue or hear from them whether you think
7 that we need to decide that early on in this
8 proceeding or not.

9 It looks like you're ready to
10 answer, Mr. Nettler.

11 MR. NETTLER: I certainly would
12 like to say something. It probably would be
13 useful since we could foreshorten a fair
14 amount of the testimony that's being presented
15 on one side or the other side, perhaps, but
16 you have to resolve it one way or another in
17 this case anyway, and it may be a way to
18 sharpen the questions that you might have of
19 witnesses as well. I just think it's -- while
20 we didn't raise it as a preliminary motion, I
21 think you having raised it yourself, I think
22 it's a good idea to sort of get into the meat

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1 of the issue.

2 And I certainly am prepared to
3 expand upon what I've already -- expound and
4 expand -- upon what I've already submitted on
5 the question as to whether it's a use variance
6 or area variance in light of some of the
7 statements made by the Applicant in their pre-
8 hearing statement.

9 CHAIRPERSON MILLER: Mr. Hughes.

10 MR. HUGHES: Madam Chair, we don't
11 have an objection to discussing the nature of
12 the variance at this point. I don't know if
13 the Board would like to -- we've sat forth, we
14 think, our argument in our prehearing
15 statement. We can supplement that here based
16 on any questions the Board has and Mr. Nettler
17 might have, however you would like to proceed.

18 CHAIRPERSON MILLER: I think that
19 it might be useful to address the arguments
20 why or why not, why is it use versus area
21 variance, vice versa. And then I think the
22 Board would have to assess whether or not

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1 they're ready to decide that question.

2 But I think it would be good for
3 you to briefly address that, and maybe we
4 could ask some questions. It might focus us
5 all better on the issues.

6 I also did want to make sure that
7 the parties were comfortable though that if
8 the Board isn't quite ready to make that
9 decision, that you felt comfortable still
10 going forward under the variance tests in
11 general either way.

12 Do you have an opinion on that?
13 We're not sure how persuasive your arguments
14 are going to be this afternoon, but we want to
15 hear them. I mean, it certainly raised the
16 questions in the pleadings, but the board
17 hasn't made a decision on that.

18 MR. NETTLER: I'm ready to move
19 forward.

20 CHAIRPERSON MILLER: Are you ready
21 to address it?

22 MR. NETTLER: Sure.

1 CHAIRPERSON MILLER: Okay. I'm
2 sorry.

3 Okay. Let me just say to the
4 other parties after these two parties have
5 addressed this legal issue, whether or not
6 this is a use variance or an area variance and
7 that affects the standard that's applied under
8 the three-prong test. Whether or not, you
9 know, there's uniqueness is the first test,
10 and then the second test is either practical
11 difficulty or undue hardship. Undue hardship
12 is a higher standard, and that's what has to
13 be proven when there is a use variance.
14 Practical difficulty is for an area variance.

15 And then adverse impact is the
16 last test. It's the same. So this, the two
17 parties have briefed it. I think what the
18 Board would like to hear a little bit further
19 from them, we may ask them a few questions and
20 then you two are also parties so that if you
21 have a comment on this, you will also be given
22 an opportunity to weigh in.

1 Okay. So you look like you're --

2 MR. NETTLER: Since I raised the
3 issue.

4 CHAIRPERSON MILLER: Okay, okay.
5 Yeah, there isn't really a motion. So go
6 ahead.

7 MR. NETTLER: And I appreciate the
8 fact that --

9 MR. HUGHES: Madam Chair.

10 CHAIRPERSON MILLER: I'm sorry,
11 yes. You have an objection?

12 MR. HUGHES: I'm sorry. Well,
13 just at the outset. We're the applicant to
14 the case, and so we would like to proceed.

15 CHAIRPERSON MILLER: Oh, you
16 would. All right.

17 MR. NETTLER: That's fine.

18 MR. HUGHES: It's going to be very
19 simple.

20 CHAIRPERSON MILLER: That's fine.

21 MR. HUGHES: We think it's very
22 straightforward.

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1 CHAIRPERSON MILLER: You have
2 moved for a variance based on an area variance
3 theory, correct?

4 MR. HUGHES: We've asked for
5 variance relief, yes, and we believe it's an
6 area variance.

7 CHAIRPERSON MILLER: Okay.

8 MR. HUGHES: We believe it's a
9 dimensional requirement. The property is
10 zoned R-1-B. Single family dwelling is a
11 permitted use in an R-1-B district. Were it
12 not for this dimensional requirement, the
13 dimensional requirement being the width of the
14 adjacent public alley --

15 CHAIRPERSON MILLER: Let me just
16 ask you right here. Is any residential use
17 allowed on this lot?

18 MR. HUGHES: No, ma'am.

19 CHAIRPERSON MILLER: No
20 residential use.

21 MR. HUGHES: On this lot under R-
22 1-B, Section 200.1, I guess -- I don't have

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1 the regulations in front of me -- single
2 family dwelling is a permitted use in that
3 zone.

4 Chapter 25 places additional
5 obligations on alley lots. Twenty-five, oh,
6 seven, point, one prohibits any habitable use
7 of an alley lot, except as a single family
8 dwelling. That is a use issue.

9 Twenty-five, oh, seven, point,
10 two, which is the provision that we're seeking
11 variance from, speaks to new construction on
12 alleys that are a minimum of 30 feet in width
13 and have clear access to a street that is 30
14 feet in width.

15 We believe that's a dimensional
16 requirement, and that's consistent with the
17 Board's holdings of the past 25 years.

18 VICE CHAIRPERSON ETHERLY: So, Mr.
19 Hughes, would it essentially be I don't want
20 to say a backwards reading, but in your
21 opinion would it be a backwards reading to
22 say, on the one hand, yeah, it's dimensional

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1 with respect to the alley, but it seems as
2 though the zoning regs are saying something
3 about a residential use on an alley of this
4 nature.

5 So it really isn't about the
6 appropriateness of the use adjacent to an
7 alley of this size. So in a way does that
8 trump the dimensionality argument -- I'm
9 making up words now, but I hope you kind of
10 get what I'm getting at -- does that kind of
11 trump the dimensional aspect of the alley
12 issue?

13 MR. HUGHES: I'm not 100 percent
14 certain that I followed you.

15 VICE CHAIRPERSON ETHERLY: No, and
16 that's okay, because I think the answer to the
17 question is no, and again, the precedent that
18 you're speaking to since about what was it?
19 I think it was '83 or '82 -- basically has
20 gone the other way, that it is not a use
21 issue. It's an area issue.

22 MR. HUGHES: Correct. If I might

1 quote language from application 14068 and the
2 conclusions of law of the Board, it says this
3 was for relief from Section 2507.2 as we have
4 here. The variance requested relates not to
5 the use, but to a physical characteristic of
6 the lot itself, i.e., the width of the alley
7 is the only item in issue.

8 We believe this is
9 indistinguishable from minimum lot dimensions,
10 minimum lot area, minimum lot width. One
11 might have such a substandard lot in a
12 residential district and need relief from
13 those provisions, which would be an area
14 variance relief, in order to construct what is
15 otherwise a permitted use.

16 CHAIRPERSON MILLER: I guess my
17 questions goes to, in part, when I was
18 looking, certainly I know there are court
19 cases that deal with area versus use variance
20 when you're talking about added density, for
21 instance. You have enough lot coverage or
22 whatever for single family, but you're adding

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1 -- you want to build a multi-family, and the
2 court has said that that's an area variance
3 because the use as a residence is allowed.
4 It's just you're increasing the density in
5 that case.

6 You're still going from one type
7 of residence to another type of residence,
8 even though there are different categories.
9 It's a multi-family dwelling versus a single
10 family dwelling. I'm looking at this
11 particular regulation. It appears that no
12 residential use is allowed in this case as
13 opposed to one time is allowed but another
14 type isn't.

15 MR. HUGHES: Well, I would
16 respond, Madam Chair, that that would also be
17 the case if a property didn't meet the minimum
18 lot width dimensions or the minimum lot area
19 dimension. You couldn't build without the
20 relief from the Board, which is an area
21 variance. That property could be zoned
22 residential, but because your property doesn't

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1 meet the minimum lot dimensions, it can't be
2 constructed as a residential use. I think
3 they're equivalent.

4 CHAIRPERSON MILLER: But usually
5 in the kind of cases that I'm referring to --
6 maybe I need to really look at a specific
7 court case, but it's like a certain density is
8 allowed. A certain type of residential use is
9 allowed; just not a greater use. Even though
10 you go from one category to another, if you go
11 from single family to multi-family, some
12 people may consider that a different use, you
13 know. A single family is different use from
14 multi-family, and the court, as far as I know,
15 has said, no, that's an increase in density.
16 It's the same type of use, residential use.

