

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY  
NOVEMBER 6, 2007

+ + + + +

The Public Hearing convened in Room 220 South, 441 4<sup>th</sup> Street, N.W., Washington, D.C., 20001, pursuant to notice at 1:00 p.m., Ruthanne G. Miller, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

RUTHANNE G. MILLER, Chair  
MARC D. LOUD, Mayoral Appointee  
SHANE DETTMAN, NCPC

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary  
BEVERLEY BAILEY, Sr. Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.

The transcript constitutes the minutes from the Public Hearing held on November 6, 2007.

APPEARANCES :On Behalf of Harris Teeter:

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

2 1:25 p.m.

3 CHAIR MILLER: This hearing will  
4 please come to order.

5 Good afternoon, ladies and  
6 gentlemen. This is the November 6th Public  
7 Hearing of the Board of Zoning Adjustment of  
8 the District of Columbia.

9 My name is Ruthanne Miller. I'm  
10 the Chair of the BZA. Joining me today is Mr.  
11 Marc Loud to my left, Mayoral Appointment and  
12 next to him is Mr. Shane Dettman representing  
13 NCPC on the BZA. Next to him is Mr. Clifford  
14 Moy from the Office of Zoning, Lori Monroe  
15 from the Office of Attorney General and  
16 Beverley Bailey from the Office of Zoning.

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

20 Please be aware that this  
21 proceeding is being recorded by a court  
22 reporter and is also webcast live.

1 Accordingly, we must ask you to refrain from  
2 any disruptive noises or actions in the  
3 hearing room.

4 When presenting information to the  
5 Board, please on and speak into the microphone  
6 first stating your name and home address.

7 When you are finished speaking, please turn  
8 your microphone off so that your microphone is  
9 no longer picking up sound or background  
10 noise.

11 All persons planning to testify  
12 either in favor or in opposition are to fill  
13 out two witness cards. These cards are  
14 located to my left on the table near the door  
15 and on the witness table.

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

19 On today's agenda is one appeal.  
20 So, I'll be reading the procedures for appeal  
21 applications.

22 The order of procedure for appeal

1 applications will be as follows. One,  
2 statement and witness of the applicant. Two,  
3 the Zoning Administrator or other government  
4 official's case. Three, case for the owner,  
5 lessee or operator of the property involved if  
6 not the appellant. Four, the ANC within which  
7 the property is located. Five, intervener's  
8 case if permitted by the Board. Six, rebuttal  
9 and closing statement by appellant.

10 Pursuant to Section 3117.4 and  
11 3117.5, the following time constraints may be  
12 maintained. The applicant/appellant persons  
13 and parties except an ANC in support including  
14 witnesses 60 minutes collectively. Appellees,  
15 persons and parties except an ANC in  
16 opposition including witnesses 60 minutes  
17 collectively. Individuals three minutes.

18 These time restraints do not  
19 include cross examination and/or questions  
20 from the Board. Cross examination of  
21 witnesses is permitted by the applicant or  
22 parties.

1           The ANC within which the property  
2           is located is automatically a party in a  
3           special exception or variance case and in an  
4           appeal case.

5           Nothing prohibits the Board from  
6           placing reasonable restrictions on cross  
7           examination including time limits and  
8           limitations on the scope of cross examination.

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

18          The Sunshine Act requires that the  
19          public hearing on each case be held in the  
20          open before the public. The Board may  
21          consistent with it's rule of procedure and the  
22          Sunshine Act enter executive session during or

1 after the public hearing on a case for  
2 purposes of reviewing the record or  
3 deliberating on the case.

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

10 Please turn off all beepers and  
11 cell phones at this time as not to disrupt  
12 these proceedings.

13 The Board will make every effort  
14 to conclude the public hearing as near as  
15 possible to 6:00 p.m. If the afternoon case  
16 is not completed at 6:00 p.m., the Board will  
17 assess whether it can complete the case  
18 remaining on the agenda.

19 At this time, the Board will  
20 consider any preliminary matters. Preliminary  
21 matters are those that relate to whether a  
22 case will or should be heard today such as

1 request for postponement, continuance or  
2 withdrawal or whether proper and adequate  
3 notice of the hearing has been given. If  
4 you're not prepared to go forward with a case  
5 today or if you believe that the Board should  
6 not proceed, now is the time to raise such a  
7 matter.

8 Does the Staff have any  
9 preliminary matters?

10 MS. BAILEY: Madam Chair, Members  
11 of the Board, to everyone, good afternoon.

12 There are preliminary matters,  
13 Madam Chair. The Staff is going to suggest  
14 that the witnesses be sworn in and the case be  
15 called prior to taking up those preliminary  
16 matters.

17 CHAIR MILLER: Thank you. Yes, I  
18 would concur as we only have one case on our  
19 agenda today.

20 So, let us proceed with the agenda  
21 and would all individuals wishing to testify  
22 today please rise to take the oath.

1 MS. BAILEY: Would you please  
2 raise your right hand? Do you solemnly swear  
3 or affirm that the testimony that you will be  
4 giving today will be the truth, the whole  
5 truth and nothing but the truth?

6 (I do.)

7 MEMBER LOUD: Madam Chair, before  
8 we proceed further, there is a matter.

9 CHAIR MILLER: Well, let me do  
10 this. I know that you have something to do as  
11 a very preliminary matter.

12 MEMBER LOUD: Okay.

13 CHAIR MILLER: I think Ms.  
14 Bailey's going to call the case and then --

15 MEMBER LOUD: Okay. Just wanted  
16 to make sure.

17 CHAIR MILLER: Right. Okay.

18 MEMBER LOUD: All right.

19 MS. BAILEY: Madam Chair, there  
20 are two appeals 17675 and 17677. Both of the  
21 cases have the same address. They're located  
22 in the same square and they also have the same

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1 lot number.

2 Would the Chair like for me to  
3 call both of them at the same time?

4 CHAIR MILLER: Yes, and I think  
5 there is a motion to consolidate as well.

6 MS. BAILEY: Thank you.

7 SPEAKER: Can I speak to that  
8 motion?

9 CHAIR MILLER: You'll have every  
10 opportunity to speak to the motions, but wait.  
11 We'll go in order.

12 MS. BAILEY: Okay. The first is  
13 17675, appeal of Reed-Cooke Neighborhood  
14 Association pursuant to 11 DCMR 3100 and 3101  
15 from the decision of the Zoning Administrator  
16 to allow off-premises alcoholic beverage sales  
17 as an accessory use to a Harris Teeter grocery  
18 store. Appellant alleges that the use  
19 violates subsection 1401.1(b) of the Zoning  
20 Regulations. The property is located in the  
21 Reed-Cooke C-2-B District at premises 1641  
22 Kalorama Road, N.W., Square 2572, Lot 36.

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1                   Secondly, it's Appeal Number 17677  
2                   and it's the appeal of L. Napoleon Cooper  
3                   pursuant to 11 DCMR 3100 and 3101 from the  
4                   decision of the Zoning Administrator to allow  
5                   off-premises alcoholic beverage sales as an  
6                   accessory use to a Harris Teeter grocery  
7                   store. Appellant alleges that the use  
8                   violates subsection 1401.1(b) of the Zoning  
9                   Regulations. The property is located in the  
10                  Reed-Cooke C-2-B District at premises 1641  
11                  Kalorama Road, N.W., Square 2572, Lot 36.

12                  CHAIR MILLER: Thank you. Okay.  
13                  How I'd like us to proceed initially is I  
14                  would like the parties to introduce themselves  
15                  for the record and then I would like Mr. Loud  
16                  to address and issue that he'd like to address  
17                  and then we'll turn to the motions that are  
18                  pending.

19                  MS. WOOLRIDGE: Good afternoon.  
20                  My name is Doris A. Parker Woolridge. I'm an  
21                  Assistant Attorney General for DCRA.

22                  MS. BOLLING: Good afternoon.

1 Melinda Bolling, Assistant Attorney General  
2 for DCRA.

3 MR. LEGRANT: I'm Matthew LeGrant.  
4 I'm the Zoning Administrator, District of  
5 Columbia. I work for DCRA.

6 MR. GLASGOW: Norman Glasgow, Jr.  
7 of the law firm of Holland & Knight  
8 representing the property owner.

9 MR. COOPER: Napoleon Cooper,  
10 Appellant 17677.

11 MR. LYDEN: Peter Lyden, 1726  
12 Euclid Street, N.W., Washington, D.C. and I am  
13 representing the Reed-Cooke Neighborhood  
14 Association, 17675 the case.

15 MR. REYNOLDS: Good afternoon,  
16 Board. I'm Wilson Reynolds representing  
17 District 07 of Advisory Neighborhood  
18 Commission 1C.

19 CHAIR MILLER: Okay. So, Mr.  
20 Loud, would you like to address your --

21 MEMBER LOUD: Good afternoon and  
22 thank you, Madam Chair. As I alluded to

1 earlier, I wanted to state something on the  
2 record for all of the parties and my  
3 colleagues on the Board. I am, as some of you  
4 know, the Executive Director of the Gateway  
5 Georgia Avenue Revitalization Corporation  
6 which is a nonprofit CDC operating along the  
7 far northern end of Georgia Avenue starting at  
8 Walter Reed Hospital and moving north into  
9 Silver Spring, Maryland.

10 And in that capacity, I have  
11 occasion to have various communications with  
12 the property owners that operate in that  
13 commercial district and one of the property  
14 owners is Douglas Jemal who owns the property  
15 at Georgia and Eastern called the Jemal Mini  
16 Plaza and those communications include such  
17 things as requests for graffiti to be removed  
18 from the properties when they're tagged with  
19 graffiti or also requests to -- request and/or  
20 referrals of potential tenants when there are  
21 vacancies in his properties that reflect what  
22 the communities along that strip of Georgia

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1 Avenue say they would like to see in the area.

2 Most recently, about three weeks  
3 ago, I did refer to Mr. Jemal a request from  
4 Aced Hardware, I'm sorry, Ace Hardware which  
5 had been looking for space or inquiring about  
6 space along upper Georgia Avenue so that he  
7 could take that information and follow up with  
8 it as appropriate.

9 That being said, I don't believe  
10 that there's any reason that I could not be  
11 fair and impartial in this case and base a  
12 ruling solely on the merits of the facts  
13 presented before the Board, but in the spirit  
14 of transparency and full disclosure, I  
15 certainly wanted to make sure that all the  
16 parties and my colleagues knew that.

17 Thank you.

18 CHAIR MILLER: Do any of the  
19 parties have any concerns about what Mr. Loud  
20 has just disclosed or any question they would  
21 like to raise at this point?

22 MR. COOPER: Napoleon Cooper. I

1 don't know if there is a procedure for  
2 requesting recusal or if the Board would agree  
3 that recusal is appropriate, but I'd like to  
4 explore that matter.

5 CHAIR MILLER: You could request  
6 recusal at this point based on what you've  
7 heard or if you want to ask some questions to  
8 determine whether or not you really want to  
9 request recusal. You could ask some  
10 questions. Now, would be the time and then  
11 the Board would consider that.

12 MR. COOPER: Thank you.

13 CHAIR MILLER: Okay.

14 MR. COOPER: All due respect,  
15 Member Loud, I would like to ask you to recuse  
16 in this context based on your relationship  
17 with Mr. Jemal. These are not convivial  
18 proceedings. They are very antagonistic.  
19 They have been from day one and I'd rather you  
20 not be put in the position to put your  
21 relationship in anyway, not that it would, in  
22 jeopardy, your friendships deciding on the

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1 issues in this matter.

2 MEMBER LOUD: I appreciate your  
3 candor and your feedback and certainly, I know  
4 it requires you to think hard and deep about  
5 the proceedings that are getting ready to take  
6 place and whether I can make those  
7 separations. On the other hand, it's not  
8 quite accurate to call us friends or to  
9 suggest that we have a relationship.

10 I think that in the context of  
11 being involved in the community, I come into  
12 contact with quite a few folks, but  
13 nonetheless, I am a professional. I'm a  
14 member of the D.C. Bar. I'm trained as a  
15 professional.

16 I believe the standard is that if  
17 there is a conflict of interest or a perceived  
18 conflict of interest and in this case, I have  
19 no connection to Harris Teeter at all. I've  
20 never been involved in any matters in my  
21 capacity as the Executive Director of Gateway  
22 that would involve Harris Teeter.

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1           My relationship with the Jemal  
2 Companies is purely both professional and  
3 specifically limited to things that would  
4 occur between Georgia and Fern and Georgia and  
5 Eastern Avenue and I don't see where there  
6 would be a real conflict of interest in this  
7 situation and there's no friendship or  
8 relationship as you would suggest to strain or  
9 sever in this particular matter.

10           MR. COOPER: May I be heard  
11 further?

12           CHAIR MILLER: Okay.

13           MR. COOPER: I accept your  
14 statement and while Harris Teeter is not a  
15 party here, Douglas Jemal invested heavily in  
16 this project and in the success of their  
17 application and I would respectfully reserve  
18 objection to your hearing the matter and  
19 that's the last I'll say on it. Nothing  
20 intended beyond that.

21           MEMBER LOUD: Again, I'm sort of  
22 looking at and I understand what you're

1 saying. Looking at the standard in this  
2 setting for someone such as myself and don't  
3 see where there's a conflict of interest  
4 actual or perceived and believe I can be fair  
5 and impartial in the case. So, I'm not  
6 inclined to voluntarily recuse myself in the  
7 matter, Madam Chair.

8 MR. COOPER: Exception noted.

9 CHAIR MILLER: Any other  
10 questions? Yes.

11 MR. LYDEN: Yes, Madam Chair, Mr.  
12 Loud, how would you characterize your  
13 relationship with Mr. Jemal? Is it friendly,  
14 business like, tense, antagonistic

15 MEMBER LOUD: It's strictly  
16 professional. It centers around specific  
17 incidents between Fern and Georgia --

18 MR. LYDEN: Um-hum.

19 MEMBER LOUD: -- that surface that  
20 impact our ongoing desire to revive the upper  
21 end of Georgia Avenue. There are no -- I've  
22 never been invited by him to any kind of

1 events. I've never sat at his table. It's a  
2 strictly professional relationship.

3 MR. LYDEN: Okay. Madam Chair, I  
4 think what you're hearing from both us is kind  
5 of like a sign I saw in the Navy Federal  
6 Credit Union many years ago. You make the  
7 record. We keep it. And unfortunately, we  
8 really don't feel warm coming here. That was  
9 prior events, different people. So, we would  
10 look forward to hopefully having a better  
11 situation today.

12 I have no further comments.

13 CHAIR MILLER: Any other questions  
14 or comments from parties?

15 Well, I guess my comment -- well,  
16 my question is I guess, Mr. Loud, have you  
17 heard anything outside of this record about  
18 this case?

19 MEMBER LOUD: No, I have not.

20 CHAIR MILLER: And okay. That's  
21 my only question. Because I would just say  
22 that we all live in the city and we all have

1 casual relationships or -- with different  
2 people and that -- it does not necessarily  
3 give rise to a reason to recuse oneself  
4 necessarily and from what I hear, I don't hear  
5 a conflict of interest and I don't hear that  
6 you're privy to any information with respect  
7 to this case outside of this case and that you  
8 believe that you can be impartial. So, I  
9 would not move for your recusal or vote for  
10 your recusal.

11 Mr. Dettman, do you have an  
12 opinion on it?

13 MEMBER DETTMAN: I share your  
14 opinion, Madam Chair.

15 CHAIR MILLER: Okay. So, your  
16 objections are noted, but the Board is not  
17 prepared to vote for recusal.

18 MR. COOPER: Understood.

19 CHAIR MILLER: Okay.

20 MR. COOPER: Understood.

21 CHAIR MILLER: And if we did, that  
22 would be -- we'd pack it all up right now.

1 Maybe you want to go home right now. This is  
2 our quorum. Okay.

3 So, let's move on then to the  
4 second issue. Well, we have some preliminary  
5 issues and one was about consolidation and I  
6 think, Mr. Cooper, is that your motion to  
7 consolidate?

8 MR. COOPER: In my initial  
9 application for appeal, I indicated that the  
10 cases be consolidated. Things have changed  
11 substantially -- significantly since that  
12 period and I contacted the Deputy Director  
13 three weeks or a month ago indicating a change  
14 of heart with respect to consolidation.

15 Now, I anticipated a motion filing  
16 which did not happen and at this time, I would  
17 request to rescind and withdraw that request  
18 for a variety of reasons which I would be  
19 prepared to state for the record briefly.

20 Appellants 17677/17675 have or may  
21 have divergent interests in this appeal.  
22 Appellants have or may have divergent ideas of

1 this. How this appeal should proceed,  
2 organize around which principles, et cetera.

3 Appellants 17677 were not a party  
4 to prior actions apparently central to the  
5 Appellee. Specifically their motions to  
6 dismiss as I am to understand them.

7 Appellants have or may have  
8 divergent post appeal, if appropriate,  
9 litigation strategies and outlook and relief  
10 expectations. Appellants have or may have  
11 divergent standing considerations for these  
12 appeals and according, Appellant 17677 opposes  
13 consolidation unless potential liabilities  
14 direct or implied are to remain independent  
15 under any appeals consolidation. One, prior,  
16 current, future statements, concessions,  
17 pleadings, actions or failure to act not  
18 prejudice or obligate Appellants 17677 unless  
19 expressly and explicitly adopted by Appellants  
20 17677 and finally, pleadings directed to any  
21 consolidation be directed separately and  
22 individual to Appeals 17677 and 17675.

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1 Thank you.

2 CHAIR MILLER: Do others want to  
3 address this? Especially, the Reed-Cooke  
4 Neighborhood Association.

5 MR. LYDEN: Well, if we don't have  
6 a willing partner, then I would believe that  
7 separating the two cases is appropriate.

8 CHAIR MILLER: All right. Let's  
9 just explore this a little bit because they're  
10 both -- oh, go ahead.

11 MR. LYDEN: We filed independently  
12 and there were no discussion of doing this.  
13 So, there was no strategy from the beginning  
14 to do -- to consolidate. As a matter of fact,  
15 I was rather surprised when it was suggested,  
16 but I said that's to the discretion of the  
17 Board.

18 CHAIR MILLER: Mr. Cooper, if you  
19 don't choose to consolidate, it sounds like we  
20 would be hearing the appeal of Reed-Cooke  
21 Neighborhood Association and you wouldn't  
22 participate at all and it's an appeal of the

1 same decision. So, I'm really not sure  
2 whether we would hear an appeal of the same --  
3 the decision will have been made by the time  
4 we would get to your appeal. Do you  
5 understand what I'm saying?

6 MR. COOPER: But, I want to make  
7 sure --

8 CHAIR MILLER: You're appealing  
9 the same decision. Are you not?

10 MR. COOPER: I want to make sure I  
11 understand what you're saying. That if we do  
12 not agree to consolidation with this appeal,  
13 there is little likelihood of our appeal being  
14 heard.

15 CHAIR MILLER: You know what let  
16 me say this. I was just thinking aloud. That  
17 depends when we decide that -- his case goes  
18 -- their case goes first. It would be decided  
19 before your case. So, I would think that your  
20 case -- there would already law decided. I'm  
21 not sure. We might hear your case. I mean if  
22 we heard their case first and didn't decide,

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1 then heard your case, but it's the same  
2 decision. So, we're going to decide -- if we  
3 get to it, if we get to -- if we cross the --  
4 if we find that they were timely filed, we're  
5 going to be looking at whether the Zoning  
6 Administrator erred or not.

7 MR. COOPER: Well --

8 CHAIR MILLER: And you're arguing  
9 the same thing whether they erred.

10 MR. COOPER: -- I --

11 CHAIR MILLER: So, we will have  
12 already --

13 MR. COOPER: If I might.

14 CHAIR MILLER: Yes. Go ahead.

15 MR. COOPER: I'd like to put  
16 forward Appellant's 17677 own basis for our  
17 appeal.

18 We are not appealing what happened  
19 between the parties, other parties in  
20 2006/2005, et cetera. Our appeal goes  
21 specifically to the issue of the March 21st  
22 letter. We disagree with how it was obtained,

1 how it was used and what it says.

2 Now, judging by the description of  
3 the government to the characterization of  
4 these appeals, this is about matters  
5 Appellants 17677 were not a party to and on  
6 that basis, they put forward motions to  
7 dismiss which we're not prepared to respond to  
8 or discuss today either and if the Board is  
9 politely and in some manner trying to  
10 communicate to the Appellants I represent that  
11 you've made a preliminary decision that our  
12 appeals are derived from the interpretations  
13 given by the government and by the property  
14 owner which I would hope has not occurred, we  
15 would be heard on these matters independently.

16 CHAIR MILLER: Okay. And I'm  
17 probably going to hear from OAG in a minute,  
18 but I mean it seems to me that, and Ms. Monroe  
19 can, you know, correct me if I'm wrong,  
20 usually when we have parties consolidate it's  
21 because it's mutual choice. It's voluntary.  
22 They want to consolidate. I don't know that

1 if you don't want to consolidate, I don't know  
2 that we can make you consolidate.

3 Do you have an opinion, Ms.  
4 Monroe?

5 MS. MONROE: I'm not sure actually  
6 to be honest with you. I'm kind of confused  
7 because I don't -- I don't see that it's  
8 different, but you claim it is and I agree.  
9 What I think is we can consolidate the appeal  
10 in one hearing. I don't think we need to have  
11 two hearings on it, but you don't -- I don't  
12 think you have to be the same party. I mean  
13 you can have more than one Appellant I mean  
14 and I think you can give your arguments and  
15 your approach and whatever, you know,  
16 individually, separately and the RCNA can give  
17 it's arguments and approach separately.

18 MR. COOPER: Can I be heard?

19 MS. MONROE: It's up to the Chair.

20 MR. COOPER: I did offer the  
21 option of proceeding on a consolidated basis  
22 with those qualifications I set forth and if

1 you'd like me to state them again, I'd be  
2 happy to. But, our concern is being prior  
3 actions by other parties, obligating us, their  
4 failure to act with respect to matters we were  
5 not a party to obligating us. Their  
6 statements, their pleadings obligating us and  
7 as I have laid out, we have divergent  
8 concerns, interests with respect to this  
9 appeal.

10 But, if the Board wants to  
11 stipulate that we cannot be prejudiced by one  
12 another's pleadings or actions or prior  
13 actions, et cetera as I specified for the  
14 record, I have no problem wrapping this all up  
15 in one hearing.

16 MR. LYDEN: Madam Chair, up until  
17 last Friday, I thought everything was pretty  
18 straightforward on this case. However, with  
19 the last minute motion to dismiss that was  
20 thrown in, a voluminous motion, it referenced  
21 a lot of things and it went back many years,  
22 there was a difference of opinion of exactly

1 what's going on here today and exactly how to  
2 attack -- how -- you know, what tactics should  
3 be used and we're not in agreement. That's  
4 fundamentally what it is.

5 And now, we've got two motions  
6 which -- one of which I received yesterday  
7 afternoon and we're trying to figure out what  
8 we're going to do with these things and you've  
9 got paper we put in, but this has been a real  
10 scramble and so, we're not unified in our  
11 beliefs on what should be done.

12 MR. COOPER: Further, I've not  
13 been heard on the motions and don't anticipate  
14 responding to the motions or discussing the  
15 motions until I've been afforded an  
16 opportunity by the Board to file a written  
17 response to the motions.

18 CHAIR MILLER: Okay. That's a  
19 different issue though. I mean I just want to  
20 deal with this one issue and we may take a  
21 break to think about this because I don't  
22 think I've seen this before where we have an

1 appeal -- we have an appeal -- okay. But,  
2 this is what I haven't seen. I have two  
3 different appeals that are about the same  
4 decision, but you have different approaches  
5 and you want to keep your appeals separate.

6 So, on the one hand, we're going  
7 to be scrutinizing whether the decision --  
8 there was an error in the decision separate  
9 from the timeliness question. We're  
10 scrutinizing the same decision, but the  
11 question is can you both do it separately?  
12 Can you jump into their appeal without  
13 actually joining their appeal? I just -- I  
14 don't know. I want to think about it for a --

15 MR. COOPER: Because I'm not --  
16 Appellants 17677 are not here to rehash a 2006  
17 decision. Our focus of appeal is specifically  
18 the March 21st letter. We object to how it  
19 was obtained not that it was obtained. We  
20 object to --

21 CHAIR MILLER: But, let me -- just  
22 wait a second. Isn't that -- isn't your focus

1 of the --

2 MR. COOPER: And --

3 CHAIR MILLER: Excuse me. I just  
4 want to get these things --

5 MR. COOPER: Yes.

6 CHAIR MILLER: -- kind of  
7 organized.

8 MR. COOPER: Um-hum.

9 CHAIR MILLER: Is your focus of  
10 the appeal also the March 21st, 2007?

11 MR. COOPER: Yes.

12 CHAIR MILLER: So, you're both  
13 appealing the same decision by the Zoning  
14 Administrator. Correct?

15 MR. COOPER: Well, the action of  
16 the Zoning Administrator. Yes, of March 21st.

17 CHAIR MILLER: Okay.

18 MR. COOPER: But --

19 CHAIR MILLER: Wait. What's  
20 different? The grounds for --

21 MR. COOPER: No, the government  
22 and the property owner have characterized this

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1 appeal about our actions --

2 CHAIR MILLER: But, that doesn't  
3 -- it doesn't -- I'm not interested in their  
4 -- how they're characterizing it.

5 MR. COOPER: Oh. Okay.

6 CHAIR MILLER: I'm interested in  
7 what's the same and what's different. You're  
8 both appealing the same decision. Correct?

9 MR. COOPER: March 21st letter.

10 CHAIR MILLER: March 21st letter.

11 MR. COOPER: Yes.

12 CHAIR MILLER: Okay. But, the  
13 reason you don't want to consolidate your  
14 appeals even though it's of the same decision  
15 is what? Your approach is different?

16 MR. COOPER: You want to --

17 MR. LYDEN: No, you're --

18 MR. COOPER: Well, I have two  
19 concerns. Those I outlined where our  
20 interests may diverge.

21 CHAIR MILLER: That's vague.

22 MR. COOPER: That --

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1 CHAIR MILLER: Well, that's vague.

2 MR. COOPER: Well --

3 CHAIR MILLER: Because I want to  
4 see if you can consolidate because it's the  
5 same decision that's being appealed.

6 MR. COOPER: Well, I say we can  
7 with the qualifications because I wouldn't  
8 rely on them to present our argument and they  
9 don't --

10 CHAIR MILLER: What  
11 qualifications?

12 MR. COOPER: -- rely on me to  
13 present theirs.

14 CHAIR MILLER: But, if you  
15 consolidate, we're going to have one -- the  
16 Board's going to issue one decision on this  
17 matter. We're not going to issue two  
18 different -- one order saying he did err, he  
19 didn't err. I mean, you know, it's going to  
20 be one decision.

21 MR. COOPER: With respect to the  
22 actions of the Zoning Administrator, that

1 would be appropriate, but with respect to the  
2 actions of one Appellant -- group of  
3 Appellants versus another, there will be  
4 opportunities for different decisions.

5 CHAIR MILLER: Okay. First of  
6 all, the decision's going to be -- if once we  
7 get beyond -- if we get beyond, timeliness  
8 question which may apply to you differently,  
9 but either the Zoning Administrator erred or  
10 he didn't err and there are going to be  
11 different theories. There will be different  
12 theories. Maybe he'll have a different theory  
13 than you and we'll hear both theory and we'll  
14 decide --we'll address both theories.

15 MR. COOPER: I have no problem  
16 with that.

17 CHAIR MILLER: Okay. Okay. So,  
18 then what?

19 MR. COOPER: If we can get around  
20 and the Board can do this by fiat and make a  
21 simple statement, representations, pleadings,  
22 et cetera of 17675 don't obligate or

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1 disadvantage Appellants 17677. I'm getting  
2 these numbers confused, but what we're trying  
3 to do is separate liability.

4 CHAIR MILLER: Okay. Let's say  
5 this. If you're concerned about -- for  
6 instance, we can't be that broad I don't  
7 think. If you're concerned about, for  
8 instance, whether you can move for  
9 reconsideration of our order even though Reed-  
10 Cooke doesn't want to, we could deal with  
11 that.

12 MR. COOPER: Well, that's --

13 CHAIR MILLER: Okay. Or whether  
14 -- I don't understand about your liabilities  
15 and things like that. We don't really get  
16 into that.

17 MR. COOPER: Well, for example, if  
18 the Board holds that from a -- on a timeliness  
19 issue with respect to the motions to dismiss,  
20 that these gentlemen should have appealed as  
21 alleged by the government and the property  
22 owner last century when we weren't on the

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1 scene, why should that obligate or penalize  
2 us.

3 CHAIR MILLER: Okay. I can --  
4 okay. So, one is the timeliness of their  
5 actions.

6 MR. COOPER: So, that's just an  
7 example. That's an example.

8 CHAIR MILLER: Well, I think we  
9 have to be specific.

10 MR. COOPER: Well, I --

11 CHAIR MILLER: I think that that's  
12 a good point. You may have been timely. They  
13 may not have been and neither of you should be  
14 penalized if you both filed appeals.

15 MR. COOPER: Right. But, we  
16 should not have in advance outline every  
17 example of where this application may be  
18 appropriate.

19 CHAIR MILLER: Okay. This is --

20 MR. COOPER: Because these things  
21 will develop over the course of the appeal.

22 CHAIR MILLER: I don't how others

1 think. I think at this point, and then I'll  
2 hear from others, I think that I'd be prepared  
3 to address some of those issues like --  
4 specifically like timeliness and motions for  
5 reconsideration as party, a consolidated  
6 party, but not to go as broadly as you're  
7 asking and let me say this. If you don't --  
8 if you can't get your guarantees from the  
9 Board which this Board doesn't do, these fiat  
10 guarantees, you can not consolidate, but that  
11 means that we will go forward with Reed-Cooke  
12 Neighborhood Association --

13 MR. COOPER: Well, what I'm trying  
14 to say is you all are busy. We are busy. If  
15 we can do this all at once, great. I just  
16 don't want the Appellants 17677 to be  
17 disadvantaged by the actions and vice versa of  
18 the other appeal and I don't see where it  
19 would be in the Board's interest or fairness  
20 to want that to be the case in any event.

21 They can't fail to respond or  
22 whatever to the disadvantage of our appeal.

1 They can't make a concession on any issue  
2 related to this appeal that obligates our  
3 appeal and why would the Board want that to be  
4 the case. I would be surprised if the parties  
5 want that to be the case.

6 So, if we made that simple  
7 exception, we could have taken this 15 minutes  
8 and gotten to it. That's all I'm saying. I'm  
9 not saying this is -- there's going to be some  
10 -- we're going to start fighting over here or  
11 something like that.

12 MEMBER LOUD: Mr. Cooper, I just  
13 wanted to ask you a couple of questions.

14 MR. COOPER: Um-hum.

15 MEMBER LOUD: Sort of along the  
16 lines of what the Chair has asked --

17 MR. COOPER: Yes, sir.

18 MEMBER LOUD: -- and I certainly  
19 understand the issue about timeliness because  
20 that's a very significant issue to grapple  
21 with in terms of you and the other party being  
22 very differently situated, but have you

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1 thought through what some of the other issues  
2 might be such that you could sort of just  
3 share some of those concerns with the Board.

4 MR. COOPER: Okay.

5 MEMBER LOUD: Is it calling  
6 different witnesses or --

7 MR. COOPER: All right. Let's  
8 take the matter of standing. There was a  
9 Supreme Court filing last Friday that only  
10 reached the docket of the Supreme Court  
11 yesterday at 4:00 in connection with a related  
12 matter in a sister agency ABC.

13 This hearing was I don't want to  
14 say -- well, I won't say. This hearing was  
15 brought up in those pleadings and action was  
16 sought that goes to the issue of standing in  
17 that proceeding.

18 Now, it was put on the docket at  
19 4:00 yesterday concerning a matter that  
20 started at 1:00 today. It will take an act of  
21 God and I have not heard from any angels. So,  
22 the question of -- and I understand there's

1       been some address of this issue in motions, my  
2       standing having been dismissed from the ABC  
3       Board proceedings which were to focus on the  
4       Supreme Court filing. It's the Court of  
5       Appeals and so forth, but that's where it ends  
6       up.

7                       So, anticipating since I haven't  
8       heard from any angels that the denial is  
9       imminent, that would present different  
10      standing questions.

11                     CHAIR MILLER: I don't think so.

12                     MR. COOPER: As an another  
13      example.

14                     CHAIR MILLER: No. We have our  
15      own standing regulations. It wouldn't  
16      influence that.

17                     MEMBER LOUD: So, just fleshing it  
18      out, though one would be the timeliness issue  
19      and your ability to craft separate and  
20      independent arguments on that and a second  
21      concern you would have would be the standing  
22      issue. That some arguments might be made

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1 regarding standing that would affect you  
2 specifically.

3 MR. COOPER: And not them.

4 MEMBER LOUD: And not them and  
5 that they would not raise that as an issue to  
6 -- they would not come to your defense so to  
7 speak and so, that's a --

8 MR. COOPER: Well, it's not --

9 MEMBER LOUD: -- or even if they  
10 came to your defense, they might not do it as  
11 good as you would. All right.

12 MR. COOPER: Yes, I can defend  
13 myself. They shouldn't be prejudiced by --

14 MEMBER LOUD: I understand.

15 MR. COOPER: -- the issues aren't  
16 relevant. I just do not care and think it is  
17 fair to nail us down to differences we can  
18 come up with in advance of how these appeals  
19 on a consolidated basis will proceed.

20 MEMBER LOUD: And I'm not trying  
21 to do that. I'm just trying to flesh out some  
22 more of the ones that you've already thought

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1 through like obviously the --

2 MR. COOPER: Okay.

3 MEMBER LOUD: -- Supreme Court is  
4 one that you had put a lot of time into. So.

5 MR. COOPER: Let me give another  
6 example. I'll give you another example.

7 MEMBER LOUD: Okay.

8 MR. COOPER: I consider the  
9 government's filing and the property owner's  
10 filing as to put it mildly -- well, it gave  
11 the appearance to me of being intended by  
12 design, calculation and collusion to deprive  
13 Appellants of the right to be heard, due  
14 process, right to petition, constitutional  
15 issues also supported and backed up and  
16 assured by applicable District of Columbia law  
17 or regulations and practices for this Board.  
18 I think that was the intent of the delayed  
19 filing of these -- of the government and the  
20 property owner.

21 CHAIR MILLER: Can I jump in here?

22 Because I don't want to get into the meat if

1 we can. I just want to get into the issue and  
2 as I'm thinking about it, it sounds like we  
3 have two separate appeals of the same order,  
4 but you don't want to consolidate. You don't  
5 have necessarily the same arguments or the  
6 same issues. You don't want to be bound by  
7 what one or the other does and so, I haven't  
8 seen this before and I would like to hear from  
9 DCRA and the property owner an opinion about  
10 that. It sounds like a question of efficiency  
11 almost, too. Should we hear two appeals  
12 together on the same decision or not?

13 MR. COOPER: May I just --

14 CHAIR MILLER: Give me one more --  
15 okay. Hold that thought.

16 MR. COOPER: If I could complete  
17 the question.

18 CHAIR MILLER: Okay.

19 MR. COOPER: In the example I  
20 cited, I felt ill-advised for my would be bed  
21 partners here to not take the time available  
22 in the practices and procedures to think

1 through and do the research necessary on the  
2 motion filed Friday afternoon by the  
3 government and the property owners and they  
4 did it. I'm not going to do it that way. I  
5 didn't do it that way.

6 Now, we're not fighting. We don't  
7 -- you know, they have more resources. They  
8 are an association. I'm an individual. They  
9 could divide the labor between them. Maybe  
10 they did a job satisfactory to them. I  
11 haven't seen it, but my approach, I was not in  
12 a position to and I didn't.

13 That's another example, Member  
14 Loud, of divergence and on appeal, as they  
15 have responded and if I'm not allowed to  
16 respond, that would present a whole different  
17 set of issues to litigate.

18 MEMBER LOUD: Thank you, Mr.  
19 Cooper.

20 MR. COOPER: That's an example.

21 MEMBER LOUD: I appreciate that.

22 I think I'm going to defer questioning back to

1 Chair so that we can maybe get some light  
2 shared on the issue of consolidating two  
3 different appeals.

4 CHAIR MILLER: I'm sorry. I had  
5 jumped in and wanted to hear from DCRA and  
6 intervener about this question.

7 MR. GLASGOW: Go first. Madam  
8 Chair, for the record, my name is Normal  
9 Glasgow, Jr. of the law firm of Holland &  
10 Knight.

11 I think that there are two things  
12 to consider. One is the motions for dismissal  
13 from the timeliness and the -- timeliness  
14 issue and those I think that they can in a  
15 sense be heard separately with respect to each  
16 Appellant, but during the course of the same  
17 hearing. In other words, you would -- we  
18 could argue one on the facts and conditions  
19 with respect to the RCNA and then with respect  
20 to Mr. Cooper, et al.

21 Second would be with respect to  
22 the merits on the two appeals. I believe that

1 as the Chair was indicating if we do get to  
2 the merits, I would assume there would be  
3 administrative res judicata if nothing else  
4 with respect to a decision on the merits on  
5 one is going to follow with the other and so  
6 that would -- and then the question is is do  
7 you want to schedule both appeals or the  
8 merits on both appeals, you know, and conduct  
9 those and say okay, here are the merits on  
10 appeal number and just taking them in order  
11 17675 and then hear the other.

12 But, essentially from that  
13 standpoint, I think it's going to be the same  
14 facts and arguments.

15 CHAIR MILLER: DCRA have a  
16 comment?

17 MS. BOLLING: Madam Chair, we  
18 concur with the property owner in his  
19 assessment that administrative res judicata  
20 would effectively bar the need for a second  
21 hearing on a lot of the matters on the merits  
22 and that all of this could be heard in one

1 hearing albeit it maybe bifurcated. One goes  
2 first and one goes second.

3 CHAIR MILLER: Yes, Mr. Cooper.

4 MR. COOPER: Based on what I just  
5 heard, it occurs to me that to avoid dual  
6 decision making, why can't we proceed and the  
7 Board make one decision at the conclusion of  
8 the entire process?

9 CHAIR MILLER: Well, it sounds  
10 like all the parties might be in favor of  
11 that. Is that correct?

12 But, we still -- the Board may  
13 take a break to make sure that's what we want  
14 to do, but we would join the two appeals.

15 MS. MONROE: Can I ask a question?  
16 What do you mean by proceed and then make one  
17 decision?

18 MR. COOPER: Well, I don't know  
19 what Latin phrase they were using means.

20 CHAIR MILLER: Well, that's --

21 MR. COOPER: But --

22 MS. MONROE: So, sorry. Let's

1       assume we hear RCNA's appeal today. Let's  
2       assume. This all conjecture. Okay. Since  
3       you didn't have an opportunity to respond to  
4       the motion to dismiss, let's assume the Board  
5       says okay, we won't hear you today. We're  
6       going to give you an opportunity to respond to  
7       the motion to dismiss. It's due in a month.  
8       So, then you wait. Okay.

9                But, if the RCNA appeal is decided  
10       on the question of a letter, the decision  
11       complained of -- in the regs, it says the  
12       appeal goes to the decision complained of not  
13       what happened three years ago and everything  
14       else that happened before the Board, but the  
15       decision complained of which is the letter  
16       from the ZA. I assume that's pretty much a  
17       given.

18               MR. COOPER: Um-hum.

19               MS. MONROE: That's all that's  
20       going to be decided. If that is decided one  
21       way or the other, if your appeal is on the  
22       same decision, your appeal is already done

1 because is it res judicata. It would be  
2 decided. Exact same issue would be decided  
3 and one way or the other, you wouldn't  
4 actually have an opportunity to argue it.  
5 That's what I'm seeing here.

6 MR. COOPER: Okay. I see what --  
7 I see your -- the dilemma you present to us,  
8 but --

9 MS. MONROE: Right. I'm concerned  
10 you may lose your opportunity is what I'm  
11 saying to argue it at all if the decision is  
12 -- on that limited issue because that's the  
13 issue that we're dealing with is made in the  
14 other -- because it's the same exact issue,  
15 same facts, same everything. You would be --

16 MR. COOPER: Well, what assurances  
17 does the Board have that our arguments with  
18 respect to the letter or disagreements with  
19 the letter are the same?

20 MS. MONROE: It doesn't matter.  
21 Because the Board is looking at the letter as  
22 the operative decision complained of. The

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1 Board will take it, look at the regulations  
2 and say did the Zoning Administrator err/did  
3 he not? They will take all the facts in the  
4 appeal. They will make a decision of whether  
5 or not he erred.

6 MR. COOPER: I --

7 MS. MONROE: And if they decide he  
8 did or he didn't, that letter, that's it.

9 MR. COOPER: Okay. I -- okay. I  
10 understand that.

11 Let's visit the issue of  
12 opportunity to respond. So, are you also  
13 saying that if I take the opportunity to  
14 respond and the decision is made in the  
15 interim, I'm out of luck?

16 CHAIR MILLER: Okay. Yes, well,  
17 let me say this, Mr. Cooper. Let me say this.  
18 That's the point about who's going to  
19 disadvantage who. Because if you want your  
20 case heard with their case and they're ready  
21 to proceed and then get over the motion to  
22 dismiss hurdle and they're ready to proceed on

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1 the merits, but you say oh, but I didn't  
2 respond to the motion to dismiss because I  
3 just got it.

4 MR. COOPER: And I will.

5 CHAIR MILLER: I'm not sure -- I'm  
6 not sure what the Board would do with the --  
7 I'm going to tell you right now the Board will  
8 be faced with well, shall we proceed with this  
9 hearing today because he responded and they're  
10 ready to go and we got the Zoning  
11 Administrator here or do we have to delay  
12 because you have joined into this proceeding.

13 MR. COOPER: I would suggest that  
14 the regulations and practices of the  
15 Commission and the Board suggest any question  
16 going to the dismissal of an applicant --

17 CHAIR MILLER: No, let me --

18 MR. COOPER: -- I mean a  
19 petitioner that the petitioner have an  
20 opportunity to be heard in writing with  
21 reasonable opportunity and if the Board  
22 decided that that wasn't appropriate in this

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1 instance, well, I would object and litigate.

2 CHAIR MILLER: Okay. That's  
3 really not what we're talking about. We're  
4 just talking about how we continue to proceed.  
5 You know, for instance, whether -- just  
6 because you hadn't responded to that, would  
7 that slow down whether we heard the case today  
8 and I kind of doubt that because if the other  
9 party gets over the hurdle and if it's timely  
10 and we could -- we would still proceed.

11 MR. COOPER: Why couldn't we set  
12 the motions to dismiss aside until parties  
13 have had a --

14 CHAIR MILLER: That's an option.

15 MR. COOPER: -- appropriate  
16 opportunity to be heard as provided in the  
17 rules in --

18 CHAIR MILLER: That would be an  
19 option.

20 MR. COOPER: -- equity and  
21 fairness.

22 CHAIR MILLER: That would be an

1 option.

2 MR. COOPER: Then if you want to  
3 proceed with the case having set those aside,  
4 let's do it.

5 MS. MONROE: I think the problem  
6 arises because there's a lack, I hate to say  
7 that, in the regulations. But, the  
8 regulations don't specific that the motion to  
9 dismiss has to be filed at any particular  
10 time. They could have brought it today. I  
11 hate to say that, but they could have.

12 There's nothing in the regulations  
13 -- now, it may not be fair or whatever you  
14 want to argue, but --

15 MR. COOPER: I'm not suggesting  
16 that --

17 MS. MONROE: So, it wasn't  
18 improperly filed. That's all I'm saying.  
19 Now, you may argue you need time to respond.

20 MR. COOPER: I'm not --

21 MS. MONROE: You didn't have  
22 enough time.

1 MR. COOPER: And I'm entitled to  
2 time to respond and I do not in anyway suggest  
3 that they did not have the liberty to  
4 collaborate and make this filing. That's  
5 perfectly within their rights, but the rules  
6 and regulations specify in a manner -- well --

7 CHAIR MILLER: We know them. We  
8 know them. Okay. I just --

9 MR. COOPER: So, okay.

10 CHAIR MILLER: We know them. We  
11 know --

12 MR. COOPER: Well, then a  
13 reasonable opportunity to submit a written  
14 response is basic.

15 CHAIR MILLER: We got it. We do.  
16 We really do.

17 MR. COOPER: Yes. Yes.

18 CHAIR MILLER: What I want to just  
19 make sure we do have and I think the Board  
20 might break for just about five minutes to  
21 sort this through, but it sounds to me and  
22 please correct me if I'm wrong because we're

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1 going to be thinking about this, that the  
2 parties are in agreement that we could hear  
3 both appeals together and you would maintain  
4 your separateness and that's what has been  
5 referred to as bifurcating where appropriate.

6 The timeliness issue would be  
7 addressed as to each of the appeals and your  
8 theories about error would be addressed  
9 separately as well.

10 So, are all the parties in favor  
11 of that?

12 MS. BOLLING: The District's in  
13 favor, Madam Chair.

14 CHAIR MILLER: Okay.

15 MR. LEGRANT: We don't have any  
16 objection, Madam Chair.

17 CHAIR MILLER: Okay.

18 MR. GLASGOW: No objection.

19 CHAIR MILLER: Okay. All right.

20 All right. I think we were just going to  
21 break for five minutes and we'll be right  
22 back.

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1                   (Whereupon, at 2:15 p.m., off the  
2 record until 2:29 p.m.)