17 And my question on this alley
18 situation, it sounds like no residential use
19 is allowed by this regulation, 2507.2.

20 MR. HUGHES: Again, 2507.1 speaks
21 to the only permitted habitable use on an
22 alley dwelling, on an alley lot, and that

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1 would be a single family dwelling. Twenty-
2 five, oh, seven, point, two and 2507.3 speak
3 to dimensional requirements of the alleys that
4 surround those alley lots.

5 VICE CHAIRPERSON ETHERLY: So, in
6 essence, it's not that Section 2500 trumps
7 what is already deemed to be a compatible use,
8 because I think part of the argument that we
9 may hear from Mr. Nettler, that in fact we see
10 in the submittal of the opposition, one of the
11 opponents, is that there is some sense of
12 incompatibility at play here with respect to
13 building on this type of alley, and because of
14 that incompatibility, it creates or effects a
15 change in the character of the use that's
16 proposed, and to an extent I hazard a guess
17 again that that's going to be part of the
18 argument here, that the introduction of the
19 proposed property is ultimately going to
20 change the character in some way.

21 But your argument is, no, this is
22 already a use that is contemplated in this

1 residential district. Twenty-five hundred
2 just prescribes it to an extent in certain
3 situations, but it doesn't change the fact
4 that the use is deemed to be compatible in
5 this underlying district.

6 MR. HUGHES: That's correct. If
7 it were an apartment house or other type of
8 residential development, another type of
9 habitable dwelling, that would be precluded
10 use.

11 Thank you. Thank you, Madam
12 Chair.

13 CHAIRPERSON MILLER: So you're
14 saying that 2507.1 means that a one family
15 dwelling use is allowed on an alley lot, but
16 you believe it's an area variance because of
17 the 30 feet restriction.

18 MR. HUGHES: Yes, ma'am.

19 CHAIRPERSON MILLER: Okay. Okay.
20 We interrupted you. Basically is there
21 anything else you want to highlight?

22 MR. HUGHES: In terms of that

1 particular portion of the test, the variance
2 test, the practical difficulty versus undue
3 hardship, the use versus area variance, again,
4 I believe we're focusing here on use versus
5 area variance, and the use, the underlying
6 zoning of the property -- I'm sorry to repeat
7 myself -- is R-1-B. A single family dwelling
8 is permitted use in the R-1-B District. Were
9 these allies 30 feet in width, as the
10 architect will show, there's no additional
11 area of relief needed. We actually meet or
12 exceed all the provisions, lot occupancy,
13 building height, setback, parking.

14 And so we believe this is purely a
15 matter of a dimensional requirement, and it's
16 a rare case that the Board sees. We've only
17 seen maybe a few more than 20 in a quarter
18 century, but it's similar to any other
19 substandard lot. It's a product of the
20 surrounding. There's nothing the Applicant
21 can do to change that.

22 VICE CHAIRPERSON ETHERLY: And

1 just one additional follow-up question because
2 it's a little bit of a subset of the argument.
3 You would, of course, given your position on
4 the overall question, you would, of course,
5 also disagree with the proposition that this
6 is a hybrid of some sort. It's a hybrid
7 variance that should nevertheless be subjected
8 to use variance review.

9 MR. HUGHES: I don't believe it's
10 a hybrid. I don't believe it's a use. That's
11 right. I believe it's very clearly an area
12 variance.

13 VICE CHAIRPERSON ETHERLY: Okay.
14 Thank you.

15 Thank you, Madam Chair.

16 CHAIRPERSON MILLER: What do you
17 think a hybrid variance would be?

18 MR. HUGHES: In this case or just
19 in any case?

20 CHAIRPERSON MILLER: Well, I don't
21 know because this is what usually happens. If
22 this is the type of case where -- I mean, it's

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1 not a real definition of what a hybrid
2 variance is, but as is often in this kind of
3 case, I don't believe it could go either way,
4 that there are interpretations where you can
5 interpret it as a use or you can interpret it
6 as an area, and we go one way or the other for
7 the strongest argument.

8 MR. HUGHES: In this case I can't
9 think of a case when it would be a hybrid. In
10 other case it would be, I guess, when the
11 density is so increased or the height is so
12 increased that it changes the use proposed
13 even though it is ostensibly a permitted use
14 in that zone. It so overwhelms the
15 regulations when you're talking about going
16 from a two story to a six story building.

17 CHAIRPERSON MILLER: Okay. Any
18 other questions right now?

19 Mr. Nettler.

20 MR. NETTLER: Thanks.

21 Well, let me start off with in one
22 respect I have to thank the Applicant for

1 giving the opportunity to allow more research
2 on the issue as to whether this is a use
3 variance or an area variance, particularly
4 starting back in 1953, when the zoning
5 regulations that precede our current zoning
6 regulations, and actually 1956, when the
7 zoning regulations that precede our current
8 regulations were amended to, for the first
9 time, provide the prohibition against an alley
10 dwelling, a residential dwelling on an alley
11 that's less than 30 feet in width.

12 That provision was prompted by the
13 fact that Congress had just previously amended
14 the statute dealing with alley dwellings in
15 the District of Columbia, which it had
16 actually initially adopted back in the 19 --
17 1934, I think, was the initial date, but it
18 had amended it in 1950 -- the early 1950s,
19 just preceding the time when that amendment to
20 the zoning regulations was put into place, and
21 it was a declaration of policy that was
22 established, and I can read that to you here

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1 because it's still a part of the D.C. code,
2 and it's still in effect, which is it is
3 hereby declared to be a matter of legislative
4 determination by Congress that the conditions
5 existing in the District of Columbia with
6 respect to the use of buildings and alleys as
7 dwellings for human habitation are injurious
8 to the public health, safety, morals and
9 welfare and is hereby declared to be the
10 policy of the United States to protect and
11 promote the inhabitants from such use.

12 And as a consequence, that
13 regulation was adopted to preclude the use
14 throughout the city of alley lots for
15 residential dwellings unless they met a
16 certain criteria.

17 And when the Lewis council was
18 established and Lewis was asked to review and
19 rewrite the zoning regulations in 1956 through
20 1958 actually, the section here, the only
21 issue that came up with regard to a change in
22 that regulation was one that was suggested by

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1 the -- pardon me for a moment -- was one that
2 was suggested by the Commissioners, which was
3 to add to it a provision that would deal with
4 R-4 situations where you had existing garages
5 and allow for those to be modified as long as
6 they complied with certain criteria that were
7 established.

8 Nevertheless, in the report that
9 was done by the final report of the Zoning
10 Advisory Council on proposed new zoning
11 regulations prepared by Howard Lewis for the
12 District of Columbia Commissioners at the
13 time, it was recognized that these were use
14 restrictions, and they were use restrictions
15 that were placed into a separate section, this
16 miscellaneous section, as they were previously
17 in 1956 because like other use restrictions in
18 the miscellaneous provisions, they were
19 derived from congressional policy and statutes
20 that had been passed, and so since they
21 applied to the District as a whole, they were
22 then placed into that section rather than into

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1 the individual residential sections because
2 whether you're in a commercial district,
3 whether you're in a residential district,
4 industrial district, whatever, you cannot have
5 a dwelling on an alley lot that doesn't meet
6 this criteria.

7 And so that also prompted me to
8 then go back and look at how that section had
9 been interpreted under the previous -- had it
10 had previously -- the numbering of the
11 previous regulations, and beginning in 1966,
12 the first case came up before your
13 predecessor, the Board of Zoning Adjustment,
14 on the review of a proposal to construct a
15 residence on an alley that didn't meet the 25
16 foot -- the requirements, the 30 foot wide
17 requirements, and the Board of Zoning
18 Adjustment said both in an appeal at that time
19 and both in an application that had been filed
20 as well some years later that these were
21 clearly a use variance was required. You had
22 to meet the same standards as any other use

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1 variance, including the hardship requirement,
2 and in fact, no application for a use variance
3 for an alley dwelling had been approved up to,
4 I believe, 1979.

5 And I note when Mr. Schurrer
6 signing on a number of these decisions by the
7 Board of Zoning Adjustment and when they had
8 made that conclusion, and it's interesting
9 because I don't know why 1979 is picked as a
10 date of departure by the Applicant. My guess
11 is because after 1979 twice, twice out of
12 about 20-something cases the Board of Zoning
13 Adjustment has gone the other way on the issue
14 without the Office of Planning ever saying
15 whether it was a use variance or an area
16 variance.

17 In one case where there actually
18 wasn't any opposition to the development of
19 the alley lot, but certainly not in
20 circumstances that under the Court of Appeals
21 decision, Davidson v. Board of Zoning
22 Adjustment, would be entitled to any

1 precedential value for you.