3                   CHAIR MILLER: Okay. We're back  
4 on the record and the Board has decided that  
5 we will proceed in the manner recommended by  
6 the parties. We will have -- we will hear  
7 today both appeals, but they will be kept  
8 separate and the procedure would be then that  
9 -- similar to what Mr. Glasgow suggested.  
10 We'll deal with the motions first. We will  
11 deal with Reed-Cooke Neighborhood Association  
12 the motion to dismiss against them first and  
13 then after hearing that motion, we will then  
14 hear the motion -- or we would see whether  
15 we'll hear the motion to dismiss against Mr.  
16 Cooper or hold that in abeyance or whatever.  
17 We will deal with each motion and then we will  
18 get to the merits of the appeal and we will  
19 hear Reed-Cooke Neighborhood Association's  
20 arguments first and testimony and cross  
21 examination, et cetera related to that first  
22 and then we'll hear from Mr. Cooper.

1           Okay. So, as far as housekeeping  
2 goes though, I want to ask or address Reed-  
3 Cooke Neighborhood Association filed a motion  
4 for extension of time to respond to the motion  
5 to dismiss, but then submitted a very thorough  
6 response the same day.

7           So, I guess I'm asking you is that  
8 motion for an extension time even still on the  
9 table?

10           MR. LYDEN: Yes. Yes, Madam  
11 Chair, it is.

12           CHAIR MILLER: You would like to  
13 respond further in writing?

14           MR. LYDEN: We're a voluntary  
15 organization and our resources are diverse as  
16 all the people in our organization and it was  
17 over a weekend trying to put things together.  
18 People I needed to talk to were gone and I was  
19 given advice that the first thing to do was  
20 ask for an extension to give us reasonable  
21 time to be able to respond and then at the  
22 same time, I was also told, however, you need

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1 to be ready in case the Board denies the  
2 extension and you're going to have to put your  
3 cleats on and go out there on the field, put  
4 your helmet on. That this is -- you will go  
5 and in an effort to be responsive, we did  
6 that.

7 I didn't -- the person that was  
8 able to put together our, what is it,  
9 opposition to the motion to dismiss, didn't  
10 show up. I didn't get a phone call until it  
11 was about quarter of 11:00 Sunday night.

12 So, what you see was something  
13 that was put together very, very quickly and  
14 we would love to have the time to amend that  
15 motion and add some more oomph to it.

16 This was done just as I was told.  
17 You know, when the game moves forward, then  
18 you have to be ready. So, we would, in fact,  
19 appreciate to have more time to give a more  
20 full response to the motions.

21 Because when we filed this, we had  
22 one. Yesterday afternoon, I picked up the

1 DCRA motion from the Reed-Cooke mailbox and  
2 that was the first time, I knew that we had  
3 gotten it. So, it's an interesting situation.

4 CHAIR MILLER: Okay. Well, what I  
5 want to say is I think you did a very good job  
6 in your submission and I think it was you. I  
7 know we've got the pleadings from both of you,  
8 but did state that, you know, the appeal was  
9 filed a long time ago and the property owner  
10 and DCRA should have filed this motion to  
11 dismiss a long time ago.

12 But, I also want to say that the  
13 Board brings a lot of knowledge about believe  
14 it or not this issue.

15 MR. LYDEN: Okay.

16 CHAIR MILLER: And we --

17 MR. LYDEN: In spite of my hostile  
18 comments, yes.

19 CHAIR MILLER: Okay.

20 MR. LYDEN: They do.

21 CHAIR MILLER: And we think that  
22 we would like to hear a brief argument on it

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1 today and hopefully, rule on it today unless  
2 there are certain questions that are raised  
3 that make us want to think about it more and  
4 then there's always an opportunity, you know,  
5 for reconsideration or if you think, you know,  
6 after you hear our decision, you know, that  
7 you want to file something later or whatever  
8 or we may get to the point where, you know, we  
9 don't think we have enough information.

10 But, we think that there is a lot  
11 of information in here. So, we have -- and we  
12 have the Zoning Administrator here today. So,  
13 let's see how this goes.

14 We certainly don't want you to be  
15 prejudice. We don't perceive that at this  
16 point. Okay.

17 Any other comments from Board  
18 Members?

19 So, and I believe we're at the  
20 motion to dismiss point against Reed-Cooke  
21 that was filed by other intervener and DCRA.  
22 So, I think we'd like to give about five

1 minutes or so if you want to make some oral  
2 arguments about it. Unless parties don't  
3 think that's enough time.

4 We have read all the filings and  
5 studied the record and studied our rules. So,  
6 what we'd like to do is have you do that and  
7 then we may engage you in some questions.  
8 Okay.

9 Is that Mr. Cooper?

10 MR. COOPER: Yes, I have a  
11 question.

12 CHAIR MILLER: You'll have to come  
13 to the mic. We are handling, you know, each  
14 one separately.

15 MR. COOPER: Right.

16 CHAIR MILLER: so.

17 MR. COOPER: Is the intervener  
18 status a discretion of the Board? Was a  
19 decision made by the Board?

20 CHAIR MILLER: Property owners,  
21 they are a party as a matter of right --

22 MR. COOPER: Thank you.

1 CHAIR MILLER: -- by our rules.

2 MR. COOPER: Thank you very much.

3 CHAIR MILLER: Okay.

4 MR. MOY: Sorry to interrupt.

5 CHAIR MILLER: Yes.

6 MR. MOY: From the Staff, would  
7 you -- did you want the Staff to clock this or  
8 were you going to do that informally on the  
9 table?

10 CHAIR MILLER: You could clock it.  
11 I mean it's not a strict -- it's not strict.  
12 Though we would -- we do really want to  
13 emphasize that, you know, there were very  
14 thorough pleadings on this. So, we don't need  
15 a long elaboration.

16 So, okay. So, I'm going to turn.  
17 I think it was intervener's motion that came  
18 first.

19 MR. GLASGOW: Thank you, Madam  
20 Chair. Just very briefly with respect to  
21 focusing in on Reed-Cooke and our motion.

22 There was a -- the BZA application

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1 was file July 1, 2005 and as a part of that  
2 application, stated on its face that there was  
3 an accessory use of beer and wine sales on the  
4 BZA application.

5 CHAIR MILLER: On the BZA  
6 application for the variance --

7 MR. GLASGOW: That's correct.

8 CHAIR MILLER: -- decision? Could  
9 you repeat that because I don't remember  
10 seeing that in the book.

11 MR. GLASGOW: Yes. Yes, it's on  
12 the application itself. It says accessory  
13 beer and wine sales. That was on the BZA  
14 application that was filed July 1st in 2005.

15 Harris Teeter filed it's beer and  
16 wine application August 11th, 2005. RCNA,  
17 Reed-Cooke Neighborhood Association protests  
18 the Harris Teeter filing September 30th.

19 CHAIR MILLER: I'm sorry to  
20 interrupt you, Mr. Glasgow, but I want to  
21 understand these dates.

22 August 11th, 2005, they filed the

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1 application where?

2 MR. GLASGOW: Harris Teeter filed  
3 it's ABC application.

4 CHAIR MILLER: ABC application.

5 MR. GLASGOW: Correct.

6 CHAIR MILLER: Okay. And what was  
7 the next date you're giving?

8 MR. GLASGOW: The next date was  
9 September 30th, 2005, RCNA protested the  
10 Harris Teeter beer and wine license before the  
11 ABC Board.

12 So, between the BZA filing, Harris  
13 Teeter filing, RCNA, they knew that we were  
14 asking for beer and wine in this grocery store  
15 back in -- as of September 2005.

16 Then November 29th, 2005, we had  
17 the hearing on BZA Application 13795. BZA  
18 decided the case. BZA Application 17395, the  
19 decision was voted January 10th, 2006. BZA  
20 order was issued June 12th, 2006. Reed-  
21 Cooke's request for reconsideration was denied  
22 on July 11th, 2007. Harris Teeter sought it's

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1 building permit, the interior building permit,  
2 March 11th, I'm sorry, September 11th, 2006.  
3 That permit was issued which showed the beer  
4 and wine portion of the store. It was issued  
5 November 13th, 2006. Then on March 27th,  
6 2006, I'm sorry. I got that a little bit out  
7 of sequence. March 27th, 2006, the building  
8 permits were issued and Harris Teeter started  
9 work on the store in March of 2006.

10 So, there's construction activity  
11 going on. Then a later permit issued in  
12 November of 2006 which -- after the BZA  
13 decision which was applied for in September  
14 after the BZA orders were issued following up  
15 with the BZA decision.

16 Then Reed-Cooke Neighborhood  
17 Association filed its appeal of the March  
18 letter of the Zoning Administrator which was  
19 a confirmation letter of decisions that had  
20 already been made on May 19th, 2007.

21 So, I think for Reed-Cooke to say  
22 anything other than they -- and in their own

1 pleadings, they say how many times they had  
2 told the Applicant you all need this relief.  
3 The Applicant didn't agree with them that we  
4 needed the relief from the Reed-Cooke Overlay  
5 and we went pursuant to the decisions of this  
6 Board and DCRA in issuing permits to follow  
7 through on the approvals that we had and yes,  
8 we've had a disagreement for several years now  
9 on this issue.

10 And what they need to do and what  
11 they needed to do, Reed-Cooke, was not be  
12 arguing with us and giving us notice as to  
13 whether or not they agreed with us that we  
14 didn't -- that we didn't need any further  
15 ruling or relief from the Board. They needed  
16 to take an appeal of the Zoning  
17 Administrator's decision, appeal of the  
18 building permit. They needed to confront the  
19 issue with the District and not be saying  
20 well, we've told them this a problem created  
21 by the property owner and the Applicant for a  
22 building permit because we've told

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1 continuously that they needed this relief.

2 They shouldn't be arguing with us  
3 over it. We never have agreed with their  
4 position on that. They should have said the  
5 District, you all are issuing building  
6 permits. They're out there constructing. The  
7 Board issued its order with respect to  
8 reconsideration telling everybody specifically  
9 we haven't decided this issue with respect to  
10 the accessory sales or non-accessory sales or  
11 whether we needed some type of relief or not.

12 In a case years ago dealing with  
13 the 1700 block of N Street, the Board issued  
14 orders on that saying that they weren't  
15 dealing with an issue and said you should  
16 appeal it to the Zoning Administrator and the  
17 parties in opposition at that point in time,  
18 they immediately appealed and there were two  
19 cases on it and two separate cases that went  
20 to the Court of Appeals. One of which was  
21 Application 12045 and the one was 12139.

22 CHAIR MILLER: Excuse me a minute,

1 Mr. Glasgow. I just don't understand what  
2 you're saying here. You're saying that  
3 because the BZA didn't reach the decision  
4 about the sale of alcoholic beverages that  
5 that meant go see the Zoning Administrator  
6 about it?

7 MR. GLASGOW: Well, they should  
8 have been -- when we're out there  
9 constructing, we've taken the position we  
10 don't need the relief. Okay. We have  
11 continuously taken that. Their own pleadings  
12 say that they have been in contact telling us  
13 you all need this relief. We said no, we  
14 don't need this relief. We're accessory use.  
15 We don't need the relief.

16 CHAIR MILLER: So, when did you  
17 get authorization from somebody that you  
18 didn't need the relief? Do you think you  
19 don't need that?

20 MR. GLASGOW: We have that through  
21 -- no, we do not believe that we need it. We  
22 believe we're accessory. That the District

1 has continuously agreed with us that this is  
2 an accessory use and as an accessory --

3 CHAIR MILLER: I work for the  
4 District. I'm sorry. But, I --

5 MR. GLASGOW: Sure.

6 CHAIR MILLER: How has the  
7 District continuously agreed with you?

8 MR. GLASGOW: Well, they did in  
9 the prior case before the Board. The Office  
10 of Planning contacted the Zoning Administrator  
11 because that issue was raised by Reed-Cooke  
12 very, very early on in -- probably sometime in  
13 -- it was in 2005. The Zoning Administrator  
14 was contacted at that point in time. The  
15 prior Zoning Administrator and through the  
16 Office of Planning, then we reconfirmed with  
17 the Office of Planning back in 2005 that they  
18 -- the Zoning Administrator agreed that we did  
19 not need any relief on that.

20 CHAIR MILLER: Do you have a  
21 letter from the Zoning Administrator back  
22 then?

1 MR. GLASGOW: No, we didn't have a  
2 letter from the Zoning Administrator. What we  
3 had is a -- we had conversations with the  
4 Office of Planning. The staff person that was  
5 working with the Office of Planning.

6 CHAIR MILLER: So, is that a --  
7 conversations with the Office of Planning,  
8 should they have appealed that?

9 MR. GLASGOW: No, I think what  
10 they should have appealed was, one, they  
11 should have looked at what was happening with  
12 respect to the construction in the March 2006  
13 permit and then certainly the -- the November  
14 permit under the Board's rules, when you have  
15 a permit, you have -- and construction is  
16 ongoing, you have an obligation within 60 days  
17 of that permit to appeal it if you don't like  
18 what's being constructed under that permit.

19 CHAIR MILLER: I want to ask you  
20 this. If you don't like what's being  
21 constructed, that's obvious what's being  
22 constructed perhaps. That puts you on notice,

1 but how does that put you on notice to a use  
2 authorization?

3 MR. GLASGOW: When someone is  
4 continuously by their actions in front of the  
5 ABC Board prosecuting an application that  
6 you're a party to, how do you know that -- how  
7 do you not know that we wanted beer and wine  
8 sales there?

9 These continuously raised before  
10 the ABC Board that there's a zoning problem  
11 here, that they don't have an approval from  
12 Zoning to sell beer and wine. That's why we  
13 -- that's the only reason why we went and got  
14 the confirmation letter in March and now, it's  
15 being used for a basis for appeal. We had a  
16 building permit and Counsel for the ABC  
17 license Paul Pascal called me up and said we  
18 continually have issues being raised here at  
19 ABC that there's a zoning violation, that it  
20 violates the Reed-Cooke Overlay and all of  
21 that and he said is there something else that  
22 you can get us and so, we went back and got

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1 the Zoning Administrator to confirm what they  
2 had already being doing in issuing the permits  
3 previously. This was just a confirmation of  
4 a prior ruling. It's not a new ruling and  
5 it's similar to the Herron decision and a  
6 number of others the Board has had.

7 CHAIR MILLER: Did the Zoning  
8 Administrator confirm in the letter that they  
9 had authorized this use in the building  
10 permit?

11 MR. GLASGOW: No, it doesn't  
12 mention that in the letter. Where's a copy of  
13 the letter?

14 But, I don't think that that's the  
15 test under the Board's rules. I think it's  
16 that we had a permit. The permit was  
17 outstanding. It clearly referenced that  
18 construction.

19 Because this letter was being  
20 obtained for zoning purposes. It was being  
21 obtained so that Mr. Pascal, who the same  
22 parties have been protesting the ABC license

1 in front of for an extended period of time  
2 since 2005 and those proceedings are still  
3 ongoing, could have something to give to the  
4 ABC Board and now, it's being used --

5 CHAIR MILLER: Why didn't they  
6 just give them the building permit?

7 MR. GLASGOW: Pardon me.

8 CHAIR MILLER: Why didn't they  
9 just give them the building permit if that  
10 shows that they were allowed to sell alcoholic  
11 beverages?

12 MR. GLASGOW: No, that part --  
13 well, they have to have the ABC approval, too,  
14 before --

15 CHAIR MILLER: No, I understand  
16 that. But, you said --

17 MR. GLASGOW: But --

18 CHAIR MILLER: -- that this letter  
19 was done for the ABC Board to show that --

20 MR. GLASGOW: Correct.

21

22 CHAIR MILLER: -- there was an

1 authorization to sell. Correct?

2 MR. GLASGOW: No. No, what this  
3 does is says there's no zoning violation.  
4 That's what this letter is about.

5 CHAIR MILLER: Okay.

6 MR. GLASGOW: That's all that that  
7 was to do. We were continuously under  
8 construction and they knew we were under  
9 construction and they were protesting the beer  
10 and wine sales and were involved in that and  
11 the only thing that they hadn't protested and  
12 hadn't come in front of is taking an appeal of  
13 the Zoning Administrator's ruling or  
14 challenging -- what they should have done is  
15 appealed the building permit. There's  
16 construction going on.

17 That's why those rules were put in  
18 the regs with the tight time frames. Because  
19 when you don't like what's happening and you  
20 have a permit issued, you have 60 days to get  
21 your appeal in and they didn't do that.

22 CHAIR MILLER: And how does the

1 building permit put them on notice that  
2 they've gotten approval for sale of alcoholic  
3 beverages?

4 MR. GLASGOW: Because the permit  
5 on its face -- the plans -- the plans on the  
6 permit show and this Board has taken the  
7 position that you -- with your due diligence  
8 if you have an issue with something, you  
9 should be checking the permits and what it is.  
10 It says -- it says wine racks right in the  
11 plans.

12 And there was -- and I think that  
13 when you are protesting an ABC license and  
14 people are constructing out on the site and  
15 the application we originally filed says beer  
16 and wine and they keep raising it in front of  
17 the Board, in the transcripts, they're raising  
18 it in front of the Board. Saying, you know,  
19 there's an issue. They're in violation with  
20 beer and wine.

21 We disagreed and we're proceeding  
22 with construction and we're proceeding in

1 construction in accordance with plans approved  
2 by the District. They have an obligation  
3 under the Herron case and others -- BZA orders  
4 on that to say we have the problem here.  
5 We're appealing that permit. We're appealing  
6 your right to construct.

7 It is from that standpoint amazing  
8 given all the scrutiny on this project and all  
9 the phone calls and everything else that have  
10 been made to the District Government that  
11 someone didn't say well, how -- what are they  
12 constructing under because they're  
13 constructing the store. We're challenging  
14 their ABC license.

15 CHAIR MILLER: I don't think they  
16 were challenging your construction of the  
17 store though because they knew you were  
18 constructing the store. They participate in  
19 the BZA hearings.

20 MR. GLASGOW: Right.

21 CHAIR MILLER: So, if they saw the  
22 construction, that's not really notice that

1 you've had approval to sell alcoholic  
2 beverages.

3 MR. GLASGOW: No, we were applying  
4 to the ABC Board for that and they were --

5 CHAIR MILLER: Well, it's the  
6 zoning regulations though.

7 MR. GLASGOW: Pardon me.

8 CHAIR MILLER: Is it not in the  
9 zoning regulations that it's prohibited in the  
10 Reed-Cooke Overlay to sell unless --

11 MR. GLASGOW: Right.

12 CHAIR MILLER: -- beer or wine of  
13 alcoholic beverages unless you have a special  
14 exception? So, how would they know that you  
15 were authorized to sell just because you were  
16 constructing your store which you had had  
17 permission to do?

18 MR. GLASGOW: Because they  
19 recognized when you read through the  
20 transcript. They disagreed with our  
21 continuous position that we were proceeding  
22 with beer and wine sales as an accessory use

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1 and they were --

2 CHAIR MILLER: I don't think that  
3 was in the BZA proceeding. In the BZA  
4 proceeding --

5 MR. GLASGOW: No, they --

6 CHAIR MILLER: -- it was that you  
7 had not sought that relief. So, therefore,  
8 the Board did not entertain it.

9 MR. GLASGOW: Right. But, they  
10 raised it to the Board. They raised it to the  
11 Board and we said on our application we have  
12 accessory beer and wine sales.

13 If the Board doesn't have a copy  
14 of that, we'll make sure that we --

15 CHAIR MILLER: A copy of what?

16 MR. GLASGOW: Of our application.  
17 The application in Application Number 17395.

18 CHAIR MILLER: The Board did not  
19 -- I just want to say it. The Board did not  
20 decide oh, we're not going to hear it because  
21 the Board agrees with the Applicant's position  
22 that they don't need relief.

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1           The finding of the Board was that  
2           you had not sought relief. It was not before  
3           the Board.

4           MR. GLASGOW: We agree.

5           CHAIR MILLER: Okay.

6           MR. GLASGOW: We agree on that,  
7           but they have an obligation under the Board's  
8           rules when the construction is going forward  
9           and there is an ABC proceeding which they're  
10          protesting. We still haven't gone to the --  
11          we have gone to the Board. We never said we  
12          went to the Board and contrary to the  
13          opposition to the motion to dismiss, we never  
14          said we had an approval from the Board on  
15          that.

16          They spend several pages in here  
17          saying how we allege we had an approval from  
18          the Board on the ABC issue. We never claimed  
19          that we did. We never asked for one. We  
20          never believed that we needed one.

21          CHAIR MILLER: So, your point is  
22          you didn't need approval and that was

1 validated by your getting the building permit  
2 which shows --

3 MR. GLASGOW: That's correct.

4 That showed those uses in the --

5 CHAIR MILLER: But, the building  
6 permit doesn't say you're authorized to sell.  
7 The building permit is a layout of your store.

8 MR. GLASGOW: That's correct.

9 CHAIR MILLER: That's what it says  
10 on the -- permit-type layout.

11 MR. GLASGOW: Yes, it's a layout  
12 that shows the uses that are going to be in  
13 the space and where they are.

14 CHAIR MILLER: It doesn't show  
15 that you've been authorized to do that.

16 MR. GLASGOW: Well, the ABC Board  
17 had to -- has to approve it before we can  
18 actually --

19 CHAIR MILLER: I thought the --  
20 well, there's a question whether the Board has  
21 to approve it.

22 MR. GLASGOW: Well, that's on the

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1 merits. Not on timeliness. I mean timeliness  
2 is the -- timeliness is the permit and the  
3 rules of the Board dealing with an issuance of  
4 the permit and that you have 60 days to appeal  
5 that permit.

6 CHAIR MILLER: If that's the  
7 permit authorizing your sale. Correct?

8 MR. GLASGOW: Well, it's the  
9 authorizing -- it's the permit that -- yes,  
10 from a zoning standpoint, there's no other  
11 permit we'd ask for because that comes from  
12 ABC Board as the authorization to actually  
13 sell. This is the layout of the space.

14 So, if we had an -- if this permit  
15 -- well, this permit has never been  
16 challenged, but this permit, if you built this  
17 space out in accordance with this permit and  
18 we had the ABC approval, we wouldn't be  
19 seeking anything else from anybody.

20 CHAIR MILLER: No, but then there  
21 comes the point when what's the appropriate  
22 time for Reed-Cooke to challenge whether you

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1 should be seeking relief.

2

3 MR. GLASGOW: They should have --

4 CHAIR MILLER: And they try to do  
5 it in the BZA hearing and that was determined  
6 that they could not do it then because you had  
7 not sought relief. Correct?

8 MR. GLASGOW: Right.

9 CHAIR MILLER: So, they tried  
10 once. That was wrong.

11 MR. GLASGOW: Right.

12 CHAIR MILLER: So, what -- they  
13 could do the certificate of occupancy. Could  
14 they not? When that says how you can use your  
15 building.