2 What is entitled to precedential
3 value are those cases that specifically
4 brought up those issues in a contested manner
5 and resolved them as it has consistently done
6 sine 1958, except for two situations, and have
7 said that it is a use variance because it does
8 go to use.

9 The idea that the government's
10 property somehow provides a basis for an area
11 variance is no different than saying because
12 a street is 90 feet in width and the
13 government has a street that's 90 feet in
14 width that I can get a variance because of
15 that 90 foot strip to build something that's
16 130 feet or 150 feet, which would be -- let's
17 go beyond that. Let's go to height act --
18 that I can build something higher because the
19 street isn't that way.

20 As the Chairman has recognized,
21 area variance cases deal with what is inherent
22 in the lot itself. It doesn't deal with what

1 is surrounding a lot that's not owned by the
2 Applicant, and in here there are additional
3 reasons why the council, the Commissioners,
4 the Lewis plan, the Board of Zoning Adjustment
5 have consistently recognized this as a sue
6 variance.

7 The idea that a minimum lot
8 situation that the Applicant referred to in a
9 residential zone can be analogous to this is
10 farfetched. A minimum lot situation is where
11 a lot that has street frontage doesn't have to
12 deal with the governmental impacts on that lot,
13 that is, an alley that surrounds it or a
14 street that has a certain width or other
15 issues. It's simply something that's about
16 that lot that you're trying to develop that
17 doesn't have the correct dimensions that
18 allows you to develop in a way that would
19 permit a single family residence.

20 There is no -- the zoning
21 regulations do not permit the use of an alley
22 lot for this purpose unless it meets those

1 requirements, and to suggest that because of
2 two circumstances out of 50-something years
3 where the Board of Zoning Adjustment may have
4 gone astray is a precedent for overturning all
5 the other instances when the Board of Zoning
6 Adjustment has recognized as Congress mandated
7 in the 1950s and is still a part of the D.C.
8 code that these alley lots should be allowed
9 to be developed because of area variance
10 requirements simply has no basis in the law.

11 I think the other point that was
12 made just a moment ago about 2507 presenting
13 additional obligations is not correct either.
14 Twenty-five, oh, seven, doesn't present
15 additional obligations to your ability to
16 develop a lot. It presents the basis upon
17 which you can develop a lot.

18 There is no resident -- if you go
19 through the R-1 through R-5-D regulations,
20 there is no permission for a residential use
21 on an alley lot, period, but for what 2507
22 does. And 2507 and its predecessor number --

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1 I think it was 7706 is what it was under the
2 prior regulations before the numbering was
3 changed in I believe the mid-'80s -- 7706 was
4 a situation, as I said, has always been
5 construed to be exactly what our position is.

6 And in fact, even since those
7 cases, I know that the Applicant has not
8 included all of the decisions that the board
9 of Zoning Adjustment has rendered even sine
10 1979, including a self-certification case that
11 I have brought before you regarding Katie's
12 Alley; this Board again recognized and the
13 Office of Planning recognized that, yes,
14 indeed an alley dwelling on an alley that is
15 less than 30 feet requires the showing of a
16 use variance.

17 There's a very good discussion, I
18 think probably one of the best discussions of
19 looking at what can be done or not done with
20 alleys and how you address the regulations
21 from the perspective of a particular
22 development, was by the Board, and I'll give

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1 you the number. It was in the case that Manna
2 had sought relief from because it addresses as
3 well a lot of the same ideas, a lot of the
4 same claims that are being made here as to
5 what is unique or what is a practical
6 difficulty or what is a hardship or not a
7 hardship, and it does that quite well, and
8 I'll give you the number of that in one
9 second. Excuse me. That is 16927.

10 I know the Applicant tries to
11 distinguish that case, but if you read it
12 carefully, it is right on point. It's a use
13 variance, and the other issues that I'm sure
14 we'll come to if the application goes forward
15 under a use variance, simply do not support
16 this application.

17 There's no precedent, no
18 legitimate precedent for you to say that the
19 development that's being sought here should be
20 treated in any other fashion other than as a
21 use variance.

22 And if you have any questions.

1 CHAIRPERSON MILLER: I have a
2 general question. Sometimes when you read the
3 use variance cases one of the standards they
4 talk about is whether or not the character of
5 the zoned district would be changed. That's
6 often tied to a use variance, and it sounds
7 like in this case what you've said is that
8 might be irrelevant here because it applies
9 across the board, across all zoned districts,
10 this limitations on building near the alley;
11 is that correct?

12 MR. NETTLER: That's correct.
13 That's true.

14 CHAIRPERSON MILLER: Okay. Other
15 questions for Mr. Nettler from the Board?

16 We thought perhaps we would bring
17 Office of Planning in on this as well. If
18 you would like to introduce yourself for the
19 record and make any comments on this question.

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

22 My name is Arthur Jackson. I'm a

1 development review specialist with the
2 District of Columbia Office of Planning.

3 As you note, in the Office of
4 Planning report, we do refer to this as a use
5 variance, and we make several observations.
6 One observation is that lots developed after
7 February 15th, 1966, any lot that's to be
8 developed for use are all required to have
9 street frontage such that the normal would be
10 that any new lot that was created would not be
11 allowed to have any new construction, such as
12 a residence, unless it was on street frontage.

13 Of course, these properties
14 predate the regulations and as such are not
15 subject to that.

16 I would also note that we made
17 reference to 2507.3. You note that 2507.3
18 even states that if there was an existing
19 dwelling on an alley lot, it is very limited
20 in what it can do as far as redevelopment,
21 expansion, improvements. In fact, it actually
22 discourages any significant development,

1 expansion of existing residential lot on -- a
2 residential building on an alley lot.

3 And then under 2507.3, essentially
4 the only way that you could develop a
5 residence on an alley lot is to have -- is
6 that the alley lot meets a specific standard.

7 And so conversely, although a
8 residential use and a single family
9 residential use is allowed are all residential
10 zoned districts. An alley lot developed as a
11 residential is not allowed at any residential
12 zoned district unless it is next to an alley
13 that meets a specific standard, and that is 30
14 feet.

15 Office of Planning's reports in
16 the past may have been on both sides. We've
17 come to the conclusion that this is definitely
18 a use variance and as such should be held to
19 the highest standard.

20 VICE CHAIRPERSON ETHERLY: So, Mr.
21 Jackson, based on your reading, it would be
22 the Office of Planning's position that 2507

1 speaks to the position that this use is
2 incompatible on an alley but for certain
3 circumstances that must be met in order for a
4 resident's use to go forward.

5 MR. JACKSON: Yes, and the issue
6 is not the size of the lot. It's not whether
7 or not it can meet the setback requirements
8 under the zoned district. It has to be. The
9 only way it can be allowed is that it has to
10 be on an alley that is at least 30 feet wide.
11 Otherwise there's no other provision to allow
12 construction on an alley lot in the
13 regulations because the regulations overall
14 anticipate that any new development would be
15 on a lot that has street frontage.

16 VICE CHAIRPERSON ETHERLY: And
17 your reading of 2507 cuts across all
18 districts.

19 MR. JACKSON: Correct.

20 VICE CHAIRPERSON ETHERLY: And
21 further --

22 MR. JACKSON: All residential

1 districts.

2 VICE CHAIRPERSON ETHERLY: All
3 residential districts, and further, because of
4 the dimensionality aspect of 2507 or despite
5 the dimensionality aspect of 2507.2, it's the
6 Office of Planning's position that that's not
7 the central focus there.

8 MR. JACKSON: No, and for example,
9 if the area lot did not meet the zoning
10 requirements in terms of size, let's say it
11 was around 40 percent that's allowed under the
12 zoning provisions. If it was next to an alley
13 that was 30 feet wide, it could still be
14 constructed on, but if it's not next to an
15 alley 30 feet wide, no matter how big the lot
16 is it's simply not allowed.

17 VICE CHAIRPERSON ETHERLY:
18 Understood. Thank you.

19 Thank you, Madam Chair.

20 COMMISSIONER JEFFRIES: So you
21 engaged the Applicant on several occasions
22 around this whole business of use versus area?

1 MR. JACKSON: I met the
2 representative on site and at that time we
3 discussed the possibility of it being both
4 ways. It could be either an area or a use
5 variance, but upon further review, we
6 determined it is a use variance.

7 COMMISSIONER JEFFRIES: Yeah,
8 because I couldn't, unless I missed something
9 in your memo, I couldn't make a determination
10 of whether you were saying you were making
11 that differentiation between use and area
12 variance, but okay.

13 MR. JACKSON: Only in the last
14 sentence under existing zoning and relief
15 requested --

16 COMMISSIONER JEFFRIES: Where is
17 that?

18 MR. JACKSON: Let's see. However,
19 2507.2 limits such construction to an alley
20 lot that abuts a 30 foot wide and that such
21 access -- and we explain what that is.
22 Accordingly, the Applicant submitted an

1 application for we refer to it as a use
2 variance. Oftentimes --

3 COMMISSIONER JEFFRIES: Oh, I see.

4 MR. JACKSON: -- in our reports
5 we'll describe the application as submitting
6 a request for relief, and we'll characterize
7 it oftentimes. I'll have to admit in some
8 cases the Applicant hasn't said what kind of
9 relief they wanted, and so probably a more
10 correct writing of that would have been that
11 the Applicant submitted a request for an area
12 variance; however, we think it's a us
13 variance.

14 That would have been clearer.
15 That would have been more clearly stated.

16 CHAIRPERSON MILLER: Are there
17 other questions from the Board for Office of
18 Planning?

19 (No response.)

20 CHAIRPERSON MILLER: Mr.
21 Frumboluti, do you have anything you want to
22 add to this discussion?

1 MR. FRUMBOLUTI: Actually,
2 listening to this discussion I find this very
3 interesting. I'm not an attorney and I don't
4 have 50 years of zoning background, but being
5 an architect and dealing in building
6 buildings, in my opinion this is definitely an
7 area variance because this deals -- area is a
8 multiplication of two numbers, and you know,
9 we deal very often with unusual lots where we
10 try to fit a practical building on that lot,
11 and that's where we ask for an area variance.
12 It has got to do with the geometry of the
13 individual lot.

14 The width of the alley has got
15 nothing to do with the geometry of the lot.
16 Therefore, I support Mr. Nettler's arguments
17 that this is a use variance.

18 Does that make any sense?

19 I mean, excuse me. No, this is --
20 okay. This is not an area variance because
21 area has got to do with area of the lot. I
22 twisted the words around here. Area has got

1 to do with the area of the lot and placing a
2 structure on the lot. Sometimes the lot might
3 be a trapezoid and you're trying to put a
4 house on the lot and you can't meet the side
5 yard requirements, and that's why you ask for
6 an area variance. The width of the alley has
7 got nothing to do with the area of the lot.
8 So, therefore, I think that this needs to be
9 a use variance. That makes sense to me.

10 Did I get it right this time?

11 (Laughter.)

12 MR. FRUMBOLUTI: Okay.

13 CHAIRPERSON MILLER: Mr. Hughes,
14 do you want to make any comments? You don't
15 have to. As a party, you're entitled to
16 participate. Okay.

17 Okay. We want to take about a 15
18 minute break.

19 MR. NETTLER: Could I just add one
20 thing?

21 CHAIRPERSON MILLER: Yeah.

22 MR. NETTLER: Because Mr. Jackson

1 raised something that I thought is worth
2 understanding. In 1966 that he made mention
3 of, the fact that the regulations were
4 changed, is interesting because the 1966
5 change also was from a study that was done by
6 the Zoning Commission because of the
7 difficulty of building affordable housing in
8 the city, and you had these large lots that
9 didn't have street frontage. So they created
10 the theoretical subdivisions that were
11 originally up until 1990 you could be done as
12 a matter of right even though you didn't have
13 street frontage.

14 They, too, were placed into the
15 miscellaneous provisions, again, because they
16 were influenced by a congressional policy
17 about where you should or should not be using
18 lots in the District of Columbia that didn't
19 have street frontage for residential uses, and
20 so it was interesting, a point that I remember
21 that Mr. Jackson has raised, but it's
22 consistent with, again, the idea that this was

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1 all looked at from a use/variance perspective
2 in furtherance of a policy that Congress had
3 first established and the District followed up
4 on.

5 VICE CHAIRPERSON ETHERLY: If I
6 could, Madam Chair, just very quickly because
7 Mr. Nettler referenced it and it was raised in
8 the Applicant's submittal at page number 7 of
9 the statement of the applicant, at the top, if
10 you could, Mr. Nettler, could you refresh my
11 recollection? I believe I might be the only
12 sitting member who was on Temperance Row.

13 Do you recall -- the Manna case --
14 do you recall how the Board -- what standard
15 under which the Board reviewed that case?

16 MR. NETTLER: Use variance.

17 VICE CHAIRPERSON ETHERLY: Use
18 variance.

19 MR. NETTLER: And it denied.

20 VICE CHAIRPERSON ETHERLY: Okay.
21 Thank you.

22 MR. NETTLER: Actually if you look

1 at every application that is listed in the
2 footnote that was in the Applicant's --

3 VICE CHAIRPERSON ETHERLY:

4 Footnote No. 3.

5 MR. NETTLER: -- prehearing
6 statement, right, unless it was a R-4 district
7 or the two cases I mentioned, they were looked
8 at as use variances and they were denied or
9 the Board said they were filed as use
10 variances and because they were in R-4
11 districts and there were existing buildings,
12 they were treated as special exceptions. You
13 know, there's a special exception provision
14 later on in 2507.

15 The interesting thing is only
16 where there was an existing building really
17 was that applied. When you had a vacant lot,
18 but for the one case that's mentioned, use
19 variance denied. It has never been built.

20 VICE CHAIRPERSON ETHERLY: Okay.

21 Thank you, Madam Chair

22 MR. HUGHES: Madam Chair.

1 CHAIRPERSON MILLER: Yes.

2 MR. HUGHES: I don't believe that
3 Mr. Nettler is correct.

4 CHAIRPERSON MILLER: Go ahead.
5 You can add your two cents.

6 MR. HUGHES: In Manna, the
7 Temperance court case, that was -- the
8 Applicant proceeded as an area variance, and
9 they didn't get to the argument of a use
10 variance. I believe that's accurate.

11 MR. NETTLER: I'm sure you can
12 read it yourselves, but --

13 VICE CHAIRPERSON ETHERLY: And
14 just for the purposes of my colleagues, I'm
15 looking at Statement of the Applicant. At
16 page 7 the Applicant discusses Application No.
17 16927 of Public Welfare Foundation, otherwise
18 referred to as Temperance Row.

19 Mr. Nettler's footnote reference
20 is at page 6 at the bottom, Footnote No. 3,
21 the string of cases that's noted by the
22 Applicant in their submittal. So those are

1 the two pages that we were referring to.

2 And, Mr. Hughes, you were saying
3 that you believe it was your recollection that
4 the Board proceeded under an area variance in
5 that case, in the Temperance Row case?

6 MR. HUGHES: The Applicant argued
7 the variance request -- I'm reading a footnote
8 from the order -- as a --

9 CHAIRPERSON MILLER: Sorry. What
10 are you reading from?

11 MR. HUGHES: BZA Order 16927.

12 "The Applicants argued their
13 variance request as a . . . relief sought went
14 to area requirements. However, the
15 prohibition against single family dwellings on
16 these types of alley lots is better analyzed
17 as a use variance because it results in a
18 complete prohibition of a use in these
19 circumstances."

20 In that case the applicant didn't
21 meet the practical difficulty test. So the
22 Board didn't go to the use variance test.

1 It's a very different case.

2 VICE CHAIRPERSON ETHERLY: But
3 would that reading suggest that the Board
4 believed that a use variance would be -- that
5 use variance analysis would be the appropriate
6 one based on what you read?

7 I think if I understand, you're
8 saying the Board didn't get to that point
9 because they failed the practical.

10 MR. HUGHES: I believe that case -
11 - I don't even know. I'd have to go back and
12 look at it.

13 VICE CHAIRPERSON ETHERLY: Okay.

14 MR. HUGHES: But there is a
15 deficiency in a number of the portions of the
16 test, the exceptional difficulty -- I'm sorry
17 -- the exceptional condition of the property,
18 as well as the other prongs of the test.

19 VICE CHAIRPERSON ETHERLY: Okay.
20 The Board might want to pull that one as we
21 talk.

22 Thank you, Madam Chair.

1 MR. NETTLER: I mean, there were
2 area variances as well as a use variance
3 sought in there. You can read it yourselves
4 and you can see. It's set out pretty clearly.

5 MR. HUGHES: But, Madam, before
6 the Board reconvenes in its chambers, Mr.
7 Nettler has suggested only two cases post 1979
8 that the Board has held that the relief
9 requested here is an area variance, and we
10 don't believe that's the case. To the extent
11 we have not provided that, we'll be pleased to
12 do so, but we believe the Board has
13 consistently as recently as 2006 held -- and
14 that would be a conversion case, Application
15 17487 -- which the Board granted an area
16 variance and determined that this was a lot
17 width issue as well, that area variance was
18 the appropriate test.