16 MR. GLASGOW: I think they would  
17 have been late on that because they -- when  
18 there's a building permit at issue, they  
19 should have the building permit. I think they  
20 should have been following the procedure that  
21 was followed in the cases on the 1700 block of  
22 N Street where as soon as you know --

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1 CHAIR MILLER: Know what though?

2 What was that about? Was that about use?

3 MR. GLASGOW: Yes.

4 CHAIR MILLER: What use was that?

5 MR. GLASGOW: That use in  
6 Application Number 12045. It opponents of the  
7 application contend that the applicant does  
8 not qualify as a private club. The Board  
9 ruled that this question was not properly  
10 before the Board and should be subject of an  
11 appeal from the ruling of the Zoning  
12 Administrator should opponents wish to pursue  
13 this matter.

14 As soon as people are moving on in  
15 a different direction that you don't agree  
16 with and getting building permits and  
17 continuing to see construction on the site and  
18 continuing to seek the ABC license to which  
19 you're a party in opposition, they should --  
20 and then particularly, I was thinking that  
21 with respect to the order of the Board saying  
22 we haven't addressed this issue at all --

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1 CHAIR MILLER: Mr. Glasgow, was  
2 that -- you were referring to the 1700 block.  
3 Is that correct?

4 MR. GLASGOW: Yes, 1700 block of N  
5 Street.

6 CHAIR MILLER: Was that a primary  
7 use or an accessory use?

8 MR. GLASGOW: With respect to that  
9 -- that --

10 CHAIR MILLER: Use as a private  
11 club?

12 MR. GLASGOW: Yes, use as a  
13 private club. That use there was for a  
14 principal use because it's the YMCA.

15 CHAIR MILLER: So, I would imagine  
16 that Reed-Cooke was certainly on notice that  
17 construction was going forward with respect to  
18 your grocery store which was the principal  
19 use.

20 MR. GLASGOW: And that we were  
21 proceeding with respect to all the uses that  
22 we had told them and the Board through our

1 filing and through -- and not saying that the  
2 Board granted us specific approval on it, but  
3 that our filings said that we were using space  
4 for that and that it was going to be  
5 accessory. That was our position and that --

6 CHAIR MILLER: Did the plans  
7 approved by the Board in the BZA order show  
8 wine and yes, show the interior as you did on  
9 this building permit?

10 MR. GLASGOW: No, they did not.

11 CHAIR MILLER: No, so, the Board  
12 didn't approve that.

13 MR. GLASGOW: No, and I'm saying  
14 the Board -- I'm not saying that the Board  
15 did. Okay. That is the confusion that this  
16 opposition motion does. It alleges that we  
17 have asserted many different things which we  
18 don't assert and then knocks them down saying  
19 you didn't have approval for that.

20 We never said the Board granted us  
21 approval for that. So, there's eight or nine  
22 pages of that in here that we -- I don't know.

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1 I guess we defend ourselves against an  
2 accusation for something that we didn't  
3 request or state that we have.

4 But, what we did get was a  
5 building permit that showed that and they had  
6 60 days from that building permit to appeal it  
7 and they didn't appeal within the 60 days and  
8 they knew very well that we were proceeding  
9 with beer and wine approvals from the ABC  
10 Board and we're participating in that and  
11 we're -- had requested to appear as opponents  
12 to that and from day one, all the information  
13 out in the community has been for several  
14 years on this project, since 2005, has been  
15 that there's beer and wine intended to be sold  
16 at this premises.

17 MR. REYNOLDS: Madam Chair, point  
18 of clarification. The building permit that  
19 Mr. Glasgow --

20 MR. MOY: Excuse me, sir. Could  
21 you use the microphone? Turn the microphone  
22 on.

1 MR. REYNOLDS: Oh, sorry. Just a  
2 point of clarification, the building permit  
3 that Mr. Glasgow refers to what's the date on  
4 that?

5 MR. GLASGOW: That building permit  
6 is November 13th, 2006.

7 MR. REYNOLDS: Could we receive a  
8 copy of that please?

9 CHAIR MILLER: Mr. Glasgow, did  
10 you serve the ANC with these papers?

11 MR. GLASGOW: Yes, we did.

12 CHAIR MILLER: Good. Okay. Thank  
13 you.

14 MR. LYDEN: We have not received a  
15 copy of Holland & Knight's filing. Perhaps it  
16 was mailed to the post office box, but we have  
17 yet --

18 MR. REYNOLDS: That was November  
19 16th, 2006?

20 MR. GLASGOW: Yes, November 16th,  
21 2006.

22 MR. REYNOLDS: That's your

1 attachment G?

2 MR. GLASGOW: Yes.

3 MR. REYNOLDS: Okay.

4 MR. GLASGOW: Well, that's our  
5 pleading.

6 MR. REYNOLDS: Right. No, I see  
7 it. Thank you.

8 MR. GLASGOW: Well, then you do  
9 have the permit and the pleading?

10 MR. LYDEN: They didn't have it.  
11 I had it.

12 MR. GLASGOW: Okay.

13 MEMBER LOUD: Thank you, Mr.  
14 Glasgow. I wanted to ask a question regarding  
15 the March 21 letter that came under the  
16 signature of Mr. Crews and in paragraph two of  
17 the letter, you need a few minutes to get your  
18 copy. Do you have your copy in front of you?  
19 Okay. In paragraph two of the letter, there's  
20 a discussion of the Reed-Cooke Overlay  
21 District prohibiting off-premises alcoholic  
22 beverage sales. However, grocery stores are

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1 use permitted as a matter of right in a C-1  
2 District. So forth and so on and it goes on  
3 to conclude that essentially off-premises  
4 alcohol beverages sales are customarily  
5 incidental and subordinate to the uses  
6 permitted in that district and therefore, a  
7 matter of right in this case.

8 From my reading of the record,  
9 there was never a point in time when that  
10 specific analysis took place and conclusion  
11 was reached and so, from your standpoint, why  
12 would the March 21 letter not be a legal  
13 decision? Why would that not trigger the  
14 running of the clock for it to be a legal  
15 decision?

16 MR. GLASGOW: Because it was a  
17 confirmation of a prior decision.

18 MEMBER LOUD: And what's the  
19 parsing in your mind? What's the distinction  
20 between and where -- actually, let me back up.  
21 Where in the record was a prior decision made  
22 where Reed-Cooke was specifically applied to

1 the facts in this case?

2 MR. GLASGOW: It would have been  
3 the November issuance of the building permit.  
4 The Board's rules provide that when a building  
5 permit has been issued, the clock starts from  
6 the issuance of the building permit.

7 MEMBER LOUD: But, there's nothing  
8 in the building permit specifically regarding  
9 the interplay between the Reed-Cooke Overlay  
10 and the sale of alcohol at this location.

11 MR. GLASGOW: Well, what it is is  
12 when you -- Zoning has to sign off on the  
13 building permit and that's why we attached as  
14 exhibits the sign-offs that were obtained and  
15 sign-off that was obtained from Zoning is  
16 shown on the tab right before Tab F and that  
17 was obtained on September 26th.

18 MEMBER LOUD: Give me a moment.  
19 Let me just make sure I'm looking at it.

20 CHAIR MILLER: Is that J approval?  
21 Is it one page and it's just slashed Zoning by  
22 Fay? Is that it or is there more to the

1 Zoning?

2 MR. GLASGOW: Yes, that's how  
3 every building permit is dealt with.

4 CHAIR MILLER: Okay.

5 MR. GLASGOW: And when you have  
6 all those slash marks there, then you can get  
7 your -- of the ones that are required because  
8 not all of these are required on every type of  
9 permit.

10 CHAIR MILLER: Where does it  
11 reference Reed-Cooke Overlay?

12 MR. GLASGOW: The Reed-Cooke  
13 Overlay is --

14 CHAIR MILLER: Actually, I see  
15 Zoning Overlay Approval By: and I don't see  
16 anything next to it. Is that wrong?

17 MR. GLASGOW: But, I can -- on Tab  
18 G -- if you look at Tab G, it talks about the  
19 zone of the building permit that we're talking  
20 about 1631 Kalorama Road, N.W. Can you see  
21 the first page under Tab G of our pleading?  
22 All right. Look in the -- you see permit

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1 number and then you see date 11/13/2006 and  
2 then you see zone RC/C-2-B.

3 CHAIR MILLER: Yes.

4 MR. GLASGOW: All right. So, they  
5 check the overlays and they check all the  
6 zones before they sign off as the Zoning --

7 CHAIR MILLER: I mean we're going  
8 to ask -- I'm sure I asked Mr. LeGrant this,  
9 but when I'm -- will you look at that last  
10 page where it says J Approvals.

11 MR. GLASGOW: J Approvals.

12 CHAIR MILLER: It says three  
13 zoning by Fay.

14 MR. GLASGOW: Yes.

15 CHAIR MILLER: Okay. There isn't  
16 any initial list next to overlay approval. Is  
17 there on yours? I just want to make sure I'm  
18 looking at the right document.

19 MR. GLASGOW: No. No.

20 CHAIR MILLER: No.

21 MR. GLASGOW: But, what is shown  
22 -- but, the zone is clearly shown on the

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1 permit that was issued.

2 CHAIR MILLER: So, you're saying  
3 they don't have to initial it?

4 MR. GLASGOW: Well, they issue  
5 that box. They -- when they check off on the  
6 box and initial, that's generally what we see  
7 on them.

8 CHAIR MILLER: Okay.

9 MR. GLASGOW: On the applications.  
10 That's not -- they don't sign it. They don't  
11 sign and date and strike through that box  
12 unless they've approved. It's not a two or  
13 three step process.

14 CHAIR MILLER: Okay.

15 MEMBER LOUD: And let me go back  
16 to where you were beginning the answer for my  
17 question in terms of looking at Exhibit G.  
18 Just point me again to where specifically  
19 you're saying that the Reed-Cooke Overlay is  
20 referenced in the approved building permit.

21 MR. GLASGOW: Sure. At the top of  
22 the box, the box for the building permit.

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1 MEMBER LOUD: Yes.

2 MR. GLASGOW: Okay. This -- the  
3 side where my finger is --

4 MEMBER LOUD: Okay.

5 MR. GLASGOW: Okay. It says zone  
6 RC/C-2-B. Do you see that?

7 MEMBER LOUD: I do see that. I'm  
8 looking two rows beneath that and it says  
9 existing use business and proposed use  
10 business. Does that in anyway compromise the  
11 position that there was specific approval and  
12 application of Reed-Cooke to this specific set  
13 of circumstances?

14 MR. GLASGOW: No, because of the  
15 Zoning sign-off on the -- that's why we  
16 attached the building permit application. So  
17 that you could see that there was a Zoning  
18 sign-off on the application.

19 If there was no Zoning sign-off on  
20 the application, then there would be a problem  
21 with respect to the permit.

22 MEMBER LOUD: And was this the

1 same building permit that had, for example,  
2 been brought to ABC that was unclear to them  
3 and for which you sought further clarification  
4 from Mr. Crews that lead to the March 21  
5 letter?

6 MR. GLASGOW: Yes, this was the --  
7 this was the -- a building -- but, I'm not --  
8 I don't know whether the building permit was  
9 entered into the record there or not. I got  
10 a call from counsel from -- for the Applicant  
11 for the ABC Board saying can you get something  
12 that I can submit to the record here.

13 MEMBER LOUD: But, this is what  
14 you're hanging your hat on in terms of there  
15 being a specific trigger date for the 60 days.

16 MR. GLASGOW: Yes, this permit,  
17 its approval from Zoning, the construction  
18 work that was going on the site. Otherwise,  
19 we're concerned that when is it that we're  
20 safe with a building permit when you're  
21 proceeding with construction. The Board's  
22 rules were changed and provide specifically

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1 that when you have a building permit out on  
2 the site, they have 60 days to appeal it.

3 MEMBER LOUD: And apart from this  
4 building permit, was there anything else or is  
5 there anything else that you're hanging your  
6 hat on in terms of there being specific -- a  
7 specific approval date for the alcohol -- off-  
8 premises alcohol sales at the site?

9 MR. GLASGOW: We would state that  
10 there was earlier discussions between -- that  
11 we were made aware of from the Office of  
12 Planning and the Zoning Administrator that the  
13 Zoning Administrator concurred with the  
14 accessory use understanding.

15 MEMBER LOUD: Thank you.

16 CHAIR MILLER: Mr. Glasgow, what  
17 are the damages to Harris Teeter? I think you  
18 raised an estoppel argument.

19 MR. GLASGOW: Yes.

20 CHAIR MILLER: If their appeal is  
21 allowed to go forward, what is the damages?

22 MR. GLASGOW: The damages for --

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1 CHAIR MILLER: Or the harm.

2 MR. GLASGOW: -- the construction  
3 to date is about \$11 million.

4 CHAIR MILLER: If you can't sell  
5 alcoholic beverages or how is that really  
6 connected because if they go forward, they're  
7 saying -- I'm pretty sure they're saying you  
8 need to come to the Board for a special  
9 exception, so, to sell alcoholic beverages.  
10 So, I don't believe that the \$11 million is  
11 tied to -- I don't think it's that costly to  
12 come to the Board for a special exception.

13 MR. GLASGOW: No, it's not, but  
14 when you have like this -- for instance, the  
15 Taiko-Goto case which is a case I worked on  
16 with Wayne Quinn. It must be 30 years ago  
17 now. But, in any event, there was a kiln that  
18 was \$2500 that was built in the backyard and  
19 the Court of Appeals said that's substantial  
20 damages and with respect to if you took the --

21 CHAIR MILLER: Isn't that damages  
22 if you were denied a special exception?

1 That's what I'm trying to understand here.

2 MR. GLASGOW: Well --

3 CHAIR MILLER: That's not what's  
4 at issue here. The only thing is the process  
5 I think is what's at issue. That you would  
6 have to come to the Board for special  
7 exception relief.

8 MR. GLASGOW: Right. Well, if  
9 someone's untimely and you have substantial  
10 expenditures and there's a timeliness which is  
11 a bar to jurisdiction. Because what you're  
12 talking about -- what happens when you get by?  
13 What's the process when you get to that  
14 merits?

15 If someone is barred  
16 jurisdictionally, then our damages are  
17 whatever it is that we've spent to put the --  
18 put any of that use in existence.

19 In the Taiko-Goto case, you know,  
20 they ruled that there was a -- it was a bar on  
21 latches and estoppel and was \$2500 and the  
22 court said that's a significant enough

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1 expenditure for that to meet those -- that  
2 substantial loss of economic --

3 CHAIR MILLER: Okay. But, your  
4 \$11 million goes to the construction of your  
5 grocery store.

6 MR. GLASGOW: It goes everything.

7 CHAIR MILLER: Isn't that correct?  
8 Which is still going --

9 MR. GLASGOW: Right.

10 CHAIR MILLER: That's not going to  
11 be lost.

12 MR. GLASGOW: And you -- if you  
13 look at the 4 percent -- you say the floor  
14 area for the beer and wine sales area is about  
15 4 percent of the store. It's about 4 percent  
16 of the gross floor area. If you take 4  
17 percent of the \$11 million saying that  
18 everything is -- we're just going to prorate  
19 it over all the space, so 4 percent of \$11  
20 million I think is about \$500,000.

21 CHAIR MILLER: You can't use the  
22 space at all?

1 MR. GLASGOW: Well, it's not for  
2 what we --

3 CHAIR MILLER: Is that what you're  
4 saying?

5 MR. GLASGOW: It's not for what we  
6 want to use it for.

7 CHAIR MILLER: But, you're not  
8 even there yet because I think all Reed-Cooke  
9 saying is you need to get a special exception.

10 MR. GLASGOW: No, but with --

11 CHAIR MILLER: And then if you  
12 lost that, maybe that would be what you would  
13 suffer.

14 MR. GLASGOW: I -- well, it's too  
15 late then. I mean this is a jurisdictional  
16 issue. The jurisdictional issue is that you  
17 take into account the expenditures with  
18 respect to latches and estoppel that was made  
19 during -- because of the untimeliness.  
20 Otherwise, you'd be going back and having a  
21 damages case after a jurisdictional issue and  
22 the jurisdictional issue takes precedence and

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1 if they are found to be untimely with the  
2 appeal, yes, we do -- we have had these  
3 expenditures and it's -- that would qualify  
4 for that part of the estoppel argument.

5 CHAIR MILLER: Any other  
6 questions? Okay.

7 I think this is basically legal  
8 argument. So, I don't think we need to get  
9 into cross examination. If anybody wants to  
10 raise that as an issue, they can, but I think  
11 it would be efficient at this point to go to  
12 DCRA to address their legal arguments.

13 MS. BOLLING: Thank you, Madam  
14 Chair and the Board.

15 The District argues that the  
16 appeal should be dismissed for Reed-Cooke  
17 because they were untimely pursuant to 11  
18 DCMR 3112.2(a). The building permit starts  
19 the clock.

20 I would point to --

21 CHAIR MILLER: Building permit  
22 starts the clock for what?

1 MS. BOLLING: For when they had to  
2 file an appeal. The issuance which was  
3 November 13th, 2006.

4 And I would point to and we  
5 pointed to in our filing the December 12th,  
6 2005 letter written by Mr. Lyden who was  
7 President then and President now of Reed-Cooke  
8 Neighborhood Association and on page 2 in the  
9 third paragraph from the bottom in the middle  
10 and I shall read and quote. "In any event,  
11 should DCRA approve plans and issue permits,  
12 ultimately issue a certificate of occupancy  
13 incorporating the violation described above"  
14 which is beer and wine sales at Harris Teeter  
15 "such permits or certificate of occupancy  
16 would be submit to appeal under 11 DCMR  
17 Section 3100.2 and Reed-Cooke Neighborhood  
18 Association would intend to prosecute such an  
19 appeal."

20 So, this was in December 12th ,  
21 2005. We believe that under 3112.2(a), which  
22 speaks to the date the person appealing the

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1 administrative decision had knowledge or  
2 notice or reasonably should have had knowledge  
3 or notice of the decision complained of,  
4 building permits are posted. They saw the  
5 work going on. They have fought -- Reed-Cooke  
6 has fought beer and wine --

7 CHAIR MILLER: But, the building  
8 permits show approval of sales of alcoholic  
9 beverages?

10 MS. BOLLING: Building permits --

11 CHAIR MILLER: Or construction of  
12 the grocery store?

13 MS. BOLLING: The building permit  
14 and plans are together and the plans show  
15 aisles of beer and wine. So, the building  
16 permit is approval and authorization of the  
17 plan. So, they knew. Reed-Cooke knew that  
18 they -- Harris Teeter was going to sell beer  
19 and wine December 12th, 2005 and when this  
20 building permit was posted, when it was  
21 issued, they needed to start their appeal  
22 process before the 60 days went by and this

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1 Board only has -- under 3112.(d), I believe,  
2 .2(d), the 60-day deadline can be extended if  
3 the Appellant can show an exceptional  
4 circumstance which means something outside of  
5 Reed-Cooke Neighborhood's control had stopped  
6 them from being able to appeal.

7 They haven't shown that. They  
8 haven't alleged that. They haven't plead  
9 that. They have not come here today to even  
10 show that and furthermore, even if they did  
11 show that, you also have to weight the  
12 prejudice to the property owner and to the  
13 tenant, Harris Teeter, which we believe would  
14 be grave. I mean Harris Teeter --

15 CHAIR MILLER: What would it be?

16 MS. BOLLING: Harris Teeter needs  
17 to go forward with the plans to sell beer and  
18 wine here. I mean that's part of their plan.  
19 That's why they're coming into this urban  
20 market. If they can't sell beer and wine,  
21 they wouldn't be going through this whole  
22 process. They're not looking to come here and

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1 not sell beer and wine. Otherwise, their  
2 plans wouldn't have included it. I mean  
3 that's part of their thing. It's only --

4 CHAIR MILLER: How are they  
5 prejudiced because they would have to come to  
6 the Board for a special exception?

7 MS. BOLLING: Well, and Mr.  
8 LeGrant will testify to this, there's a big  
9 zoning difference between principal uses and  
10 accessory uses that he can tell you as an  
11 expert and I won't even get into to. But,  
12 there's a big difference and Harris Teeter,  
13 the property owner and the District feel that  
14 under the zoning regulations that the  
15 accessory use for selling beer and wine when  
16 it's incidental or accessory use under the 15  
17 percent for the alcohol beverage and under 20  
18 percent under the Court of Appeals law in this  
19 jurisdiction, they're fine. There's not a  
20 problem. But, he'll talk to that later.

21 But, so, they had knowledge. They  
22 had notice. They should have appealed?

1 CHAIR MILLER: What did they have  
2 knowledge of though? I mean it sounds like  
3 they had knowledge of the construction.

4 MS. BOLLING: They had knowledge  
5 that Harris --

6 CHAIR MILLER: They had knowledge  
7 of the building permit probably. I don't  
8 know. Did they? The ANC gets notice of the  
9 building permit.

10 MS. BOLLING: Yes, the ANC does  
11 get electronic notice of the building permit  
12 from DCRA.

13 CHAIR MILLER: And it sounds like  
14 your -- the same point as you think because  
15 those plans showed wine on some aisles in them  
16 that that meant they were on notice that it  
17 had been approved that the store could sell  
18 it. Is that correct?

19 MS. BOLLING: That there was a  
20 provisional certificate of occupancy.

21 CHAIR MILLER: There's a  
22 provisional. Is that in the record?

1 MS. BOLLING: Well, that comes --  
2 that's part of the zoning regs and Mr. LeGrant  
3 will --

4 CHAIR MILLER: Is that in the  
5 record? I haven't seen that.

6 MS. BOLLING: We haven't  
7 testified.

8 CHAIR MILLER: Does it -- well,  
9 that would be -- some -- got to notice. Is  
10 there a provisional that says use -- sale of  
11 alcoholic beverages on it?

12 MS. BOLLING: Okay. Let me see if  
13 I understand. When a building permit is  
14 issued, immediately under 3203.11(c) a  
15 provisional certificate of occupancy is issued  
16 and so, if Zoning approved in that zone, the  
17 Reed-Cooke Overlay, C-2-B, they have approved  
18 the sale as an accessory use beer and wine  
19 here. Then they've issued a provisional  
20 certificate of occupancy.

21 CHAIR MILLER: Couldn't they issue  
22 a provisional certificate of occupancy for the

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1 grocery store? Why does that mean they  
2 approved sale of beer and wine?

3 MS. BOLLING: Well, in this  
4 particular case, everybody, all the parties  
5 knew that there was going to be beer and wine  
6 sold here. So, it wasn't something that was  
7 just sprung up in the last minute. So, it was  
8 considered.

9 CHAIR MILLER: I think everybody  
10 knew that they wanted to sell beer and wine.

11 MS. BOLLING: Absolutely.

12 CHAIR MILLER: Okay. I don't  
13 know. We'll hear from Reed-Cooke, but way  
14 back when we heard the case for the variances,  
15 we heard they wanted -- that they -- people  
16 thought they wanted to sell it. So, that's  
17 really not the issue I don't think. The issue  
18 is how they got their approval and when they  
19 got their approval supposedly.

20 MS. BOLLING: When Zoning approves  
21 and then the agency issued the building permit  
22 authorizing the landlord and the tenant to

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1       construct this interior and allowed for the  
2       sale of beer and wine in this interior build  
3       out, it was approved by the agency. It was  
4       approved by Zoning. They had notice. It was  
5       served on the ANC. They knew about it before  
6       then December 12th and they should have  
7       appealed within 60 days.

8                   CHAIR MILLER: What's December  
9       12th?

10                   MS. BOLLING: Their letter that  
11       they wrote to, the Board's indulgence, to I  
12       guess your predecessor Mr. Geoffrey Griffis,  
13       the Chairman of the BZA. It's my Exhibit 1 in  
14       the motion to dismiss for the District.

15                   On December 12th, 2005, Mr. Lyden,  
16       President at that time and currently of Reed-  
17       Cooke Neighborhood Association, wrote a letter  
18       to the Chairman at that time and in that  
19       letter, that's the part I was citing earlier  
20       when he said he intended to appeal the  
21       building permit and a certificate of  
22       occupancy. Both of which were issued November

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1 13th, 2006.

2 Thank you.

3 CHAIR MILLER: Thank you. I'd  
4 like to ask Mr. LeGrant some questions since  
5 you are the expert here on zoning. Even  
6 though we're not qualifying you as an expert,  
7 we know you're an expert.

8 MR. LEGRANT: Okay.

9 CHAIR MILLER: Okay. Looking at  
10 the building permit, it says -- I'll wait  
11 until you -- you have it in front of you?

12 MR. LEGRANT: We're getting it.

13 MS. BOLLING: One second.

14 CHAIR MILLER: Okay.

15 MR. LEGRANT: Yes.

16 CHAIR MILLER: Okay. It says, you  
17 know, for instance, description of work,  
18 interior tenant build out, the permit type  
19 layout, conditions, restrictions, all  
20 construction done according to the current  
21 building codes, all construction done  
22 according to the current zoning regulations,

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1 interior work only.

2 So, how is one to know or is it --  
3 do you believe that this authorized sale of  
4 alcoholic beverages? A building permit.

5 MR. LEGRANT: Well -- well --

6 CHAIR MILLER: This building  
7 permit.

8 MR. LEGRANT: Right. The building  
9 permit page that you cite, of course, is a  
10 single page that represents the approval of  
11 the agency and inherent with this is a set of  
12 plans that were reviewed under all those  
13 regulations you noted. In this case, the  
14 plans as my counsel pointed out did show in  
15 the floor plan areas labeled for beer and  
16 wine.

17 It's the Office of Zoning  
18 Administrator's position that that was  
19 reviewed at the time to -- and as -- to see if  
20 it was -- the review of the plans was to  
21 insure subject to all the applicable  
22 regulations including that of the base zone,

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1 the C-2-B base zone and the Reed-Cooke  
2 Overlay.

3 So, the description that's set  
4 forth on this building permit page, of course,  
5 are terms, categories basically under the  
6 building code, but nonetheless, the issuance  
7 by DCRA is the approval that it was reviewed  
8 and including the review of the Office of  
9 Zoning Administrator that the plans attached  
10 to it met the zoning requirement in affect.

11 CHAIR MILLER: Well, let me ask  
12 you this. Could you interpret that to mean  
13 that they approved the layout and the -- not  
14 necessarily the sale?

15 MR. LEGRANT: Well, I guess if --  
16 to take the argument, if there was something  
17 in the layout that was in conflict with the  
18 zoning regulations, then the Office of Zoning  
19 Administrator would have either not approved  
20 it or held for it for correction and notified  
21 the Applicant that it was the Department --  
22 the Office's decision that it needed some type

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1 of relief.

2 But, I guess inherent in its  
3 approval is that everything has been -- that  
4 was -- the plans represent has been reviewed  
5 and our compliance with the zoning  
6 regulations.

7 CHAIR MILLER: And do you think  
8 that that is sufficient in here just to have  
9 that one check off on Zoning when, in fact,  
10 there's a provision in the regulations that  
11 prohibit the sale of alcoholic beverage sales  
12 subject to a public hearing before the Board  
13 of Zoning Adjustment? That it's just  
14 sufficient to have a check off on Zoning to  
15 put the community and everyone on notice that  
16 they've been approved by the Zoning  
17 Administrator?

18 MR. LEGRANT: Well, there are many  
19 projects that the Zoning Administrator's  
20 Office reviews that have varying levels of  
21 public controversy. In this particular case,  
22 the -- I just have to reiterate the provisions

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1 of the Reed-Cooke Overlay District were  
2 reviewed. I think we will speak to in the  
3 merits --

4 CHAIR MILLER: How do we know  
5 that? Because it's a little -- because it  
6 says it's in the Reed-Cooke Overlay?

7 MR. LEGRANT: Well, in any review  
8 of a building permit application, we need to  
9 -- the Office needs to ascertain whether it's  
10 -- what all particular regulations apply in  
11 the base district, the overlay district and  
12 the general provisions inherent in the zoning  
13 code itself.

14 CHAIR MILLER: Well, okay. I've  
15 seen some of these zoning review pages before  
16 for overlays, like tree and slope overlay or  
17 whatever.

18 MR. LEGRANT: Yes.

19 CHAIR MILLER: And there seems to  
20 be more indication that they've actually  
21 considered the issues that are relevant to  
22 that overlay. Now, I don't see that here.

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1 All we see is like a check next to Zoning.

2 MR. LEGRANT: Okay. In some of  
3 the cases, you noted for example a tree and  
4 slope overlay. There may be a specific  
5 computation for impervious area for example  
6 and I think it's inherent in that review that  
7 that be documented.

8 It speaks a little bit to the  
9 difference -- you know, we look to both the  
10 building and the use. If it's a building-  
11 related analysis, then we do have a zoning  
12 computation sheet that documents some of those  
13 numerical standards, compliance with height  
14 and setbacks, lot occupancy and parking and so  
15 forth.

16 For the use itself, it's simply  
17 that we look at the use provision set forth in  
18 the code and if it's not in compliance, the  
19 process stops. Otherwise, okay, the use has  
20 been checked. The assumption -- the decision  
21 is yes. The analysis proceeds and if it meets  
22 all the other requirements, then the building

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1 permit is approved by the Office of Zoning.

2 MEMBER LOUD: Mr. LeGrant, I  
3 wanted to ask you a question regarding this  
4 specific case. Where it appears that the  
5 granting of the building permit followed a BZA  
6 hearing.

7 MR. LEGRANT: Yes.

8 MEMBER LOUD: Correct? And in the  
9 context of the BZA hearing, it was  
10 specifically noted that the scope would not  
11 include the issue of off-use sale -- sale for  
12 off-use -- sale off-premises of the alcohol.  
13 Is that part correct as well?

14 MR. LEGRANT: Well, the BZA --

15 MEMBER LOUD: Just trying to wrap  
16 my arms around the whole issue.

17 MR. LEGRANT: Well, the BZA  
18 approval spoke to specific variance relief.  
19 For example, the loading berth requirements --

20 MEMBER LOUD: That's correct.

21 MR. LEGRANT: -- and so forth.

22 MEMBER LOUD: That's correct.

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1 MR. LEGRANT: So, inherent in the  
2 review, if we would -- it's incumbent upon the  
3 office to insure that the BZA order is  
4 followed in terms of the relief that was  
5 specified.

6 MEMBER LOUD: In that case, why  
7 wouldn't the notice then to the public be that  
8 the parking requirements and the loading berth  
9 requirements that were addressed at the BZA  
10 hearing met the requirements of RC/C-2-B as  
11 opposed to going beyond that and also knowing  
12 with some degree of clarity and certainly that  
13 it also included the off-use -- the sale for  
14 off-use of alcohol?

15 MR. LEGRANT: Well -- yes.

16 MEMBER LOUD: This building permit  
17 in other words was issued on the specific  
18 variance -- parking variance and loading berth  
19 variance issues that came before BZA. Is that  
20 correct?

21 MR. LEGRANT: That's correct.

22 MEMBER LOUD: Okay.

1           MR. LEGRANT: But, then inherent  
2           in its approval is the BZA granted relief for  
3           those provisos of the code. Then all these  
4           other standards and requirements of the code  
5           nonetheless had to be reviewed and checked and  
6           this continues to be the office's assertion  
7           that the alcohol sales portion that was  
8           represented in the floor plans are not subject  
9           to the restrictions set forth in the Reed-  
10          Cooke Overlay District.

11           MEMBER LOUD: Does it trouble you  
12          at all as the Zoning Administrator that there  
13          could be occasions where parties could get  
14          around the zoning requirements say of an  
15          overlay like Reed-Cooke simply by bringing an  
16          appeal -- well, let me articulate this  
17          properly. Simply by refusing to include in  
18          their scope of appeal the use questions. Just  
19          at the outset specifically saying those are  
20          off limits. We're not going to address those  
21          and address the variance issues and be allowed  
22          to get the benefits of something that's

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1 specifically prohibited by an overlay simply  
2 because they prevented BZA from addressing the  
3 other issues.

4 MR. LEGRANT: Well, I don't know  
5 if I would say it troubles me. It is  
6 certainly tough calls that have to be made in  
7 my office, but necessarily the process is  
8 reactive. We react to what's represented in  
9 the application. The application shows as a  
10 -- describes the proposed building. There's  
11 a floor plan. There's representations of the  
12 dimensions of the loading berth that, you  
13 know, on this case had their variance relief.  
14 Number of parking spaces. All that needs to  
15 be looked at as to whether they can be a  
16 better, fairer, more formative process. You  
17 know, it's beyond the scope of my office to  
18 speak to if the process that -- the adequacy  
19 of the process we have now for informing  
20 neighborhoods of like building permit  
21 issuance.

22 I don't know if that speaks to

1 what you were trying to get to in your  
2 question.

3 MEMBER LOUD: I think the point of  
4 my question was that if we're really talking  
5 about this discussion being about notice and  
6 it would take such a tortured interpretation  
7 of the application of Reed-Cooke that would  
8 allow parties to essentially get around the  
9 entire overlay simply by crafting their permit  
10 and their permit papers so that it renders it  
11 null and void. That that might be a very  
12 tortured interpretation I guess of that  
13 provisions which goes directly to whether or  
14 not there was notice in the November 13  
15 building permit.

16 But, I appreciate your response  
17 and it was helpful for me.

18 MR. LEGRANT: Okay. Thank you.

19 CHAIR MILLER: Any other  
20 questions? Okay.

21 MR. GLASGOW: Can I respond to two  
22 things very quickly --

1 CHAIR MILLER: Okay.

2 MR. GLASGOW: -- that Mr. Loud had  
3 in his last question?

4 With respect to a building permit,  
5 anytime you have a BZA order, normally, I  
6 think that most special exceptions or  
7 variances I've ever had in a case is probably  
8 five or six on any one case.

9 If you look at a Zoning  
10 Administrator's computation sheet, they  
11 probably do computations on 30 items. I think  
12 the comp sheets that I've seen, you know,  
13 really are tight. So, all of those different  
14 things. So, that when you get a building  
15 permit, you have the right under that building  
16 permit to construct everything that's shown on  
17 that building permit, on the plans that go  
18 with the building permit. So, the review by  
19 the Zoning Administrator's Office goes far,  
20 far beyond what you applied to the Board for.  
21 You still have to be in compliance in all  
22 other regulations.

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1           Like if you come in with a set a  
2 plans and you don't have a rear yard and you  
3 didn't ask for it, you get stopped. You have  
4 to deal with that in some fashion, but I want  
5 to make sure that that part was understood.

6           Secondly, I've been -- I've had a  
7 number of BZA cases. I can't remember whether  
8 you've sat on any of them, but I think I've  
9 sat on some with the Chair where there's been  
10 a question as to well, you -- do we need this  
11 additional relief or not in the case. I think  
12 we had one with respect -- a few months ago.  
13 It had to do with something with respect to  
14 the parking regulations or something and do  
15 you need an additional relief.

16           So, the Board has not over a  
17 period of time, if they really, really think  
18 that there's an additional relief -- it's not  
19 the applicant. We don't control the entire  
20 process. We can apply for what we want, but  
21 the Board in some instances has stepped in and  
22 said well, we think you need X, Y and Z relief

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1 in addition or are you sure that this is the  
2 relief under this section rather than another  
3 section.

4 So, I think that if -- I think the  
5 -- we looked at it that the Board just said  
6 okay, you haven't asked for the relief. You  
7 know, there's a question there that's been  
8 raised by Reed-Cooke and everybody else.  
9 We're not dealing with it. It's not in front  
10 of us, but I haven't had the Board been  
11 reticent in my experience to say we think you  
12 need another area of relief if the Board has  
13 just come to the conclusion that you have to  
14 have another area of relief.

15 CHAIR MILLER: I just want to  
16 state for the record that if the Board does  
17 not do that, that does not mean that the Board  
18 doesn't think you need the relief, you know.  
19 So, it often happens when -- also when the  
20 Applicant is very agreeable to adding relief.  
21 So, I just don't want any wrong conclusions,  
22 you know, drawn from the Board's actions or

1 inactions with respect to suggesting relief.

2 So, okay. Are we ready to go to  
3 Reed-Cooke now? Do you want to say any  
4 arguments in opposition to the motion to  
5 dismiss?

6 MR. LYDEN: Well, say I'm in shock  
7 is to put it mildly. I've got my training  
8 wheels on in doing this. This is the first  
9 one of these I've ever done.

10 I think we'll stand by the  
11 submission we've made in opposition to the  
12 motion. The -- we'll just leave it there.

13 I think the regulations are very  
14 clear that this is a unique special exception  
15 as a matter of fact and that the exception is  
16 -- it's clear in Chapter 14 that the special  
17 exception is required and we never had that  
18 window to get in and the venue to present it  
19 and we also note that this was the first  
20 overlay that was written in the District of  
21 Columbia and there were some elements in that  
22 overlay that were not repeated in other

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1 overlays and one of them was that this  
2 statement that says if there's a conflict  
3 between Chapter 14 and any other part of the  
4 zoning regulations, the more restrictive of  
5 the two will apply and in this case, the more  
6 restrictive is the Reed-Cooke Overlay.

7 And other thing is that the  
8 property owner is not without relief. That  
9 there is specific direction given in Chapter  
10 14. If you've got a problem and your business  
11 is going to fail or you don't believe you can  
12 make it or for any reason, you have -- the  
13 opportunity is there for the -- to go and seek  
14 a special exception. That was never done and  
15 we brought it up repeatedly and because of, I  
16 guess, our neophyte status, we missed some  
17 passes there, but we were not silent about the  
18 fact that there was a need for the -- for a  
19 special exception and I think the regulations  
20 are very clear in Chapter 14.

21 CHAIR MILLER: Did you see the  
22 building permit soon after it was issued?

1 MR. LYDEN: Personally, no. We  
2 have people in our association moving in and  
3 out and we've had -- several people -- we've  
4 handled this as a case and, you know, when a  
5 case manager gets promoted, they leave and  
6 then somebody else steps up and tries to fill  
7 in the holes.

8 All I remember was they've issued  
9 the permits and I said great and I said there  
10 are -- are they posted in the window or  
11 something? They said yes and that was that.  
12 But, we never felt that issuing of a building  
13 permit -- we never contested the building. We  
14 contested at the BZA hearing about what we  
15 thought about the project and then the density  
16 and size and whatnot and as far as building  
17 the grocery store and putting it in, we would  
18 have had the opportunity to go in and go  
19 appeal this to a court. We did not do that.

20 CHAIR MILLER: Did you see the  
21 permits that were posted or no?

22 MR. LYDEN: Personally, no.

1 CHAIR MILLER: Have you seen them?  
2 I mean I assume they're the same as what we  
3 have, but I don't know. Maybe there are more.  
4 Have you seen them?

5 MR. LYDEN: No, I have not.

6 CHAIR MILLER: Okay.

7 MR. LYDEN: I walk by there and --  
8 walk by the building and I've just picked  
9 this. Again, I hate to say tag-team  
10 management on this, but no, I have not.

11 CHAIR MILLER: Is there anything  
12 else you want to add or should we hear from  
13 the ANC now? Oh, I'm sorry. Are there any  
14 questions for Reed-Cooke right now? Okay.

15 Thank you.

16 MR. REYNOLDS: Thank you, Madam  
17 Chair. It was not my intention to be enjoying  
18 your company here today. However, since these  
19 motions were brought light to me, were brought  
20 forth to me and I did receive the one from our  
21 sister agency of Consumer Regulatory Affairs,  
22 one of the agencies that I -- has performed

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1 great and valuable services to the citizens of  
2 District 07 and ANC 1C and an agency I admire  
3 greatly.

4 I received this yesterday and I  
5 heard of the Holland & Knight motion, but I  
6 have not had a chance to review it.

7 I'm concerned by some things here.  
8 From what I've seen of the motions and what  
9 I've heard of the motions, I find them  
10 frivolous and I find them an attempt to  
11 prevent opening a record and reviewing an  
12 issue which is never clearly been addressed.

13 In the application for the  
14 building permit and the building permit  
15 together in the building permit itself that  
16 are in the excellently organized exhibits  
17 here, the mention of beer and wine is not  
18 there.

19 Mr. Glasgow appropriately asked  
20 the question when are you safe with a building  
21 permit? Well, to me, it's pretty direct  
22 1403.1, when the Board of Zoning Adjustment

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1 grants a special exception. That has not  
2 happened yet.

3 What I find is that these  
4 proceedings are merely an attempt to stop the  
5 process to finally bring to light the issue of  
6 an overlay district being applied to these  
7 questions of alcohol.

8 In regard to damages though, I  
9 find that highly disturbing because I've seen  
10 the plans, but I spend a great deal of time  
11 walking this district because it is my single  
12 member district and I also chair the committee  
13 for the ANC on Planning and Zoning and  
14 Transportation. Although not an attorney, I  
15 can tell the construction has really just  
16 ended the phase of the general or gross build-  
17 out to deal with the elements that are going  
18 to incorporate the business offices that are  
19 going to be built there. But, has not  
20 actually gone into the final detailed build-  
21 out for the grocery store itself. There are  
22 plenty of opportunities to make corrections

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1 here. To make a claim to allege that there is  
2 \$11 million or a portion of \$11 million that  
3 is granted as damages here, I think is a bit  
4 excessive. I think there's plenty of  
5 opportunities to change that around.

6 But, in the end, the motions  
7 themselves I believe are without merit. In  
8 the case of actually being able to review the  
9 issue of the validity of the letter written in  
10 March should continue and should be allowed.

11 Thank you.

12 CHAIR MILLER: Thank you. Could I  
13 get your name again please?

14 MR. REYNOLDS: My first name is  
15 Wilson W-I-L-S-O-N and my last name is  
16 Reynolds R-E-Y-N-O-L-D-S and my residence is  
17 2370 Champlain Street, N.W., Unit 23 in the  
18 District. Zip code --

19 CHAIR MILLER: Do you have  
20 authorization from the ANC to represent the  
21 ANC in this case?

22 MR. REYNOLDS: No, ma'am, I --

1 CHAIR MILLER: Oh, you're speaking  
2 as an individual --

3 MR. REYNOLDS: Yes, I am --

4 CHAIR MILLER: -- ANC  
5 Commissioner?

6 MR. REYNOLDS: -- I am here simply  
7 as the single member district representative  
8 for this, but I also am bringing my  
9 qualifications as the Chair of the Commission  
10 for Planning, Zoning and Transportation.

11 But, I do want to make it clear  
12 that I am not entitled to great weight in this  
13 matter because I am not acting on behalf of  
14 the entire ANC.

15 Thank you.

16 CHAIR MILLER: Okay. I'm not sure  
17 you're entitled to be a party as a matter of  
18 right either, but that being said, now that  
19 you're here though, I would like to ask you do  
20 you get all building permits sent to the ANC?

21 MR. REYNOLDS: We do get them by  
22 electronic transmission.

1 CHAIR MILLER: You do?

2 MR. REYNOLDS: Yes.

3 CHAIR MILLER: So, on a fairly  
4 prompt basis or what?

5 MR. REYNOLDS: Prompt, currently,  
6 yes. Absolutely and totally.

7 When this permit was applied for,  
8 I was not on the ANC.

9 CHAIR MILLER: Okay.

10 MR. REYNOLDS: I was a member of  
11 the Reed-Cooke Neighborhood Association and I  
12 still am a member of the Reed-Cooke  
13 Neighborhood Association.

14 CHAIR MILLER: So, but -- okay.  
15 Just to know what kind of notice gets out to  
16 the community though, if you get by electronic  
17 means the building permit, do you get anything  
18 with respect to the plans?

19 MR. REYNOLDS: I have not seen  
20 that. I have not seen plans.

21 CHAIR MILLER: So, an ANC person  
22 would have to -- ANC person, whatever, would

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1 have to follow up and go down to DCRA to look  
2 at the plans. They just get notice of the  
3 building permits. Is that right?

4 MR. REYNOLDS: Yes, ma'am.

5 CHAIR MILLER: Okay. Okay. Thank  
6 you. Any other questions? Have any final  
7 comments?

8 MR. GLASGOW: I think there was a  
9 copy of the permit that was sent in November  
10 of 2006 on this to the ANC.

11 MS. BOLLING: Are you speaking of  
12 the electronic file?

13 MR. GLASGOW: Yes.

14 MS. BOLLING: Yes, Madam Chair, if  
15 they -- a file sent out by the District of  
16 Columbia's Department of Consumer Regulatory  
17 Affairs of everything issued in November. I  
18 believe we didn't supplement our motion with  
19 that, but it just lists all of them. It  
20 doesn't include the plans. It's the name of  
21 the property, the square and the lot and it's  
22 a, you know, a title line. If you'd --

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1 CHAIR MILLER: Right.

2 MS. BOLLING: -- if you'd like it,  
3 we could --

4 CHAIR MILLER: Well, I was just  
5 asking because the line appears on the plans.  
6 It doesn't appear on the building permit. So,  
7 that would not necessarily put them on notice  
8 to the wine issue, but it would put them on  
9 notice that there's a building permit with  
10 plans in DCRA's office basically.

11 MS. BOLLING: That's correct.

12 CHAIR MILLER: Okay. Okay. We're  
13 ready to deliberate this issue right now.

14 Okay. I want to just set the  
15 background what our regulations are. This is  
16 a question of jurisdiction. Pursuant to the  
17 Zoning Act, the Board has jurisdiction to hear  
18 appeals alleging error in any order,  
19 requirement, decision, determination or  
20 refusal made by any district administrative  
21 officer or body in the carrying out or  
22 enforcement of the zoning regs and that's in

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1 D.C. Code 6-641.07(g) (1).