19 And in terms of the condition
20 about differentiating between the condition of
21 a lot versus the adjacency of a public right-
22 of-way, what have you, there are cases to

1 suggest that -- and I'm looking at the
2 Washington Canoe Club case -- for the
3 direction that in that case the need for
4 advance was inherent in the preexisting
5 condition of land and the adjacent land
6 improvements in the form of the capital --
7 pardon me -- the Capital Crescent Trail, yes.
8 Excuse me.

9 So we don't believe it's limited
10 to simply the condition of the lot. The
11 adjacency of deficient public alleys, we
12 believe, qualify for area variance.

13 CHAIRPERSON MILLER: I just want
14 to ask you further about that. I think that
15 was one of the points that we've heard today,
16 is that this doesn't involve the lot itself,
17 the dimensions of the lot itself. It involves
18 something outside of that.

19 Now, are you saying do you have
20 cases that go to that issue, where area
21 variances were granted with respect to that
22 circumstance where the dimensions weren't an

1 issue on the lot, but it was related to
2 something outside of the lot?

3 MR. HUGHES: Cases at the Court of
4 appeals level or cases --

5 CHAIRPERSON MILLER: Any cases. I
6 mean, I think that --

7 MR. HUGHES: We have a number of
8 cases that have come before the Board
9 involving 2507.2 and the width of the alley
10 where the Board has approved it as an area
11 variance.

12 CHAIRPERSON MILLER: Okay. Other
13 than what you've already referenced. Okay.
14 So we'll look at those.

15 MR. HUGHES: I don't believe so,
16 Madam Chair.

17 CHAIRPERSON MILLER: Okay.

18 MR. HUGHES: But my point -- I'm
19 sorry --

20 MR. NETTLER: In terms of alley
21 lots?

22 MR. HUGHES: -- my point was to

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1 respond to Mr. Nettler's comment that it was
2 a farfetched suggestion on our part that what
3 was impacting the property outside the bounds
4 of the property was somehow not to be
5 considered in the Board's consideration of an
6 area variance. In that case it was frontage
7 on federal land. In this case it's frontage
8 on a public alley.

9 MR. SHER: Madam Chair, if I
10 might.

11 CHAIRPERSON MILLER: Okay.

12 MR. SHER: One quick attempt at
13 response to your question as to factors
14 outside the property. For the record, my name
15 is Steven Sher, Director of Zoning and Land
16 Use Services for the law firm of Holland and
17 Knight.

18 One of the cases that gets cited
19 often involves the National Republican Club
20 property up on Capitol Hill, and one of the
21 factors that the Board found that entitled
22 that property to a variance was its unique

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1 proximity to the Capitol and the institutions
2 of government at that point that that club was
3 there to serve or was in relation to.

4 So I think it's not an alley lot
5 case. It's just a case where the Board looked
6 at factors outside of the property itself to
7 say there are things here that we can look at
8 to determine whether a property is eligible
9 for a variance or not.

10 COMMISSIONER JEFFRIES: What type
11 of variance?

12 MR. SHER: I have to pull the
13 case. IT's here, but --

14 CHAIRPERSON MILLER: I think you
15 might be getting at this whole -- you know, we
16 heard about the whole confluence of factors.
17 You're not necessarily specifically looking at
18 the parameters of the property.

19 MR. SHER: Yes.

20 CHAIRPERSON MILLER: It seems a
21 little different.

22 MR. SHER: We haven't obviously

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1 made the case for that yet, but the question
2 is: what is the case to be made here? And
3 that's what the Board is grappling with at the
4 moment.

5 We believe that there are a number
6 of factors that come together that say why
7 this property is exceptional and affected by
8 extraordinary conditions and is entitled to a
9 variance, but what kind of a variance is the
10 threshold that you're dealing with? And we
11 haven't gotten much beyond that.

12 You posed the question could there
13 be fact -- at least I think I heard the
14 question -- could there be factors outside of
15 the property that would affect whether or not
16 the property itself had an exceptional
17 situation or condition, but I withdraw it.

18 CHAIRPERSON MILLER: I'm sorry.
19 No, I just want to say that's different from
20 what I was saying.

21 MR. SHER: Okay.

22 CHAIRPERSON MILLER: Because the

1 problems weren't -- the problems in those
2 cases really did relate to the lot itself, but
3 there were other factors, a confluence of
4 factors that created additional circumstances,
5 but the area problems I thought were within
6 the parameters of the property. They needed
7 to do something with their property. They
8 needed to expand or they needed -- well, I
9 don't know.

10 Anyway, it just seemed like a
11 point that Office of Planning brought up, too,
12 that there was some distinction here because
13 the problems weren't within the parameters of
14 the property.

15 MR. NETTLER: If I might add --

16 CHAIRPERSON MILLER: But I do know
17 what you're saying, Mr. Sher, and that's kind
18 of a broader area.

19 MR. NETTLER: If I might add, the
20 case that Mr. Sher referred to, I believe, was
21 a use variance. So if he's got the number for
22 it, and there's 17486 was a conversion of an

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1 existing building. There's no discussion in
2 the case about whether it's an area variance
3 or use variance. A self-certified case.

4 MR. HUGHES: It was a summary
5 order, but if the Board would read the
6 transcript it's discussed at the hearing.

7 CHAIRPERSON MILLER: What case are
8 you referring to?

9 MR. HUGHES: This is application
10 17486. Is that not, Mr. Nettler, what you're
11 referring to?

12 MR. NETTLER: Right.

13 CHAIRPERSON MILLER: I think that
14 maybe we should take a break and just decide
15 how we're going to proceed with the rest of
16 the afternoon. So I'm pretty sure it will be
17 at least 15 minutes if you all want to take a
18 walk or anything like that.

19 (Whereupon, the foregoing matter
20 went off the record at 3:35 p.m.
21 and went back on the record at
22 4:19 p.m.)

1 CHAIRPERSON MILLER: Okay. We're
2 back on the record.

3 After having taken a few moments
4 to think about how to proceed, the Board has
5 decided that this is a significant question
6 that seems to have precedential importance,
7 and that we thought it would be the wiser
8 course to take more time and read the cases
9 and consider any other cases that were
10 submitted. Even though some of us or all of
11 us may have certainly had inclinations which
12 way to go, we thought that that would be the
13 better course, and that it would not really
14 prejudice -- and I'd like to hear from the
15 parties -- but we don't think it would
16 prejudice the presentation of the case in
17 general; that the facts would still be the
18 same, and what we're talking about are
19 basically two different standards for
20 evaluation for the second prong, practical
21 difficulty versus undue hardship, and that we
22 thought that you would be able to address --

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1 you could address either both of those points
2 or the higher standard.

3 So do the parties have any
4 concerns about proceeding in that way? Do you
5 have any questions about what I just said?

6 MR. NETTLER: I'll tell you my
7 concern about not having the issue resolved.
8 You're right. The facts are what they are,
9 but because the -- it may seem odd -- but
10 because the Applicant has presented it in a
11 certain context, I don't imagine that they're
12 going to be going forward to deal with it in
13 the context of whether it might be a use
14 variance or present evidence that they feel
15 might be appropriate in presenting it as a use
16 variance.

17 And I think not having that issue
18 resolved really is an inefficient way of
19 trying to deal with the presentation because
20 if they -- and they can certainly speak for
21 themselves -- if they understood that it was
22 a use variance issue, then I would be positive

1 the presentation would be very different, and
2 the facts that they would have to present to
3 you would have to be different, as you
4 understand the standards are different.

5 So I'm not sure that's the most
6 efficient way, is to go forward with what
7 facts they have that deal with a practical
8 difficulty when practical difficulty may be
9 irrelevant and the hardship component is
10 relevant.

11 CHAIRPERSON MILLER: Okay. Let me
12 just interrupt you for a second. Okay?
13 Because I think it is key what the Applicants
14 want to do.

15 Applicants have filed an
16 application, and you challenged the type of
17 variance. So I guess Applicants are free to
18 proceed with their application. However, they
19 choose, knowing that Mr. Nettler's party has
20 challenged the type of variance you should be
21 seeking.

22 So it really is up to the

1 Applicant. Do you want to proceed with this
2 question outstanding or not?

3 MR. HUGHES: Madam Chair, I
4 believe Mr. Nettler is correct in saying we
5 are prepared to present an application for an
6 area variance, as that is our position that
7 what we require is an area variance. We're
8 not -- the examination of permitted uses of
9 the property in the different direction, the
10 use variance examination of the case is very
11 different than what we have prepared to
12 discuss, which is residential use of the
13 property consistent with the zoning.

14 And so I don't believe we are
15 prepared tonight to go forward with the
16 discussion that there's no other possible use
17 of the property. So if the Board wishes to
18 leave the question open, we would perhaps
19 request an extension of time to prepare that
20 case.