2 But, an appeal has to be timely.  
3 Otherwise, the Board does not have  
4 jurisdiction and that is mandatory and  
5 jurisdictional and the time limits are set  
6 forth in our regulations at 3112 and they've  
7 been held to be mandatory and jurisdictional  
8 by the Court of Appeals. 3112.2 requires that  
9 all appeals be filed within 60 days after the  
10 date the person filing the appeal had notice  
11 or knowledge of the decision complained of or  
12 reasonably should have had notice or knowledge  
13 whichever is earlier. 3112.2(d) says that the  
14 60 day-time limit may be extended only if the  
15 appellant shows that there are exceptional  
16 circumstances that are outside the appellant's  
17 control and could not be reasonably  
18 anticipated that substantially impaired the  
19 appellant's ability to file an appeal to the  
20 Board and, two, the extension of time will not  
21 prejudiced the parties to the appeal.

22 Basically, I think the issue here

1 is that the intervener and DCRA say that Reed-  
2 Cooke Association's appeal is untimely.  
3 They're appealing apparently the Zoning  
4 Administrator's approval of -- that the  
5 intervener could sell alcoholic beverages off  
6 premises for off-premises use. Let me see.  
7 The provision exactly is in 1401.

8 The following uses shall be  
9 prohibited in the RC overlay district: B.  
10 Off-premises alcoholic beverage sales.

11 DCRA and intervener say that the  
12 time -- that the decision was made in the  
13 building permit which issued November 11th --  
14 November 13th, 2006 and the appeal was filed  
15 I believe May 21st, 2000, wait a second, 6.  
16 In any event, the question is really which --  
17 when -- was the decision made in the building  
18 permit or was the decision made in the March  
19 21st, 2006 letter of the Zoning Administrator  
20 which specifically addressed the question of  
21 off-premises alcohol beverages sale citing  
22 Section 1401.1(b).

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1           Okay. So, then we go to look at  
2           -- first of all, look at the building permit  
3           and see whether or not Reed-Cooke had notice  
4           or knowledge of the decision complained of and  
5           I really think the decision complained is --  
6           is the authorization by zoning that they could  
7           sell beer -- they could sell off-premises  
8           alcoholic beverages and DCRA and intervener  
9           say that the fact that it was -- wine is  
10          indicated in certain -- on the plans for  
11          certain aisles and Zoning signed off on it and  
12          a building permit was issued, that that  
13          indicated Zoning approval and therefore, the  
14          clock started ticking then for an appeal for  
15          60 days.

16                 Do other Board Members want to  
17          address that question now before I give my  
18          opinion or do you want to --

19                 MEMBER LOUD: No, I think you can.  
20          From my vantage point, you can go ahead --

21                 CHAIR MILLER: Okay.

22                 MEMBER LOUD: -- and then I'll

1 weigh in with my thoughts.

2 CHAIR MILLER: To me, I do not  
3 think that that building permit is valid  
4 notice of authorization for sale under 1401.1  
5 of off-premises alcoholic beverages. To me,  
6 it -- and I'm on the Zoning Board. I mean I  
7 look at it and it's a building permit. It  
8 seems to go to construction. It goes to  
9 interior attendant build out. It goes to  
10 layout.

11 As far as an issue so important as  
12 a prohibited use that's in our regulations, a  
13 prohibited use that says it can only be  
14 allowed pursuant to special exception after a  
15 public hearing before the Board of Zoning  
16 Adjustment, I find this would be -- number  
17 one, it does not seem to me -- well, we're  
18 only going to notice. So, I would not look at  
19 this as adequate notice that such a use has  
20 been approved.

21 Nowhere in here does it talk about  
22 approval of sale of alcoholic beverages. We

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1 see a check off on Zoning. We don't even see  
2 a specific check off next to overlay. We  
3 don't see any comments next to overlay. Any  
4 issues that the overlay may raise. We see no  
5 -- I see no notice in here that this is an  
6 approval of sale. I do see notice that there  
7 was wine indicated on the plans, but I don't  
8 see how that -- how you can make the leap from  
9 that to an approval of a use that's a  
10 prohibited use in our zoning regulations  
11 that's suppose to be determined by special  
12 exception by the Board of Zoning Adjustment.

13 So, I think that we all know that  
14 the community was on notice that the  
15 intervener intended to sell liquor, but I  
16 don't think they were on notice as to when  
17 there was an official approval of that and  
18 that, in fact, the March 21st, 2000 letter  
19 actually addresses that head on and that's the  
20 first time that this issue was really  
21 addressed and I find it interesting that this  
22 letter does not confirm that the decision was

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1 made in the building permit whatsoever. It  
2 does not reference that building permit. It  
3 references only discussions with the  
4 intervener.

5 So, I don't think that this is  
6 analogous to any of the Board decisions that  
7 I'm familiar with and I think I've read just  
8 about all of them. Though perhaps they're not  
9 all coming to mind, but the one that Mr.  
10 Glasgow talked about which did go to a use was  
11 a primary use. It wasn't an accessory use.  
12 It was very reasonable for the community to  
13 conclude that if they saw a building permit  
14 like this that this was a permit in accordance  
15 with the BZA's previous order that did not  
16 address sale of alcoholic beverages.

17 Others?

18 MEMBER LOUD: Madam Chair, thank  
19 you. I appreciate your comments and  
20 appreciate the parties, of course, for what I  
21 thought was a very full record of briefing on  
22 the issue and very helpful for me in reading

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1 my conclusion.

2 I guess at the end of the day, I  
3 was not persuaded by the arguments that the  
4 November 13th building permit constituted a  
5 decision on the sale of alcohol for off-  
6 premises use at the Harris Teeter site.

7 First, the building permit was  
8 issued after the BZA hearing where it was  
9 specifically noted that the whole alcohol  
10 issue was not on the table. At least, not at  
11 the BZA and it was that BZA hearing that, I  
12 think, validated the building permit for  
13 issuance.

14 Secondly, on the building permit  
15 as regards zoning, the notations that all  
16 construction be done to zoning regulations,  
17 that's one of the conditions noted, but with  
18 respect to Zoning, there's no other  
19 information on the building permit.

20 Particularly, nothing with respect to the  
21 Reed-Cooke Overlay. I'm mindful that there is  
22 a notation on the upper right-hand corner that

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1 designates the Reed-Cooke Overlay.

2 But, to me it would be just as  
3 reasonable for someone to conclude solely that  
4 the parking -- the construction needs around  
5 parking and loading berths were zone compliant  
6 with the Reed-Cooke and not necessarily  
7 anything to do with the sale of alcohol on the  
8 premises. So, I think that it was ambiguous  
9 in that regard and I think that we ought to be  
10 really clear with our citizens around issues  
11 like that and not leave it open to a number of  
12 different interpretations.

13 So, I conclude that the decision  
14 in this case was really the March 21 letter  
15 that was signed by the Zoning Administrator  
16 and that that was a very clear decision for  
17 the parties here to take action against and  
18 not the earlier November 13 building permit.

19 MEMBER DETTMAN: Madam Chair, just  
20 in order for me to sort of talk about when I  
21 think this decision was made, I need to just  
22 sort of step back through this time line and

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1 I think that to address Mr. Glasgow's comment  
2 that in the original BZA application the sale  
3 of beer and wine was included, it's included  
4 and it's included under a section that says  
5 intended uses and so, at that point, it's sort  
6 of intent to sell beer and wine and from that  
7 point all the way up until August 18th, 2005,  
8 I would agree that it's still sort of intent.  
9 Ah, we might, but we might not.

10 On August 18, 2005, Harris Teeter  
11 filed an application with the ABC Board for  
12 the class B liquor license and to me, that's  
13 sort of the first aha moment. Because there  
14 I see well, not only do they intend to, but  
15 now, they're starting the process to get  
16 authorization and the ABC Board process is the  
17 authorization to exchange money for beer or  
18 wine and I can't recall actually if the ABC  
19 Board has approved or not.

20 The second aha moment for me was  
21 the September 11, 2006 which Harris Teeter  
22 applies for a building permit to construct the

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1 interior layout of the proposed grocery store  
2 and why that's the second aha moment is that  
3 not only do they intend to sell this, but now,  
4 they're starting to program their space and  
5 it's included in their building plans that  
6 show not only where the racks are going to go.  
7 But, it also indicates how much linear shelf  
8 area is going to be dedicated to holding beer  
9 or wine.

10 And so, after the application was  
11 filed, on September 26, 2006, the Zoning  
12 Administrator approves the interior building  
13 permit application and drawings and what that  
14 says to me is that the Zoning Administrator  
15 made the determination that the Reed-Cooke  
16 Overlay use prohibitions don't apply because  
17 he decides that it's an accessory use and that  
18 the use prohibitions don't apply to accessory  
19 use. They apply to principal use.

20 And so, when this decision was  
21 made, I think it was actually the November  
22 2006 issuance of the building permit and

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1 although the building permit does not actually  
2 say for the sale of beer and wine, I think up  
3 until November 2006 it's been clearly argued  
4 that they intend to sell the beer and wine and  
5 that they started the process with the ABC as  
6 well as the BZA. That they're going to go  
7 further than intend to sell it. They're going  
8 to start to get authorization to exchange  
9 money for it from the ABC and they're going to  
10 get authorization from DCRA in order to  
11 allocate where in their store it's going to  
12 go.

13 So, long story short, I think that  
14 the decision that the clock started in  
15 November 2006.

16 CHAIR MILLER: I can see that as  
17 the other side of the argument and I can  
18 understand where you're coming from and I  
19 guess my point is though that -- well, you're  
20 bringing a lot to the table, you know, having  
21 a planning background, et cetera, but it does  
22 show, you know, their programming and their

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1 intent to do that. But, does that mean that  
2 the community should be on notice that that's  
3 actually been approved and that's where I  
4 would differ from you if you're differing from  
5 the direction that I was going in. Because we  
6 have such a strong prohibition in the  
7 regulations that for that little indication on  
8 the layout and this is called kind of a  
9 building permit layout, build out, for that --  
10 for them to have to know then that that means  
11 zoning approval of sale, I wouldn't make that  
12 leap and deny the appeal for that -- I mean I  
13 wouldn't make the leap.

14 And therefore, say we don't have  
15 jurisdiction because it's based on should they  
16 have reasonably known and I don't believe that  
17 the community necessarily should have  
18 reasonably known from that. Particularly,  
19 when it doesn't say anywhere on the building  
20 permit or in any other notes, you know,  
21 approval of sale or anything like that.

22 MEMBER DETTMAN: The reason why I

1 spent a little bit of time talking the point  
2 at where the Zoning Administrator made the  
3 determination that this falls as an accessory  
4 use and is not -- doesn't fall under the use  
5 provisions of 1401.1 is that after the  
6 original BZA hearing when it appears in the  
7 transcripts this issue was brought up, between  
8 the time of the original hearing and the  
9 issuance of the second -- the interior  
10 building permit, I think that's ample time for  
11 the parties involved, the interested parties  
12 to address this issue with the Zoning  
13 Administrator.

14 And Mr. LeGrant pointed out that  
15 when an application for a building permit is  
16 issued, the Zoning Administrator or the staff  
17 that's assigned to this application goes  
18 through and figures out what provisions of the  
19 zoning regs apply.

20 This was a new building permit for  
21 the interior construction of the building. It  
22 wasn't an amendment or revised building

1 application or building permit application  
2 that has already gone through Zoning. So, I  
3 think that process should have been triggered  
4 again and I think it had been triggered. So,  
5 that at this time, at September 2006 when this  
6 interior building permit application comes in,  
7 if the right amount of work and effort had  
8 been put into it, there was potential there  
9 for the Zoning Administrator to say okay,  
10 well, for the interior construction of this  
11 space, you need relief from the RC Overlay.

12 But, that that decision wasn't  
13 made. The decision was made that this was  
14 actually an accessory use that did not apply.

15 CHAIR MILLER: You know, I mean I  
16 don't know that he'd have to make that  
17 decision and that's what bothers me when  
18 there's nothing written in, you know, in all  
19 the papers that support the building permit.  
20 Because to me, it's like part -- you know,  
21 layout. Okay. Well, you may have to go ask  
22 for a special exception, but in the meantime,

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1 I'll approve your layout. You know, you can  
2 put your wine in these aisles, you know.

3 That's different. Approval of  
4 layout is different from approval of sale and  
5 I can understand that one might argue that  
6 well, you don't just do layout. I mean you're  
7 going to sell it. But, that doesn't mean that  
8 the ZA was actually approving sale under that  
9 theory.

10 Then the only theory that they  
11 could do it would be as it was a matter of  
12 right and the special exception didn't apply,  
13 but this is a very controversial issue and so,  
14 it's so not evident to me. Just to put wine  
15 as part of the layout means, you know, and the  
16 ZA signed off. I just don't think that that's  
17 -- you know, we're talking about -- it's not  
18 black and white. It's kind of like what's  
19 reasonable and is it reasonable for the  
20 community not to have known that this was  
21 approval and I don't even know that this was  
22 approval myself. I mean you could read it as

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1 approval, but I don't think it's clear that it  
2 is.

3 So, for that reason, I wouldn't --  
4 we have to judge that, you know, when they  
5 knew or should have known and should have they  
6 have known that this was the approval and  
7 because I can't even determine that it  
8 actually was the approval necessarily, I  
9 wouldn't find that we didn't have jurisdiction  
10 because they -- it wasn't reasonable for them  
11 not to know.

12 Are there other comments on that  
13 aspect? Otherwise, there are a couple of  
14 other points made in the motion and then we  
15 can come back to that if we need to.

16 Mr. Dettman, did you want to say  
17 something else right now?

18 MEMBER DETTMAN: Just one last  
19 thing and then I --

20 CHAIR MILLER: Okay.

21 MEMBER DETTMAN: -- I probably in  
22 my ramblings have said it. But, in terms of

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1 the decision to authorize the sale, I've  
2 always sort of viewed the -- to get the  
3 authorization to sell alcohol, you have to go  
4 to the ABC. I think that the provision of  
5 off-premises alcoholic beverages sales -- the  
6 decision that the Zoning Administrator made to  
7 me authorized the owner to construct a  
8 building that would be used in part or in  
9 whole for the off-premises alcoholic -- for  
10 off-premises alcoholic beverage sales.

11 His decision didn't approve the --  
12 you know, the selling of alcohol. It just  
13 sort of approved that you could use a building  
14 in part or in whole and I think that decision  
15 was made just prior to the issuance of the  
16 building permit in November 2006.

17 CHAIR MILLER: Here, but, because  
18 I -- it sounds like you're saying by checking  
19 off he approved the use of that building for  
20 sale of the wine. No, for -- right? But, he  
21 didn't approve the use for sale, but not  
22 necessarily sale?

1                   MEMBER DETTMAN: I think he  
2 approved -- by approving that building permit,  
3 he approved the construction of a building  
4 that was going to be used in part or in whole  
5 for the off-premises alcoholic beverage sales.

6                   CHAIR MILLER: Okay. So, then  
7 there's a difference though it sounds like  
8 when you're approving construction versus  
9 sale. Is that what -- are you saying that?  
10 It's a two-step process.

11                   MEMBER DETTMAN: That's --

12                   CHAIR MILLER: So, you're  
13 approving a building that's constructed for  
14 that use, but you're not necessarily approving  
15 the sale.

16                   MEMBER DETTMAN: I think in this  
17 case. I wouldn't say in every case. But, I  
18 think in this case that deals the sale of  
19 alcoholic beverages, my approach to this case  
20 is sort of -- runs along two parallel lines.  
21 One has to do with the process that needs to  
22 be put in place with the ABC. The other one

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1 that needs to be put in place with DCRA, the  
2 Office of Zoning.

3 CHAIR MILLER: Okay. But, my  
4 question for you is if the building permit was  
5 evidence the ZA's approval of construction of  
6 a building allowing the accessory use of for  
7 sale of alcoholic beverages, is that different  
8 than authorizing sale of off-premises  
9 alcoholic beverages under 1401 because Bill  
10 Crews, the Zoning Administrator then, refers  
11 to 1401 in the letter? Do you know what I'm  
12 saying?

13 MEMBER DETTMAN: I'm not sure I  
14 follow your question.

15 CHAIR MILLER: Okay. 1401.1, in  
16 the letter, they specifically approve the use  
17 of the premises for alcoholic beverage sales  
18 I believe. Do you think they did that in the  
19 building permit?

20 MEMBER DETTMAN: Did you say that  
21 in 1401 they specifically --

22 CHAIR MILLER: Well, in March --

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1 in the March 21st letter --

2 MEMBER DETTMAN: Um-hum.

3 CHAIR MILLER: -- the Zoning  
4 Administrator specifically refers to 1401.1(b)  
5 and he says that it's an allowable accessory  
6 use for a retail grocery store and in the  
7 building permit, there's no reference to  
8 1401.1(b). Is there a difference in your --

9 MEMBER DETTMAN: I think the  
10 letter that's dated March 21st, 2007, Mr.  
11 Crews' reference to 1401.1(b) and I think he  
12 was stepping through his rationale on saying  
13 that the use, the off-premises alcoholic  
14 beverage sales, is allowable as a matter of  
15 right in these commercial districts. However,  
16 it is prohibited in 1401.1(b), but I think  
17 that he made the determination that these use  
18 provisions in 1401 deal with principal uses  
19 and since his interpretation of this project,  
20 this proposal is that because of their -- you  
21 know, their gross receipts and sales and that  
22 their square footage is only going to be 9

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1 percent dedicated to the sale, that it fell  
2 under the accessory uses customarily  
3 subservient to the primary use.

4 CHAIR MILLER: So, then any person  
5 aggrieved by any order requirement, decision,  
6 determination or refusal made by an  
7 administrative officer or body including the  
8 mayor of the District of Columbia in the  
9 administration or enforcement of the zoning  
10 regulations may file a timely appeal with the  
11 Board.

12 This Reed-Cooke Neighborhood  
13 Association, I think they clearly have  
14 standing. I think that they're  
15 representatives of their neighborhood to  
16 protect this overlay that they were active I  
17 believe in enacting. So, I don't see any  
18 reason why they wouldn't have standing and I  
19 think that they have certainly indicated -- I  
20 mean they have a right to address any -- well,  
21 I don't know if circumventing is the right  
22 word, but they want to protect the procedures

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1 that are in place under the overlay and I  
2 think that's what they're doing right now and  
3 they -- and if it gets to the merits with  
4 whether the sale of alcohol has any adverse  
5 impacts, it's their neighborhood. So, I  
6 really don't see any issue here about  
7 standing. Do you?

8 MEMBER LOUD: I would concur,  
9 Madam Chair.

10 CHAIR MILLER: Okay. Let's get to  
11 equitable doctrines of estoppel and laches.  
12 Laches is basically when they sit on their  
13 rights and don't appeal and it's unreasonable.  
14 Again, I don't see them not sitting on their  
15 rights. I think that they have been active on  
16 this issue and I just -- I'm of the view that  
17 that building permit did not put them on  
18 notice of an approval of the sale of alcoholic  
19 beverages.

20 MEMBER LOUD: Again, that issue is  
21 very related to the timeliness discussion  
22 rather and it -- depending on how you came out

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1 on that, you probably come out the same way on  
2 the latches issue, but I think for me the  
3 building permit was very ambiguous and as you  
4 noted, Madam Chair, even the March 21 letter  
5 you would think or certainly a reasonable  
6 person would think that the very first  
7 paragraph would say as my building permit  
8 dated November 13th, 2006 indicates, we have  
9 already approved sale of alcohol for off-  
10 premises use. But, there's no mention of it  
11 anywhere. In fact, there's a mention of  
12 previous BZA cases, DCCA cases, but not a  
13 specific mention of that November 13 building  
14 permit as the decision. In the final  
15 paragraph, the ZA ends up by saying I concur  
16 with and then it just leads one to conclude  
17 that he's concurring with a discussion that  
18 was had previously with the person that the  
19 letter's being sent to, but not affirming a  
20 decision that has already been made and  
21 issued.

22 So, again, however you came out

1 earlier is probably how you're going to come  
2 out on -- on that issue.

3 CHAIR MILLER: Okay. And then we  
4 just did briefly. There was an argument  
5 about, you know, equity and harm to the  
6 appellant and I just thinks that fairly  
7 specious. The harm here is that -- the  
8 greatest harm, the immediate harm would be  
9 that they would -- if the Appellants win their  
10 appeal, they'd have to come before this Board  
11 for a special exception which is the procedure  
12 set forth in our regulation.

13 So, they're well aware of the  
14 regulations and I don't think it's \$11 million  
15 that they've spent on constructing a grocery  
16 store and certainly, it's not at issue in our  
17 decision right now. The only thing at issue  
18 is the right process.

19 Okay. Is there anything else  
20 here? Any other comments on the motions to  
21 dismiss? Either DCRA or interveners?

22 Okay. Are we ready for a motion?

1           At this point, then I would move  
2           to deny the District of Columbia's motion to  
3           dismiss and the property owner's motion to  
4           dismiss.

5           MEMBER LOUD:   Seconded.

6           CHAIR       MILLER:   Further  
7           deliberation?  All those in favor say aye.

8           (Ayes.)

9           CHAIR MILLER:   Opposed?

10          MEMBER DETTMAN:  Opposed.

11          CHAIR       MILLER:  All those  
12          abstaining?  Would you call the vote please?

13          MS.   BAILEY:  Madam Chair, the  
14          motion to dismiss from the property owner and  
15          DCRA, the motion was made by Ms. Miller,  
16          seconded by Mr. Loud.  Mr. Dettman is opposed  
17          to the motion.  So, the vote is 2-1-2 and the  
18          motion fails for a majority vote.

19          CHAIR       MILLER:  That's correct.  
20          However, I think that the way our rules read  
21          and I -- and Ms. Monroe can correct me if I'm  
22          wrong, that we need to have a vote whether to

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1 grant the relief requested next and I believe  
2 that would come from Mr. Dettman. A motion to  
3 grant the motions to dismiss.

4 MS. MONROE: You don't need to.  
5 You can if you'd like. The regulations do not  
6 specify one way or the other.

7 CHAIR MILLER: Okay. Well, my --  
8 that's what we done in the past. We know how  
9 it's going to turn out maybe, but why don't we  
10 do that and then we can have further  
11 deliberation -- discussion on the -- how we  
12 interpret it.

13 So, do we have a motion to grant  
14 the motions to dismiss?

15 MEMBER DETTMAN: Madam Chair, I'd  
16 like to make a motion to grant the motion to  
17 dismiss the appeal.

18 CHAIR MILLER: Okay. And I'll  
19 second it for a vote.

20 All those in favor say aye.

21 MEMBER DETTMAN: Aye.

22 CHAIR MILLER: All those opposed?

1 MEMBER LOUD: Opposed.

2 CHAIR MILLER: All those  
3 abstaining? Okay. Would you call the vote  
4 then, Mr. Moy?

5 MS. BAILEY: Ms. Miller and Mr.  
6 Loud, you voted against the motion. Is that  
7 correct?

8 CHAIR MILLER: That's correct.

9 MS. BAILEY: Okay. I just want to  
10 get my bearing here for a second.

11 Madam Chair, the vote is -- the  
12 motion was to grant the motion of DCRA and the  
13 property owner to dismiss the application.  
14 Mr. Dettman made the motion. Ms. Miller and  
15 Mr. Loud are opposed to the motion. So, the  
16 vote is 1-2-2.