21 CHAIRPERSON MILLER: So are you
22 saying that -- okay. I didn't think that

1 would be your reaction. Okay? So let me just
2 say it this way. You know, say that the Board
3 were to go back and spent the next 45 minutes
4 or whatever double checking some of the cases
5 that were cited or whatever and came back and
6 said, "Okay. The Board sees this as a use
7 variance," would that mean that you would be
8 withdrawing your application?

9 MR. HUGHES: We wouldn't be
10 withdrawing the application. What we would --
11 we would be willing to proceed with the
12 application tonight. What I'm suggesting is
13 that we believe that it's an area variance,
14 and that is the testimony we're prepared to
15 provide tonight, although we could address the
16 question of undue hardship and self-imposed
17 hardship, et cetera, if the Board were so
18 inclined.

19 COMMISSIONER JEFFRIES: So you
20 would not withdraw. I mean, if we walked
21 away, came back in an hour and said, "We see
22 this as a use variance," then obviously you're

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1 not prepared today to argue a case around a
2 use variance.

3 But you would come back in the
4 future?

5 MR. HUGHES: I'm sorry, Mr.
6 Jeffries. That would be our preference.
7 That's what I was suggesting.

8 COMMISSIONER JEFFRIES: Okay.

9 VICE CHAIRPERSON ETHERLY: And
10 just to kind of jump into the fray here, one
11 of the things that was being contemplated in
12 my head is as I look at your submittal, your
13 statement of the -- your Applicant statement,
14 at page 13 you speak to actually pages 12
15 through 13 where you discuss Russell
16 primarily, a little bit of Tyler, but
17 primarily it's Russell v. BZA. There's a
18 discussion mostly on page 13 that speaks to a
19 little bit of the interplay between undue
20 hardship and practical difficulty.

21 And to an extent, I took that
22 discussion to suggest perhaps that there had

1 been some contemplation of how that argument,
2 if it were to be made, i.e., a use variance,
3 was teed up and perhaps ready to move forward.

4 So I think I'm probably just
5 reiterating what you've already said. It
6 would be your stance that you're not ready at
7 this point to move forward with a use variance
8 discussion today, definitely could, of course,
9 move forward with area variance, but you'd
10 need another hearing date to move through the
11 use variance discussion adequately.

12 MR. HUGHES: Yes.

13 COMMISSIONER LOUD: I'd like to
14 ask a question, and I think I understand your
15 position on it much more clearly as a result
16 of Mr. Etherly's question, but just so I'm
17 crystal clear on it, the way you're
18 approaching the problem and the way you're
19 looking at it is that you see a significant
20 difference or you see a difference period in
21 presenting a case for undue hardship on these
22 facts and presenting a case for practical

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1 difficulty on these facts.

2 In other words, to meet the lesser
3 threshold practical difficulty, you would not
4 necessarily automatically extend into undue
5 hardship just by the nature of these facts.

6 For me as a Board member
7 reflecting on our discussion earlier this
8 afternoon and looking at the file, the land
9 appears as though it would be worthless under
10 a certain set of scenarios either way, and so
11 that the difference between what you would
12 present as an undue hardship and what you
13 would present as a practical difficulty is not
14 all that clear, but I'm assuming that to you
15 it's very, very clear.

16 I just wanted you to sort of
17 elaborate on that.

18 MR. HUGHES: We believe that the
19 property is rendered virtually useless under
20 the regulation. It's more of an issue -- I
21 think Mr. Nettler has spoken just a little bit
22 to it. It's a product of Court of Appeals

1 review of past cases differentiating use and
2 area variances and implications upon a self-
3 imposed hardship, if you will, that are not
4 relevant to an area variance.

5 And as I said at the beginning, we
6 represent the contract purchaser of a
7 property. Alley Cat Mews is the current
8 owner, and we've been authorized to proceed
9 with this application. So I'd like some
10 opportunity to review that aspect of the
11 issue.

12 We do believe that the practical
13 impact of this regulation is that the use that
14 it is -- the otherwise applicable residential
15 zoning of the property is not permissible
16 without variance from this provision or some
17 sort of action by the District to widen that
18 alley and make it thereby compliant. I mean,
19 that's just a hypothetical. Those are the
20 alternatives that we have for any use of this
21 property, any residential use of this
22 property.

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1 However, what we haven't focused
2 on is what are other permitted uses of the
3 property that would thus make it an undue
4 hardship or, as the Court of Appeals has
5 addressed, that's a higher standard. That's
6 a higher burden we need to meet, and we need
7 to focus on that. What are other
8 nonresidential uses perhaps that could be
9 developed on that site?

10 There are some, but there are
11 other --

12 CHAIRPERSON MILLER: Okay. But
13 Greenpeace filed their filing a while ago. So
14 weren't you on notice that we could decide
15 that it was a use variance? You wouldn't have
16 been ready to proceed today?

17 This isn't a surprise. I guess we
18 were looking at it thinking just the standard
19 was different, that your proof wouldn't be so
20 different.

21 VICE CHAIRPERSON ETHERLY: And as
22 a jump-in to the Chair's question, it sounds

1 like you are saying based on your review of
2 the undue burden, undue hardship case law,
3 you're contemplating that you would perhaps
4 have to present evidence or proof that there
5 is no use, no developable use that you could
6 put the property to, not just that you can't
7 use it for residential purposes, but that
8 under the due burden test, you would
9 conceivably have to show that there's nothing
10 you could do with it at all, and you're not
11 prepared to do that today.

12 And that's more of a hypothetical
13 because I don't want to speak as if that is
14 the test, because as the Chair has indicated,
15 we haven't begun to dig into the undue burden
16 stuff yet, but again, I perhaps was guilty
17 of -- in reading page 13, thought perhaps you
18 had perhaps already contemplated some of the
19 undue hardship stuff, and it sounds like
20 clearly you may have, but you're not prepared
21 to go into it in great detail today.

22 MR. HUGHES: To answer your

1 question, that's correct, and that would be
2 our preference, Madam Chair, is to address --
3 understanding that the Board keeps an open
4 question as to what direction it's going to
5 go, we would like an opportunity to better
6 prepare testimony to present that prong of the
7 use variance test since the Board is
8 considering that as an open question.

9 And if the Board decides the issue
10 tonight, we would still request an additional
11 opportunity to prepare that because, again, we
12 do believe it to be properly before you as an
13 area variance.

14 CHAIRPERSON MILLER: I just want
15 to ask Mr. Nettler if you have any other
16 comments on this because I'm a little bit
17 surprised because I thought that you would be
18 prepared to go forward anyway, given that that
19 issue was raised before the hearing.

20 But, Mr. Nettler, do you have an
21 opinion? I think you said something like --
22 I don't know. Go ahead. What's your opinion

1 on that? I won't characterize it.

2 MR. NETTLER: I'm not surprised, I
3 guess is one way of saying it. I understand
4 what Mr. Hughes is saying. I do believe it
5 would be more efficient for the case and maybe
6 other considerations may be taken into place
7 upon reflection that may be more beneficial to
8 the Board's time as well, but obviously we
9 have our position in terms of a use variance,
10 and if you're going to take the time to
11 resolve that issue and then allow them to
12 proceed after resolving that issue, I
13 obviously gave you the other BZA decision
14 number so that you'd have all of those, not
15 only the ones that are post 1979, but as well
16 as the pre-'79 cases and the ones that we had
17 cited in our letter.

18 But I think it's more efficient to
19 have a resolution of the issue.

20 COMMISSIONER JEFFRIES: Well, as
21 it relates to sort of where I sit with the
22 case at this point, I mean, you know, I have

1 always sort of reviewed area variances in a
2 very strict way, and that is the four corners
3 of the site and, you know, never really
4 considering sort of adjacent alley or road
5 that's somehow impacting upon what can be
6 built on that site.

7 And so I really from where I sit,
8 I mean, I'm moving more toward the use
9 variance, and I'm doing this just so that the
10 Applicant can, you know, start to think about
11 some things as they go back and revisit.

12 But I have to say that, you know,
13 I'm having some difficulty with figuring out
14 what some of your arguments will be for sort
15 of a use variance for the site. So I'm in a
16 bit of a quandary in that sense.

17 But I just, you know, want to be
18 clear that at least on my end that, you know,
19 it would be very helpful for this Board to
20 really make certain that we make an informed
21 decision and that, being one of the non-
22 attorneys up here, that we're clear on, you

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1 know, the legal precedence for this. I think
2 it could be a very important case and that we
3 need to, I think, move somewhat cautiously
4 before we make a determination here.

5 So I would really like to see some
6 of the -- review some of the former cases and
7 just be clear about, you know, how the BZA has
8 looked at cases like this before before we
9 make the decision. But I just wanted to make
10 certain that the Applicant understood that,
11 you know, based on what I've heard today, I'm
12 leaning more towards the use, but you know,
13 I'm still reasonably open.