17 CHAIR MILLER: Okay. My  
18 understanding of the rules then, Ms. Monroe,  
19 you can correct me if I'm mistaken, is that  
20 for there to be an affirmative action on the  
21 part of the Board, there has to be a majority  
22 vote of the Board and that would be three and

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1 since there are not three votes to grant the  
2 motions to dismiss, that they're not granted.  
3 That they're deemed denied. They're not  
4 granted. There has to be three affirmative  
5 votes.

6 MS. MONROE: Say that again.

7 CHAIR MILLER: In order to grant  
8 to -- it's my understanding and you know we  
9 can recess and look at the rules again, but my  
10 understanding is for an affirmative -- for  
11 their to be an affirmative action on the Board  
12 there has to be -- for us to grant something,  
13 there has to be three votes to grant  
14 something.

15 MS. MONROE: So, you're reading  
16 affirmative action as a grant not as a denial?

17 CHAIR MILLER: As a grant. Yes.  
18 As a grant.

19 MS. MONROE: I think either one is  
20 an affirmative action.

21 CHAIR MILLER: All right. Well,  
22 maybe I'm phrasing it wrong, but in order for

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1 us to grant relief that's sought, there has to  
2 be three. We can --

3 MS. MONROE: For any decision, you  
4 have to have three. I mean what the  
5 regulation says. The only regulation on  
6 point.

7 CHAIR MILLER: Then, well, I think  
8 it's read that way because otherwise we're,  
9 you know, in a deadlock because it's not --

10 MS. MONROE: And then the first  
11 motion usually it would fail. The first  
12 motion would fail.

13 CHAIR MILLER: It's not on a  
14 first-come basis. It's usually on granting  
15 affirmative -- granting relief. We cannot  
16 grant a motion without three.

17 MS. MONROE: The concurring vote  
18 of the majority.

19 CHAIR MILLER: They didn't bring  
20 before us a motion -- they brought before us  
21 a motion to dismiss. We can't grant a motion  
22 to dismiss if we don't have three Board

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1 Members voting for that.

2 MS. MONROE: That's correct.

3 CHAIR MILLER: Okay.

4 MS. MONROE: You need three.

5 CHAIR MILLER: Okay. That brings  
6 us to Mr. -- the motion to dismiss against Mr.  
7 Cooper. Is that correct? Where we are going.

8 MR. GLASGOW: That is the next  
9 motion.

10 CHAIR MILLER: Okay. We don't  
11 have to rehash all the issues.

12 MR. GLASGOW: No, I don't think  
13 so.

14 CHAIR MILLER: Okay.

15 MR. GLASGOW: And I don't intend  
16 to. I think that that -- that motion has some  
17 separate facts to it with respect to the dates  
18 of participation in certain items. With  
19 respect to the ABC Board, the dates are  
20 different. That type of thing, but I think  
21 all the basic points are the same for --

22 CHAIR MILLER: Let's hear from Mr.

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1 Cooper. Sorry to cut you off, but I remember  
2 that Mr. Cooper didn't get a chance to respond  
3 in writing and so, if your -- I want to know  
4 whether your position after what you've heard  
5 already today is whether you want us to hold  
6 the motion in abeyance or whether you're  
7 prepared to have us deal with it now.

8 MR. COOPER: I consider the action  
9 taken by the Board most appreciated and --  
10 okay. I consider the action of the Board most  
11 appreciated and sufficient with respect to the  
12 government and the property owner's motion to  
13 dismiss and I would -- I have nothing further  
14 to say on that.

15 I would imagine that the property  
16 owner has further issues he'd like to dispute  
17 with me going to standing which I will seek  
18 and the opportunity to respond on.

19 CHAIR MILLER: Sir, my question is  
20 just to be clear, are you ready to address  
21 these issues right now and not have them held  
22 in abeyance?

1 MR. COOPER: If my failure to  
2 address these -- the issue of standing  
3 currently will put at risk the decision of the  
4 Board with respect to this motion, I'm not  
5 going to do that. I'm not going to jeopardize  
6 the decision the Board has already made on --

7 CHAIR MILLER: We made a decision  
8 with respect to Reed-Cooke. We didn't make a  
9 decision with respect to you.

10 MR. COOPER: Okay.

11 CHAIR MILLER: Okay. Some of the  
12 decisions that we made obviously about the  
13 building permit --

14 MR. COOPER: All right.

15 CHAIR MILLER: -- et cetera,  
16 they're going to stay the same. Like this res  
17 judicata thing already because we've decided  
18 that.

19 MR. COOPER: That's right. Well,  
20 then as that's decided, I'll take my -- any  
21 available opportunity to respond that the  
22 Board affords me on that motion and we should

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1 be able to proceed with the rest of the --

2 CHAIR MILLER: Okay. It sounds  
3 like Mr. Glasgow has some issues that are  
4 specific to you with respect --

5 MR. COOPER: Yes.

6 CHAIR MILLER: -- to a motion to  
7 dismiss and my question is are you prepared  
8 for us to go forward and entertain them now --

9 MR. COOPER: No.

10 CHAIR MILLER: -- or -- no, we're  
11 going to put those in abeyance and then we're  
12 going to go back to Reed-Cooke's merits.

13 MR. COOPER: Yes, I'm done with --  
14 until I have an opportunity to respond, I  
15 don't have anything to say about the motion to  
16 dismiss. Not about standing or any other  
17 issue.

18 As the Board has already decided  
19 for purposes of Reed-Cooke, that only leaves  
20 standing and once I respond, then I would  
21 expect the Board to address the standing  
22 issues between us as far as I'm concerned.

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1 I don't mean to be --

2 CHAIR MILLER: Okay. I'm going to  
3 hear from Mr. Glasgow, but this is the way I  
4 see it then. If we put that in abeyance, your  
5 issue in abeyance on standing or whatever,  
6 okay --

7 MR. COOPER: um-hum.

8 CHAIR MILLER: -- then you might  
9 not have an opportunity to address it orally.  
10 You would have an opportunity to address it in  
11 writing because --

12 MR. COOPER: Perfectly fine.

13 CHAIR MILLER: -- we have, you  
14 know, hearing dates.

15 MR. COOPER: Perfectly fine.

16 Perfectly fine.

17 CHAIR MILLER: Okay. That's fine  
18 with you. Okay.

19 MR. COOPER: Preferred.

20 CHAIR MILLER: Mr. Glasgow, any  
21 comments?

22 MR. GLASGOW: I believe that our

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1 pleadings and arguments on that are -- they're  
2 in our documents.

3 CHAIR MILLER: Okay.

4 MR. GLASGOW: I think the time  
5 line that I went through it's a record that as  
6 to when Mr. Cooper submitted to the ABC Board  
7 and his date was different. Now, his date for  
8 taking his appeal is also different and he did  
9 not file his appeal until --

10 CHAIR MILLER: Mr. Glasgow, I  
11 don't want to get into this though if we're  
12 not going to get into it. I mean my question  
13 is --

14 MR. GLASGOW: Oh, I'm --

15 CHAIR MILLER: -- he wants to hold  
16 it in abeyance.

17 MR. GLASGOW: Oh, the whole thing  
18 in abeyance. I'm sorry. I didn't -- I didn't  
19 know whether you were asking --

20 CHAIR MILLER: Yes.

21 MR. GLASGOW: -- me to set forth  
22 any additional comments I wanted to make to

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1 the Board on that or --

2 CHAIR MILLER: Right. I only  
3 would if he wanted -- if he was ready to  
4 entertain it and then I was just turning to  
5 you to make sure that unless you had some  
6 objection or argument why we should be dealing  
7 with this now and not hold it in abeyance.  
8 Okay.

9 MR. GLASGOW: Madam Chair, it's up  
10 to you as to whether we hold it in abeyance.  
11 I'm ready to proceed now or --

12 CHAIR MILLER: Okay.

13 MR. GLASGOW: -- ready to proceed  
14 how you want to do it.

15 CHAIR MILLER: Okay.

16 MR. GLASGOW: He does have  
17 different dates as to when he --

18 CHAIR MILLER: Right.

19 MR. GLASGOW: -- filed his appeal.

20 CHAIR MILLER: Okay. Well, I'm  
21 going to ask my Board Members. I think it's  
22 -- you know, we have the option of just

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1 holding Mr. Cooper's part in abeyance on  
2 standing, et cetera under the motion to  
3 dismiss. They will then address it in writing  
4 after that hearing and then we'll consider  
5 that in the record when we make our decisions.

6 Is that okay?

7 MR. COOPER: All I need is a due  
8 by date.

9 CHAIR MILLER: Do that at the end  
10 of this whole hearing.

11 MR. COOPER: Okay.

12 CHAIR MILLER: Okay.

13 MR. COOPER: Thank you.

14 CHAIR MILLER: I think I'd like to  
15 just have a five-minute break before we get  
16 into the merits. That's where we're getting.  
17 A ten-minute break. Okay.

18 (Whereupon, at 4:26 p.m., off the  
19 record until 4:45 p.m.)

20 CHAIR MILLER: Okay. We're back  
21 on the record and we're not going to proceed  
22 with Reed-Cooke Neighborhood Association's

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1 appeal. So, the process is to hear from the  
2 Appellant first as to the case with respect to  
3 the Zoning Administrator's letter being in  
4 error.

5 Are you ready to proceed?

6 MR. LYDEN: Yes, I am.

7 CHAIR MILLER: Okay.

8 MR. LYDEN: My name is Peter  
9 Lyden. I'm a resident of the Reed-Cooke  
10 Neighborhood and I'm a member of the Executive  
11 Board of the Reed-Cooke Neighborhood  
12 Association.

13 BZA Appeal Number 17675 concerns a  
14 March 21st, 2007 letter written on letterhead  
15 stationery of the Government of the District  
16 of Columbia by a senior official of the  
17 Department of Consumer Regulatory Affairs Mr.  
18 Bill Crews.

19 The letter give the appearance of  
20 authenticity and states that a grocery store  
21 at 1631 Kalorama Road can as a matter of right  
22 under D.C. Zoning Regulations sell alcoholic

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1 beverages.

2 The statements made in this letter  
3 are not true, are false and misleading to the  
4 un-knowledgeable reader.

5 The appearance of authenticity was  
6 used to mislead the Alcoholic Beverage Control  
7 Board to believe that all zoning issues have  
8 been cleared and they were free to proceed to  
9 grant an alcoholic beverage control license  
10 for case number 61034-05/062P at 1631 Kalorama  
11 Road.

12 Reed-Cooke Neighborhood  
13 Association made a motion to dismiss to the  
14 ABC Board based on the fact that no exception  
15 to Chapter 14, the Reed-Cooke Overlay had been  
16 made.

17 In November 2006, this issue was  
18 debated, was made by the ABC Board and a  
19 detailed -- and we detailed the pertinent  
20 elements. As a result, an afternoon session  
21 was devoted to questioning the Reed-Cooke  
22 Neighborhood Association by the Alcoholic

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1 Beverage Control Board. At the end of the  
2 afternoon, the ABC Board said they would take  
3 our presentation under advisement and at that  
4 time, Holland & Knight representative was  
5 questioned about the exception and they could  
6 not -- they were not able to produce anything.

7 At the end of the afternoon, they  
8 said they would take our presentation under  
9 advisement. We heard nothing from the ABC  
10 Board until the publication of the Zoning  
11 Administrator's letter to Holland & Knight and  
12 we received that not on the date it was  
13 signed, but on the date of hearing which I  
14 believe was March 28th.

15 The following week, the ABC Board  
16 met and Chairman Burger said we have our  
17 direction to proceed. You might disagree with  
18 the letter. You may not like what the letter  
19 says, but we have our authority to move  
20 forward.

21 On April 14th, 2007, Reed-Cooke  
22 Neighborhood Association sent a letter to the

1 Zoning Administrator pointing out his errors  
2 in his letter and requesting that he rescind  
3 the letter and I have a copy of that attached  
4 to my testimony which I will enter into the  
5 record. There was no response.

6 In March, Mayor Fenty had been our  
7 guest speaker at a special Reed-Cooke  
8 Neighborhood Association meeting. There was  
9 an overflowing crowd making it a very  
10 successful event. A thank you letter was sent  
11 to Mayor Fenty for his attendance and  
12 requested help to rescind the Zoning  
13 Administrator's letter was included.

14 That request for help resulted in  
15 his 19 June 2007 letter which is attachment 2  
16 to my testimony. It stated that the Office of  
17 the Zoning Administrator had no jurisdiction  
18 over the issue.

19 It was just after we received the  
20 Mayor Fenty letter that Mr. Crews was removed  
21 as Zoning Administrator. We don't know why  
22 and we don't pump ourselves up to think that

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1 we were the cause of it. Coincidence was an  
2 interesting thing.

3 In the meantime, Reed-Cooke  
4 Neighborhood Association filed this appeal to  
5 the BZA resulting in case 17675. The Zoning  
6 Administrator's letter was used at the ABC  
7 Board as proof positive that when you build a  
8 grocery store, you have a matter of right for  
9 an ABC license. The pesky Reed-Cooke Overlay  
10 District does not exist for this ABC case and  
11 the ABC Board has pressed on with hearings to  
12 reach a final decision to grant or not grant  
13 the requested license. With the March 21,  
14 2007 Zoning Administrator's letter, they think  
15 they have clear sailing to grant the letter,  
16 arguments to nullify the March 21st, 2007 DCRA  
17 Zoning Administrator's letter and direct the  
18 property owner to seek a special exception as  
19 detailed in Title 11 Zoning Chapter 14.

20 The District of Columbia Municipal  
21 Regulations are very specific on the latitude  
22 given the Zoning Administrator and limits the

1 Zoning Administrator's ruling authority to  
2 minor deviations as stated in paragraph 25222  
3 as follows. 25222.1 says the Zoning  
4 Administrator's authorized to admit the  
5 following deviations if the Zoning  
6 Administrator determines that the deviation or  
7 deviations will not impair the purpose of  
8 otherwise applicable regulations. Deviations  
9 not to exceed 2 percent of the area  
10 requirements governing the lot minimum size,  
11 percent of lot occupancy and area courts and  
12 roof structures. B, deviations do not exceed  
13 the greater of 2 percent or 12 inches of the  
14 linear requirements governing minimum lot  
15 width and C, deviations do not exceed the  
16 greater of 10 percent or 12 inches of the  
17 linear requirements governing rear yard, side  
18 yard, minimum dimensions of a court and court  
19 reaches, roof setback structure requirements  
20 provided that all deviations of roof structure  
21 setback requirements comply with the act to  
22 regulate the height of buildings.

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1           Nowhere in the regulations is the  
2 Zoning Administrator given the authority to  
3 interpret the zoning regulations in the manner  
4 or to the degree that he did in his letter to  
5 Holland & Knight.

6           This alone is sufficient reason  
7 for you, the BZA, to nullify, void, rescind  
8 the Zoning Administrator's letter.

9           In the Zoning Administrator's  
10 letter of March 21st, he stated a grocery  
11 store is a use permitted as a matter of right  
12 under a C-1 District under paragraph 701.4(1)  
13 and is therefore permitted as a matter of  
14 right by carry over to the C-2 District.  
15 Accessory uses customary and incidental  
16 subordinate to the uses permitted in C-2  
17 Districts are permitted.

18           However, off-premises alcohol  
19 beverage sale is a use that is specifically  
20 prohibited in the Reed-Cooke Overlay District  
21 by DCMR 1401.1(b). This is where the subject  
22 property is located.

1                   Moreover paragraph 1400.4 states  
2 where there are conflicts between this  
3 chapter, Chapter 14, and the underlying zoning  
4 district, the more restrictive regulations  
5 shall govern. In this case, Chapter 14, the  
6 Reed-Cooke Overlay District is the more  
7 restrictive and prevails. Thus, paragraph  
8 1400.4 that prohibits the -- 1400.1(b) that  
9 prohibits off-premises alcohol sales in the  
10 Reed-Cooke Overlay District overrides any  
11 matter of right for off-premises alcohol sales  
12 uses accessory or otherwise contained anywhere  
13 else in Title 11 zoning.

14                   This clarification was put into  
15 Chapter 14 specifically to prevent any  
16 confusion about orders or precedence with any  
17 other part of the zoning regulations.

18                   However, the property owner is not  
19 without relief. Paragraph 1403 special  
20 exception and in its subordinate paragraph  
21 states an exception from the requirements of  
22 this chapter shall be permitted only if

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1 granted by the Board of Zoning Adjustment as  
2 a special exception pursuant to paragraph 3104  
3 after public hearing and subject to the  
4 following criteria and it lists a number of  
5 criteria.

6 Thus, the property owner had clear  
7 direction on how to proceed if a prohibited  
8 use so important to his business that he  
9 cannot operate it without it. He may seek a  
10 special exception through the Board of Zoning  
11 Adjustment process as stipulated in paragraph  
12 1403, 1403.1, 1403.2 and 3104.1.

13 In the case of 1631 Kalorama Road,  
14 the owner has tried about every way possible  
15 to get around the prohibited prohibition of  
16 off-premises alcoholic beverage sales except  
17 to step up and ask for a special exception.  
18 Had this been done in the previous BZA case  
19 for variances, this would have been resolved  
20 one way or the other and the owner would have  
21 known where he stood before he progressed  
22 beyond the variance point.

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1           We do not understand what they are  
2           afraid of and why they avoid taking the  
3           accepted legal route offered to them.

4           The Zoning Administrator's letter  
5           is clearly in error by not applying the  
6           elements of paragraph 1401.1(b) and 1400.4 to  
7           the request made by the representative the  
8           property owner for a ruling to allow off-  
9           premises alcohol beverages sales. The Zoning  
10          Administrator did this even though he lacked  
11          the authority by regulation and law. In doing  
12          so, the Zoning Administrator avoided  
13          addressing the specific acts of the zoning  
14          regulations that are in force to protect the  
15          Reed-Cooke Neighborhood.

16          This neighborhood is an area of  
17          the District of Columbia with very special and  
18          unique land-use problems. So special and so  
19          unique that special considerations were  
20          enacted and incorporated into the D.C.  
21          Municipal Regulations.

22          Accordingly, we ask that the Board

1 of Zoning Adjustment as authorized by D.C.  
2 Code 6-641.07 and the DCMR 3100.2 and 4  
3 reverse and nullify the incorrect  
4 determination by the Zoning Administrator that  
5 off-premises alcohol beverage sales are  
6 permitted at this property and direct the  
7 property owner to proceed in accordance with  
8 Chapter 14 if he chooses -- so desires.

9 This concludes my statement. If  
10 you have any questions, I'd be happy to answer  
11 any questions.

12 CHAIR MILLER: Any questions,  
13 Board Members?

14 I would just like to say also that  
15 you will be submitting that into the record?

16 MR. LYDEN: Yes.

17 CHAIR MILLER: Okay.

18 MR. LYDEN: Oh, yes. I got 25 --  
19 20 copies.

20 CHAIR MILLER: Okay.

21 MR. LYDEN: Again, I'm trying to  
22 find the right slot to put it in or when.

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1 CHAIR MILLER: Right. Okay. So,  
2 you can give that to Ms. Bailey at some point  
3 before the day's over.

4 Okay. So, we would turn to DCRA  
5 next.

6 MS. WOOLRIDGE: Only a couple of  
7 questions.

8 CHAIR MILLER: You're going to ask  
9 some questions? Not legal questions? All  
10 right. Evidentiary questions? It's kind of  
11 a blur here because for the most part this is  
12 legal argument, but I know like Mr. LeGrant is  
13 going to be testifying as a witness I assume.  
14 Perhaps he could be cross examined, but not  
15 you. You understand?

16 MS. WOOLRIDGE: Okay. Now --  
17 okay.

18 CHAIR MILLER: So, he's  
19 representing that association, but if there  
20 are a few questions that don't go to like the  
21 legal aspects, I think you can ask.

22 MS. WOOLRIDGE: Mine would have

1 gone to legal.

2 CHAIR MILLER: Okay. Thanks.

3 MS. WOOLRIDGE: Thank you.

4 CHAIR MILLER: So, no questions?

5 Okay. Did I say the order wrong?

6 MR. GLASGOW: No, they would be  
7 proceeding with their case in chief at this  
8 point. I guess I wanted to -- I wanted to  
9 confirm with the Chair because I know this is  
10 sort of a hybrid kind of thing. With respect  
11 to the testimony on -- I don't know whether it  
12 was testimony or legal argument as to what the  
13 breadth of Section 2522.1 is. I guess I can  
14 -- I guess I can ask any questions I've got of  
15 the Zoning Administrator because they're the  
16 ones that deal with it.

17 CHAIR MILLER: Okay. Yes, I mean  
18 that is -- it's like you don't -- they're not  
19 going to ask you questions I don't think  
20 unless you give factual testimony. Right.  
21 Okay. So, are we ready to go forward with  
22 DCRA?

1 MS. BOLLING: Yes, Madam Chair.

2 CHAIR MILLER: Okay.

3 MS. BOLLING: Just one question.

4 Is it okay to move our exhibit back over here?

5 No.

6 MR. LEGRANT: I was asked to move  
7 the exhibit here for the camera's purposes.

8 MS. BOLLING: Okay.

9 MR. LEGRANT: Sorry.

10 (Whereupon, the evening session  
11 began.)

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

2 4:58 p.m.

3 MS. BOLLING: Mr. LeGrant, would  
4 you please state your name and title for the  
5 record?

6 MR. LEGRANT: Yes, my name is  
7 Matthew LeGrant. I'm the Zoning Administrator.

8 MS. BOLLING: And, Mr. LeGrant,  
9 how long have you worked for DCRA as the  
10 Zoning Administrator?

11 MR. LEGRANT: I was the Deputy  
12 Zoning Administrator from March 2006 until  
13 June 2007. I was the Acting Zoning  
14 Administrator from July through last week and  
15 now, I've been designated the Zoning  
16 Administrator.

17 CHAIR MILLER: Congratulations.

18 MR. LEGRANT: Thank you.

19 MS. BOLLING: Mr. LeGrant, how  
20 long have you worked in the zoning line or  
21 work or in the zoning industry?

22 MR. LEGRANT: I've been in the

1 field of zoning for approximately about 25  
2 years with a variety of jurisdictions.

3 MS. BOLLING: Specifically, where  
4 have you worked as a zoning expert other than  
5 the District of Columbia?

6 MR. LEGRANT: I have worked in  
7 California with the city of Berkeley,  
8 California. I have also worked with the city  
9 of Alexandria in Virginia and I have also been  
10 a consultant and worked with consulting firms  
11 in the San Francisco Bay Area.

12 MS. BOLLING: During your  
13 attention to the current appeals, have you  
14 reviewed the approved building permit number  
15 98040?