14 VICE CHAIRPERSON ETHERLY: And I'd
15 like to echo Mr. Jeffries' concerns. I mean,
16 I don't know if this is perhaps leaning toward
17 advocating for have we reached the limit of
18 what we can do today, given what we're
19 hearing, because we've got a lot of people in
20 the room, people who have taken time out of
21 their days to come here and get your opinions
22 heard and on the record, and I know this Board

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1 is very sensitive to that.

2 But Mr. Jeffries hit it right on
3 the head. It's a very important question.
4 I've gone back and forth from reading the
5 submissions to what we've heard here, and I'm
6 probably with Mr. Jeffries leaning towards a
7 use variance, especially based on what I've
8 heard from the Office of Planning.

9 But as I've shared with my
10 colleagues and as we've talked about it here
11 in the course of our hearing, for me there's
12 some tension between the notion of a use
13 variance for residential use in an underlying
14 residential district.

15 Still understanding and hearing
16 what the Office of Planning has argued,
17 hearing what Mr. Nettler has offered, I think,
18 in very excellent detail, and taking into
19 consideration the Applicant has offered,
20 there's not clarity necessarily, and I think
21 for us to move forward there will need to be
22 on this issue.

1 There's part of me which is
2 inclined to just put my head down and say,
3 "Look. Let's just go with use variance and do
4 it today and make use of what we have here."
5 But because it is such a critical question
6 and, again, because to an extent there's that
7 tension of we're talking about a residential
8 use in an underlying residential district now
9 being deemed to be a use variance conceivably
10 or possibly, it's tough. It's very, very
11 tough, and so it's not something I want to
12 venture into lightly.

13 So to the extent I'll definitely
14 associate myself with the remarks of Mr.
15 Jeffries here and perhaps that just offers a
16 little bit of context for many of the members
17 of the parties in opposition and just members
18 of the community here in terms of why are we
19 now spending 20 minutes kind of talking about
20 where we are when we've just spent 20 minutes
21 being inside talking about it some more.

22 But it's a very difficult question

1 that's been raised that has a lot of
2 ramifications for the future. As you've
3 heard, we've talked about previous cases where
4 this Board has dealt with alley development.
5 It's going to be an issue that I think is only
6 going to get bigger as people begin to look
7 more towards alleys for residential
8 reprogramming or other uses.

9 So I'll just echo Mr. Jeffries'
10 concerns, but it's a tough call because I
11 recognize that folk have been here for a while
12 today looking to move towards closure on this.

13 So there you go, Madam Chair.

14 CHAIRPERSON MILLER: Okay. Now we
15 need to decide how to proceed. So it appears
16 that the Board will take under consideration
17 the type of variance that it's going to
18 determine that this is, and I would like to
19 leave open the record and invite counsel to
20 submit any more authority, such as what was
21 referenced today that might not be in the
22 record so far and other case law, and the

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1 Board will thoroughly examine all of that
2 information and come up with a decision.

3 First of all, I guess we need to
4 decide how much time we need to do that.

5 (Pause in proceedings.)

6 CHAIRPERSON MILLER: Okay. The
7 Board has scheduled next Tuesday a meeting
8 anyway. So we're willing to add to our
9 agenda. It's nothing that you all will
10 participate in, but a ruling on this. It
11 wasn't a motion, but it's like a motion, what
12 type of variance is at issue in this case.

13 So we would need your authority,
14 additional authority, as soon as possible.
15 When would that be, Ms. Bailey? Thursday or
16 Friday?

17 MS. BAILEY: Friday. Friday is
18 the 28th of September.

19 MR. NETTLER: I didn't hear.

20 CHAIRPERSON MILLER: You've
21 already briefed it, I understand. So this is
22 just supplemental. Okay? So we don't want to

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1 slow you all down too much.

2 So if you will submit that by
3 Friday, we will consider it over the weekend
4 and Monday, and we'll rule on this on Tuesday
5 next week.

6 MR. NETTLER: Do you want me to
7 give you copies of the ones I've referenced or
8 do you want me to just reference the number
9 since you can access them on the Internet, or
10 what would you like?

11 CHAIRPERSON MILLER: Copies.

12 MR. NETTLER: Copies? Okay.

13 CHAIRPERSON MILLER: Well, if you
14 can. No, I mean, it's preferable.

15 MR. NETTLER: I can make copies.

16 CHAIRPERSON MILLER: Okay. Since
17 the turnaround is quick with the Office of
18 Zoning, too, that would be great.

19 Okay. Then we have a couple of
20 other procedural issues I just want to confer
21 with the parties on. One is we notice that
22 there are a lot of people in the audience, and

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1 we don't normally just ask you this. We don't
2 know whether you want anyone to testify at
3 this point in the case or not. There was
4 conjecture here that the testimony might go to
5 impacts or if there are individuals who might
6 have some burning need to testify today.

7 Normally we don't like to go out
8 of schedule. I only raise it because there
9 are a lot of people here and we have time to
10 hear somebody, but you know, if somebody is
11 going out of the country and this is the only
12 time they can testify or something like that.

13 Yes.

14 MR. FRUMBOLUTI: I was wondering
15 if I could give my testimony today because I
16 do make numerous trips out of the country, and
17 I might not be around for the next time. I
18 mean the other option is to have another
19 Commissioner come in and do it. So I mean,
20 it's not imperative, but you know, I'm
21 volunteering if it's practical.

22 CHAIRPERSON MILLER: Okay, and

1 there are two things. I want to hear if there
2 are any objections from counsel for the other
3 parties, from the other party, and then we
4 also would need to pick a new date. Is that
5 right?

6 Let me ask the Applicant this.
7 Were the Board to decide that this is a use
8 variance, it would affect your preparation, I
9 understand, and how you want to proceed. So
10 would you be wanting to pick a date today for
11 the next hearing in any event?

12 MR. HUGHES: We would like that,
13 yes.

14 CHAIRPERSON MILLER: Okay. So we
15 could pick a date in any event. Okay.

16 Mr. Moy, if you wanted to take
17 longer to look at the calendar, we could
18 proceed with Mr. Frumboluti.

19 Okay. I want to see if there's
20 any objection to taking the ANC out of order
21 in this case, given that it's not clear what
22 exactly the application is going to be, but it

1 is for the same piece of property, a variance.
2 What's your opinion on that?

3 MR. HUGHES: I have no opposition.
4 Am I understanding that Mr. Frumboluti likely
5 won't be -- if he is in the country or someone
6 will be participating on behalf of the ANC
7 when we reconvene the hearing or is this --

8 Mr. Frumboluti?

9 MR. FRUMBOLUTI: Yes, if I am not
10 here, we'll have somebody else from the ANC
11 here in my place. However, I am the -- this
12 is my district, and being an architect, I have
13 more knowledge of this kind of case than some
14 of the other members of the commission.

15 CHAIRPERSON MILLER: May I ask you
16 one other question? Do you want to wait first
17 and see what date we come up with?

18 MR. FRUMBOLUTI: My problem is
19 that I don't know. I don't get a lot of
20 notice sometimes when I have to leave the
21 country. It's either way. I mean, you know,
22 we can go either way. I'm just offering.

1 CHAIRPERSON MILLER: All right. I
2 think since there aren't any objections and
3 you have that circumstance you can proceed
4 with your testimony and then we'll set a date
5 after that.

6 MR. FRUMBOLUTI: Okay. Thank you
7 very much.

8 I'm just going to excerpt from the
9 letter that we wrote to you on June 22nd. So
10 here goes.

11 The Zoning Board is authorized to
12 grant variance for the applicant for the
13 variance that meets the three-prong test set
14 out in 11 DCMR, Section 3103.2. The test
15 requires that the applicants demonstrate that,
16 one, the property is unique because of its
17 size, topography or other extraordinary or
18 exceptional situation or condition inherent in
19 the property; two, strict application of the
20 zoning regulations will cause undue hardship
21 or a practical difficulty; or, three, the
22 granting of the variance will do no harm to

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1 the public good.

2 As you know, the variance at issue
3 seeks relief from zoning regulation 2705.2,
4 which states the following: "one family
5 dwelling shall not be erected or constructed
6 on an alley lot unless the alley lot abuts an
7 alley 30 feet or more in width and has from
8 the alley access to a street through an alley
9 or alleys not less than 30 feet in width."

10 The proposed building would be on
11 an alley approximately 20 feet in width and
12 thus fails to meet this regulation.

13 Okay. With respect to the first
14 prong of the variance test, the Applicant
15 offered that its property was unique for the
16 following reasons. The subject property is
17 affected by an extraordinary and exceptional
18 condition in that it is bounded on all three
19 sides by public alleys that are less than 30
20 feet in width.

21 Thus, according to the Applicant,
22 the alley lot is, in effect, unique because it

1 is the exact type of property that the zoning
2 regulation at issue targets. If the BZA
3 grants this application, the effect will be a
4 de facto amendment of the zoning regulations
5 by BZA because requests by other owners
6 similarly situated would have to be granted
7 the same relief.

8 So basically what we're saying is
9 other alley lots throughout the city in this
10 same situation would automatically be
11 grandfathered into this, which we think is a
12 real problem.

13 Second, there is no undue hardship
14 or practical difficulty here. Less than two
15 months after the Applicant bought the property
16 for \$36,000, the neighbors offered him \$47,000
17 for its sale. This was a 25 percent profit
18 right off the bat.

19 The Applicant agreed to buy the
20 property fully knowing the zoning regulations
21 in place and immediately put the property up
22 for sale at a price that is 350 percent

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1 greater than his own purchase price. The
2 Applicant's failure to get the 350 percent
3 price in a six month period does not represent
4 a hardship.

5 So the ANC sees absolutely no
6 hardship case here. The Applicant knew
7 exactly what he was doing when he bought that
8 piece of property.

9 Third, the granting of the
10 variance will do harm to the public good and
11 to the zone plan. As the BZA stated in its
12 decision on Application No. 16550, since the
13 subject property is completely surrounded by
14 alleys, the front yard of the proposed
15 dwelling would face the rear yards of existing
16 dwellings, a configuration that is undesirable
17 with respect to urban design, marketability,
18 and the privacy of existing back yards. The
19 introduction of such housing into the middle
20 of the alley lot would lower the value of
21 adjacent properties and destabilize the
22 neighborhood.

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1 Just imagine leaving this house at
2 12 o'clock at night to walk down to the
3 theater or something like that and have to
4 walk down a dark alley, you know, surrounded
5 by trash cans. It's not cognizant to good
6 urban planning.

7 This is exactly the undue hardship
8 faced by the neighbors if the variance is
9 granted. Also, fire and other emergency
10 vehicles require roadways that are 30 feet
11 wide. Granted the variance would create a
12 significant fire hazard not only for such a
13 home, but for neighbors as well.

14 In short, the requested variance
15 does not by any stretch of the imagination
16 satisfy any of the requirements of the three-
17 pronged test. We respectfully request that
18 the BZA decline the request for a variance.

19 CHAIRPERSON MILLER: Thank you.

20 Are there questions from the
21 Board?

22 (No response.)

1 CHAIRPERSON MILLER: Cross-
2 examination by the Applicant?

3 MR. HUGHES: No, Madam Chair.

4 CHAIRPERSON MILLER: Cross-
5 examination by Mr. Eads?

6 MR. EADS: Yes.

7 CHAIRPERSON MILLER: Mr. Etherly,
8 do you have a question?

9 VICE CHAIRPERSON ETHERLY: Just
10 very quickly. Thank you very much, Madam
11 Chair.

12 Mr. Frumboluti, is it?

13 MR. FRUMBOLUTI: Right.

14 VICE CHAIRPERSON ETHERLY: Thank
15 you very much for your testimony.

16 Real quickly, is it your sense
17 that there would be no structure of any sort
18 that would be appropriate for this lot?

19 That's a fairly broad question,
20 perhaps not necessarily one grounded in the
21 zoning regs., but I'm just kind of -- perhaps
22 from just a general opinion standpoint at this

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1 time.

2 MR. FRUMBOLUTI: Well, you know,
3 at risk of getting some wrath from some of the
4 neighbors, you know, I think a garage would be
5 appropriate on a lot such as that. I mean,
6 it's permitted by the zoning regulations, and
7 I think also artist studios are permitted.

8 VICE CHAIRPERSON ETHERLY: That's
9 correct, and that was kind of precisely what
10 I was --

11 MR. FRUMBOLUTI: What worries me
12 about an artist's studio is that a developer
13 could build an artist studio that's really a
14 house. Of course, he wouldn't have an
15 occupancy permit, but so I'm a little nervous
16 about the artist studio, but you could see
17 garages there.

18 But, you know, I don't think
19 parking is a big -- I'm not sure how big a
20 deal parking is in this area. So I'm not sure
21 that's necessarily a viable option either. I
22 think the best option for this site is for the

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1 owner to sell it to the neighbors at a nice 25
2 percent profit and let the neighbors enjoy it
3 as a park.

4 I mean, if you walk back there,
5 it's just a beautiful, beautiful space, and
6 the children of the neighbors have been
7 playing there for many, many years, and with
8 the expectation they would continue to do so
9 in the future.

10 VICE CHAIRPERSON ETHERLY: Okay.
11 Thank you.

12 Thank you, Madam Chair.

13 CHAIRPERSON MILLER: I'm just
14 wondering did the neighbors try to buy the
15 property to begin with? Not from this owner,
16 but from the previous owner?

17 MR. FRUMBOLUTI: I don't know. I
18 can't go through the whole history. Maybe --

19 MR. EADS: I know the history. I
20 was going to get into that some in my
21 testimony, but the Hozmers who owned the lot
22 from the early 1940s moved away from the

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1 neighborhood many years ago. They live out in
2 the Pacific Northwest, I believe, somewhere,
3 and the son of the family would come back
4 occasionally to tend to the lot and all.

5 And we had told him several times
6 that we would be willing to buy it if it ever
7 came on the market. He suffered a heart
8 attack about 18 months ago, and at that point,
9 I guess, Ms. Hozmer decided that she was
10 willing to sell, but she didn't contact
11 anybody, to my knowledge, in the
12 neighborhood.

13 The first we knew about it was
14 when we got the letter from Alley Cat Mews
15 saying they had bought it.

16 CHAIRPERSON MILLER: Okay. Any
17 other questions?

18 COMMISSIONER LOUD: Just one,
19 Madam Chair. I'd like to ask for a copy of
20 the Commissioner's testimony. I don't have
21 it. Other Board members may have it. I'm not
22 certain, but just for -- okay.

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1 MR. FRUMBOLUTI: I brought a copy
2 with me. I can give that to you.

3 COMMISSIONER LOUD: Okay. I think
4 you would give it to Ms. Bailey.

5 MR. FRUMBOLUTI: It is the
6 unabridged version of the letter. I basically
7 abridged the letter that the ANC wrote to the
8 Board.

9 COMMISSIONER LOUD: Okay.

10 CHAIRPERSON MILLER: Okay. We
11 don't have that in our record, but we will.

12 All right. Okay. So that being
13 done, I think at this point we're going to
14 pick a date to continue the rest of the
15 hearing, and that would be if you all are
16 available, December 11, third in the
17 afternoon. Yes, December 11, third in the
18 afternoon.

19 (Pause in proceedings.)

20 CHAIRPERSON MILLER: Let me say
21 this. In the event that the Board determines
22 that a use variance is what's at issue, then

1 I would expect from what you've said that you
2 would be -- would you be amending your
3 application or not, or would it just affect
4 your presentation?

5 If you don't know, I was just
6 going to say that there would be filing
7 deadlines again if you were going to amend
8 your application.

9 MR. HUGHES: Madam Chair, I
10 believe we would just file a prehearing
11 statement two weeks in advance of that date.

12 CHAIRPERSON MILLER: Okay. Ms.
13 Bailey, do you just want to check what date
14 that is?

15 And this is somewhat speculative,
16 but just so that the parties know what date
17 would apply in the event the application is
18 changed.

19 MS. BAILEY: Madam Chair, it's 14
20 days prior to the hearing. So let's see. It
21 would be due on Wednesday, November 28th.

22 CHAIRPERSON MILLER: Okay. That

1 would be if there's a change. If there's not
2 a change, you wouldn't have that filing
3 deadline.

4 Okay. I don't think we have any
5 notice issues here because everyone was
6 prepared to go supposedly today I mean,
7 however it was determined on this legal
8 question. So it's the same property variance.

9 Okay. Any other questions?

10 (No response.)

11 CHAIRPERSON MILLER: Okay. Then
12 we'll wait for your authority. The record is
13 open through Friday for the parties to submit
14 any further authority on the issue of whether
15 this is a use or an area variance. That's in
16 the form of any cases or whatever, any other
17 kind of written material filings, whatever.
18 But you have already briefed this anyway, but
19 I just wanted you to know that the record is
20 open because that's kind of an important
21 question that will determine the future of
22 this case.

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1 Okay. Anything else?

2 (No response.)

3 CHAIRPERSON MILLER: Well, thank
4 you very much.

5 (Whereupon, at 4:55 p.m., the
6 public hearing was concluded.)