16 MR. LEGRANT: Yes, I have.

17 MS. BOLLING: And what were your  
18 findings?

19 MR. LEGRANT: Okay. In regards to  
20 this building permit which was approved on  
21 November 13th, 2006, I reviewed the  
22 application. I reviewed the plans associated

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1 with the permit application as well as the  
2 attached materials to the building permit and  
3 the issued building permit itself.

4 MS. BOLLING: Do you agree that  
5 the building permit application number 98040  
6 conformed to zoning regulations?

7 MR. LEGRANT: Yes, I -- yes, I do.

8 MS. BOLLING: And why?

9 MR. LEGRANT: The building  
10 application -- building permit application  
11 showed a building layout and a -- a use that  
12 was consistent with the zoning district --  
13 districts identified applicable to the area as  
14 well as to the previous Board of Zoning  
15 Adjustment order on this matter.

16 MS. BOLLING: In your review of  
17 the BZA order in this matter, I believe it's  
18 17395 -- well, did you review it I guess I  
19 should ask first?

20 MR. LEGRANT: Yes, I have.

21 MS. BOLLING: And did you also  
22 review BZA order 17395(a)?

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1                   MR. LEGRANT:  Yes, the matter of  
2                   its -- the question of its reconsideration.

3                   MS. BOLLING:  And what were your  
4                   conclusions?

5                   MR. LEGRANT:  Well, my conclusions  
6                   reviewing the BZA orders that, of course, the  
7                   -- in this case, the property owner Jemal  
8                   Citadel, LLC had sought for and received  
9                   specific variance relief in terms of rear  
10                  yard, nonconforming structure and loading  
11                  berth requirements for the establishment of  
12                  the mixed-use project including the grocery  
13                  store and general offices and the  
14                  reconsideration was the question as to whether  
15                  the question of the -- the Board's  
16                  consideration and approval of that order  
17                  include the question of off-sales alcoholic  
18                  beverage sales.

19                  My conclusion of the review of  
20                  those orders was that the relief for the  
21                  specific variances listed was granted and that  
22                  the Board -- that in the conclusion of the

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1 issue of reconsideration is that no relief for  
2 alcoholic beverage sales was identified.

3 MS. BOLLING: Are you familiar  
4 with the March 21st, 2007 letter from Bill  
5 Crews to counsel for the property owner known  
6 as the Citadel?

7 MR. LEGRANT: I am.

8 MS. BOLLING: What was the purpose  
9 of this letter?

10 MR. LEGRANT: Okay. The -- the  
11 letter which was issued by the previous Zoning  
12 Administrator Bill Crews was to -- a  
13 determination and confirmation of a particular  
14 section's applicability in the Reed-Cooke  
15 Overlay District provisions, Section  
16 1401.1(b). Whether the -- that section's  
17 prohibition of -- of a particular use, in this  
18 case the off-premises alcoholic beverages  
19 sales, was applicable to these application.

20 Mr. Crews went on and described  
21 his citing of the sections of the applicable  
22 zoning districts. He went on and described

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1 some of the analysis that he did in reviewing  
2 that material and concluded that his -- that  
3 the subordinate sale of beer and wine for off-  
4 premises consumption was an allowable  
5 accessory use for retail sale in a retail  
6 grocery store and the restrictions of  
7 1401.1(b) applied to principal uses only and  
8 did not apply to accessory sales within the  
9 grocery store.

10 MS. BOLLING: Do you agree with  
11 Mr. Crews' conclusions and why?

12 MR. LEGRANT: I do agree. I  
13 looked at Mr. Crews' analysis and the  
14 authorities he cited in his review and then I  
15 conducted my own review separately to look at  
16 those -- that authority to see if I, in fact,  
17 agree with that authority and what -- my  
18 review included looking at several of the  
19 provisions that he -- notations in his letter  
20 including some sections of the Alcoholic  
21 Beverage Control Law of the District of  
22 Columbia, a Court of Appeal decision and the

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1 -- in addition looking at what standards apply  
2 to consider this an incidental use. In this  
3 case, looking at the floor area aspect of the  
4 proposed beer and wine sales use.

5 In terms of the particulars of  
6 these provisions, the -- first of all, I will  
7 say that the -- of course, the ABC Law is not  
8 determined in this regard. That Mr. Crews'  
9 decision and my ultimate concurrence with his  
10 decision has to do with the zoning  
11 regulations. Nonetheless, Mr. Crews found and  
12 in reviewing the District of Columbia's  
13 Alcoholic Beverage Control Law, that they do  
14 have a type of license which speaks to an  
15 incidental use. They utilize a standard 15  
16 percent as a standard for what distinguishes  
17 an incidental use and that -- it's my  
18 understanding the -- this particular ABC  
19 license applies in the subject case.

20 He also noted a -- a Court of  
21 Appeals decision, The Association for  
22 Preservation of the 1700 Block of N Street,

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1 N.W. and Vicinity v. the D.C. Board of Zoning  
2 Adjustment in which there -- the Court of  
3 Appeal in that decision affirmed the BZA  
4 decision which upheld a standard which in that  
5 particular case was a standard having to do  
6 with 20 percent of a -- of an income of a  
7 particular source as distinguishing an  
8 incidental use.

9 Finally, the -- in reviewing the  
10 floor plans that were approved as part of the  
11 building permit, the -- I looked at the  
12 materials submitted by the property owner or  
13 the counsel on behalf of the property owner of  
14 what percentage of the floor area was devoted  
15 to the wine and beer sales use. They assert  
16 a -- a 4 percent standard. My review of those  
17 numbers, but honestly, I've not done by own  
18 independent calculations of those numbers, but  
19 reviewing the -- the floor plans which I  
20 believe the Board has received as the Exhibit  
21 -- labeled Exhibit 2 shows a -- an area that  
22 in my estimation is clearly an incidental use

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1 to a primary use. That is the beer and wine  
2 use is a clearly incidental use which I would  
3 estimate to be less than 10 percent of a floor  
4 area devoted to that use.

5 MS. BOLLING: Drawing your  
6 attention to the large exhibit, and I think we  
7 gave all of the parties a copy and the Board  
8 as well, how did you use the exhibit in your  
9 methodology to make your determination?

10 MR. LEGRANT: Well, the exhibit is  
11 more illustration I think for the -- the Board  
12 and the parties as to what exists there in  
13 terms of the zoning. The Reed-Cooke Overlay  
14 is shown in a -- a gray hatch marked pattern.  
15 It includes the subject site which is shown in  
16 a red. That site -- the site is designated by  
17 a red pattern. There's simply an aerial  
18 photograph that shows the Citadel which  
19 apparently was a -- previously an ice skating  
20 rink and that's being converted to this mixed-  
21 use project including the grocery store and  
22 the -- but I would note that the case number

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1 and the case name is not inclusive of both  
2 cases that are before us and should have  
3 certainly done so.

4 MS. BOLLING: Does the activity  
5 which is the sale of beer and wine in the  
6 Harris Teeter grocery store conform to the  
7 standard zoning practice here in the District?

8 MR. LEGRANT: I believe the -- the  
9 -- the approval here is consistent with the  
10 standard zoning. The -- the crucial issue is  
11 -- are -- is the -- is the use that's listed  
12 in the list of prohibited uses the off-sale  
13 premises sales of alcoholic beverages  
14 prohibited and I believe -- Mr. Crews'  
15 believes and I continued -- I agreed that it  
16 -- those uses as consistent throughout the  
17 administration of the zoning ordinance are --  
18 are principal listed uses.

19 So, the principal uses that are  
20 listed in the various section of the zoning  
21 code set forth those uses regulated and  
22 subject whether they're by right, if they're

1 listed at -- for special exception or if  
2 they're listed as prohibited. Those are  
3 principal uses.

4 If we have a -- which in this case  
5 is a grocery store use and as Mr. Crews put  
6 forth in this letter is a use by right. It's  
7 -- the question is is an accessory use subject  
8 to or is an incidental use subject to these  
9 prohibitions? The conclusion of -- of the  
10 Zoning Administrator is that it is not. It's  
11 the principal uses that are enumerated that  
12 are subject to these restrictions. Not -- not  
13 an -- not an incidental.

14 The use set forth is I believe  
15 clearly incidental to the overall retail  
16 grocery store use and that the Zoning  
17 Administrator did not err in not applying the  
18 prohibition in this particular case.

19 MS. BOLLING: Can you think of any  
20 other examples that can explain the difference  
21 between a principal use and accessory use so  
22 we could use it to form an analysis of why

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1 this is an accessory use that's not  
2 prohibited?

3 MR. LEGRANT: Well, there -- there  
4 is some uses that, for example, might involve  
5 primarily the sales of items, but also that  
6 store may have a repair function and I -- I  
7 think the code has specific regulatory --  
8 specifically addresses cases where incidental  
9 repair of -- of materials -- of -- of those  
10 products sold. So, maybe to bring it down to  
11 earth a little bit, if you have a bicycle shop  
12 and you have a repair function. So, you're  
13 selling bicycles as the -- as the -- as the  
14 principal use, but then in the -- in the back  
15 of that store, you also offer repair service.  
16 That -- a particular zoning regulation may not  
17 say oh, this principal use bike shop also  
18 includes the repair, but it's allowed under  
19 zoning regulations to have that repair  
20 function.

21 And although this particular  
22 situation's not addressed, the incidental

1 sales of alcohol, I believe the Zoning  
2 Administrator is correct in saying that it's  
3 a -- it's an incidental use that does occur in  
4 conjunction with grocery stores. It's a very  
5 common occurrence and that his interpretation  
6 is that the prohibition seeks to limit those  
7 stores in which alcohol sales is a principal  
8 use.

9 MS. BOLLING: No further  
10 questions, Madam Chair.

11 CHAIR MILLER: All right. Is  
12 there any authority other than the opinion of  
13 you and Mr. Crews that the use provision set  
14 forth in 1401 which talk about prohibited uses  
15 only applied to principal uses and not  
16 accessory uses or incidental uses?

17 MR. LEGRANT: Well, other than --  
18 first, let me say this. In talking to my  
19 counsel and in -- the centered zoning practice  
20 that I have adhered to in my practice comes of  
21 those situations in which incidental uses that  
22 -- that no zoning code is -- is global in

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1 being able to address every situation. So,  
2 necessarily, a Zoning Administrator must make  
3 judgment calls, interpretations when faced  
4 with uses that don't -- that are not clearly  
5 enumerated.

6 We do have a case of -- that we  
7 found Sevilla v. Sweat which my counsel can  
8 certainly describe in more detail. That we  
9 looked at the sale of packaged beer and wine  
10 in a grocery store did not constitute a new or  
11 extended use and I think we could provide the  
12 Board with that materials about that  
13 particular case. That -- that --

14 CHAIR MILLER: How about where --  
15 oh, I'm sorry. I was just going to say how  
16 about where you're talking about a prohibited  
17 use.

18 MR. LEGRANT: I'm not familiar  
19 with an example of a prohibited use that --  
20 that -- in this case, there were particular --  
21 the prohibited use spoke -- prohibited use  
22 provisions distinguishes incidental from

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1 primary uses. Nonetheless, the -- the -- as  
2 I said earlier, the way that the zoning  
3 regulations are set up, they enumerate uses as  
4 principal uses and that is the starting point  
5 of the analysis in which Mr. Crews and I  
6 looked at those enumerated uses.

7 CHAIR MILLER: Can you just direct  
8 our attention to that so we can follow what  
9 you're talking about in the regulations?  
10 Where they talk -- where you said that the  
11 regulations start with principal uses? What  
12 you mean.

13 MR. LEGRANT: Well, I guess what  
14 I'm trying to describe is each -- each  
15 district lists out those uses and although the  
16 -- the zoning regulations -- this particular  
17 set of zoning regulations does not have a  
18 definition of principal use. The assumption  
19 that I've had to make is those uses enumerated  
20 are, in fact, the primary or principal use  
21 listed and then, therefore, if there is -- so,  
22 that's the first use we have to look at and

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1 this case is a grocery store use which I don't  
2 think anybody has disputed is -- is permitted  
3 by right.

4 The question is now to me are  
5 incidental uses -- if they are listed does the  
6 prohibition apply to the -- an incidental use.  
7 I think it's a tough call. It's something  
8 that both Mr. Crews and I looked at very  
9 carefully.

10 On its face when you do the  
11 reading of that, it suggests that hey, you  
12 shouldn't do it here at all, but nonetheless  
13 looking at the full background and experience  
14 that I have in applying zoning regulations.  
15 So, we have to look at the principal uses and  
16 in this case, this incidental use which we --  
17 the court case that I noted that the ABC  
18 regulations make provision for and that the  
19 floor area reflects is, in fact, an incidental  
20 portion of the principal use here.

21 CHAIR MILLER: Did you look at the  
22 -- what I would call the legislative history

1 of the Reed-Cooke Overlay for any guidance  
2 there as to what was intended?

3 MR. LEGRANT: I attempted to do  
4 some research in that regard. I did not get  
5 to the point of -- of finding a transcript  
6 about those.

7 If -- you know, I would say that  
8 if the transcript of that, if it can be  
9 located, if it brought evidence to the  
10 contrary, that -- that the listing of those  
11 uses had some specific intention for  
12 incidental uses, I might be persuaded  
13 otherwise, but I've not found any evidence to  
14 date of that.

15 MS. BOLLING: Madam Chair, I just  
16 wanted to give the Board the cite of the case  
17 that stands for that prohibition restricts  
18 only the principal use of the premises. It  
19 does not impose a limitation upon other uses  
20 that are ancillary or incidental to that  
21 principal use and that was 450 P as in Paul  
22 2nd 424 and that's a 1969 case out of Arizona.

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1 CHAIR MILLER: And what did it do  
2 exactly?

3 MS. BOLLING: It stands for that  
4 prohibition restricts only the principal use  
5 of the premises. It does not impose a  
6 limitation upon other uses that are ancillary  
7 or incidental to that principal use.

8 MEMBER LOUD: Can you repeat the  
9 site again?

10 MS. BOLLING: Yes, it's 450 P as  
11 in Paul 2nd 424 and it's a 1969 case and the  
12 title is Sevella S-E-V as in victory I-L-L-A  
13 v. Sweat S-W-E-A-T.

14 CHAIR MILLER: Okay. We'll look  
15 it up, but is there anything else you want to  
16 tell us like what it involved, what kind of  
17 use, what was prohibited?

18 MS. BOLLING: It was a grocery  
19 store that was existing and they wanted to add  
20 beer and wine and the court found that  
21 packaged beer and wine was an incidental use  
22 in the store and it didn't go against an

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1 existing prohibition for new beer and wine  
2 being sold in that area. For it -- you know,  
3 in that zone.

4 CHAIR MILLER: Okay. Because it  
5 was incidental to the business?

6 MS. BOLLING: Exactly.

7 CHAIR MILLER: Okay. I just want  
8 to be clear. Is there anything else you want  
9 to tell us in general about how when we're  
10 looking at the regulations we would be  
11 treating I guess use provisions in general as  
12 only applying to principal uses. Correct?  
13 That's what you're saying?

14 MR. LEGRANT: That's -- that's  
15 what I'm saying.

16 CHAIR MILLER: Okay. And the  
17 reason for that is? I mean is it obvious? Is  
18 it just basically that's what --

19 MR. LEGRANT: Okay. Well, the --  
20 in identifying -- simply identifying a  
21 principal use I believe the Zoning Commission  
22 is saying these -- these uses are what we're

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1 -- we're targeting our regulations for. This  
2 is what we want the Zoning Administrator in  
3 the -- the District to -- to look at. The --  
4 the -- I just believe the -- the Zoning  
5 Administrator must -- when faced with a  
6 particular case must make a judgment call as  
7 to if the case in hand fits into that category  
8 and the first analysis is what is the  
9 principal use and if the principal use is a  
10 permitted use, then -- and if there is an  
11 incidental aspect which is as the case here,  
12 it -- it simply -- the principal use is what  
13 is the regulated use. I don't know if I can  
14 explain it in -- in other terms.

15 CHAIR MILLER: It sounded like a  
16 pretty general question that I asked, but I  
17 was just curious. But, secondly, do you also  
18 look at the chapter as a whole and see whether  
19 or not it fits in with the intent as is  
20 apparent just from the regulations? Whether  
21 it would have a different impact, this use  
22 provision that's prohibited, if it's a part of

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1 a grocery store as opposed to if it was a  
2 stand-alone principal use?

3 MR. LEGRANT: Well, certainly and  
4 I -- I think what -- what informed the Zoning  
5 Administrator and myself in this regard is the  
6 vast -- the -- a grocery store use is a use  
7 that encompasses many products and that the  
8 problematic use in my experience in  
9 administering zoning regulations now for 22  
10 years is those -- in case of alcoholic  
11 beverage sales are -- are those establishments  
12 that it's a -- people go there specifically  
13 for that product and it's -- it's unfortunate  
14 to -- to say -- I'm not going to say all  
15 liquor stores, the alcoholic beverage stores  
16 that -- that's a principal use have that  
17 problem, but they do in my experience have --  
18 are associated in some case -- in -- in many  
19 cases with problems especially later at night.  
20 People going to there to buy -- they're going  
21 to go there only basically to buy alcohol if  
22 that's a principal use.

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1           My experience in my career is that  
2 a grocery store with incidental sales is not  
3 that type of problematic use and I believe the  
4 interpretation as a Zoning Administrator is  
5 that the problematic use is the target of the  
6 -- of the prohibition regulation.

7           CHAIR MILLER: Okay. One more  
8 question. But, would the impact be different  
9 if there weren't any other establishments  
10 around the grocery store that were allowed to  
11 sell alcohol and, therefore, the supermarket  
12 is the only place that is selling the alcohol  
13 in the area?

14          MR. LEGRANT: Well, the regulation  
15 there gives me no guidance. It's -- it's --  
16 if there was a spacing standard or a -- a  
17 density standard, those would give me some  
18 guidance I think in that regard.

19          CHAIR MILLER: You know and might  
20 be going a little bit afield, but I only ask  
21 that because your last answer was based on  
22 your years of experience distinguishing

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1 problems associated with principal uses --

2 MR. LEGRANT: Yes.

3 CHAIR MILLER: -- versus the  
4 incidental. Oh, I was just curious. So, you  
5 know, in a world where there are all these  
6 principal places to go, then the impact from  
7 an incidental place is going to be different  
8 than if that's the only place in town.

9 Maybe it's just a rhetorical  
10 question.

11 MR. LEGRANT: I guess it's -- it's  
12 a bit of a hypothetical.

13 CHAIR MILLER: Any other  
14 questions?

15 MEMBER LOUD: Good afternoon, Mr.  
16 LeGrant and congratulations to you as well.

17 MR. LEGRANT: Thank you.

18 MEMBER LOUD: Just a quick  
19 question regarding sort of a presumption in  
20 your testimony which is that you presented as  
21 a given that off-premises alcohol beverage  
22 sales sections are customarily incidental in

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1 grocery stores and I know that that is the  
2 case in Berkeley and probably the San  
3 Francisco Bay Area and probably most other  
4 places.

5 My experience is not necessarily  
6 that that's the case in Washington, D.C. and  
7 my experience could be limited. So, my  
8 question is can you flesh out for me how you  
9 have made the determination that that is a  
10 customarily incidental use in a grocery store  
11 in Washington, D.C.? If you understand my  
12 question.

13 MR. LEGRANT: Yes. Yes, I do  
14 understand your question and -- and perhaps  
15 it's limited to the grocery stores that I --  
16 I personally visit. I can't say that I've  
17 been to a -- many, many grocery stores in the  
18 District, but I have been to several and I've  
19 been to those in the jurisdiction I reside in  
20 Arlington and in California and it just seemed  
21 -- it -- it -- my general experience with and  
22 perhaps supermarket although that's not the

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1 term in the zoning regulations, it's grocery  
2 stores, is that a -- a grocery store of this  
3 size typically has the vast majority of its  
4 products as groceries and the incidental  
5 portion, one or two aisles, are devoted to  
6 alcohol sales and -- and that just is based in  
7 large part on my personal experience.

8 MEMBER LOUD: And that personal  
9 experience again would be stores inside of the  
10 District of Columbia?

11 MR. LEGRANT: Some of those stores  
12 are inside the District of Columbia.

13 MEMBER LOUD: And how much total  
14 square footage is the Harris Teeter site in  
15 this case?

16 MR. LEGRANT: This case -- the  
17 floor is 38,540.

18 MEMBER LOUD: Okay. So, it's  
19 large. It's not a corner grocery store that  
20 typically sell -- you know, a lot of corner  
21 stores sells -- corner grocery stores sell  
22 beer.

1 MR. LEGRANT: Right. Right.

2 MEMBER LOUD: And you're saying  
3 just so I understand your conclusion that in  
4 your expert opinion and your personal  
5 experience that grocery stores of that size  
6 customarily do have off-premises alcohol  
7 beverages sales?

8 MR. LEGRANT: Yes.

9 MEMBER LOUD: Okay. And again,  
10 that's just based on your personal observation  
11 of how many grocery stores say?

12 MR. LEGRANT: I would say probably  
13 20 -- 20/25 grocery stores and maybe about of  
14 that, you know, five -- five in the District.

15 MEMBER LOUD: Thanks.

16 MR. LEGRANT: Thank you.

17 MEMBER DETTMAN: Mr. LeGrant,  
18 would you happen to know if there -- since the  
19 certificate of occupancy is the document that  
20 drives use or, you know, state use, would you  
21 happen to know if there's a difference between  
22 the C of O of a grocery store that doesn't

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1 carry alcoholic beverages versus a grocery  
2 store that does?

3 MR. LEGRANT: Well, I guess my  
4 experience has been in the C of O for the  
5 District is if -- if the codes are for just  
6 specific regulatory treatment for alcohol  
7 beverage sales that a -- a C of O should --  
8 should list that use out. So, it would be --  
9 it would describe the use in terms of -- of  
10 describing those uses both the grocery sales  
11 and the alcohol sales.

12 MEMBER DETTMAN: Okay. So, the  
13 off-premises sale of alcoholic beverages  
14 wouldn't warrant an additional C of O? It  
15 would just warrant a notation on the grocery  
16 store C of O that there was going to be the  
17 provision of alcoholic beverages?

18 MR. LEGRANT: I would say so.

19 MEMBER DETTMAN: Okay. And if an  
20 existing grocery store that doesn't currently  
21 sell alcoholic beverages, if they -- some  
22 point down the road they decide to, what kind

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1 of regulatory process is triggered if  
2 anything?

3 MR. LEGRANT: Well, if -- if there  
4 was a -- I -- I guess the series of events  
5 would be if they went to the ABC and the ABC  
6 felt that their existing C of O did not  
7 encompass these, they would be directed to  
8 DCRA to apply for an amended or a change of  
9 use certificate of occupancy. At which point,  
10 the -- the analysis could -- would be done to  
11 -- to see if alcohol sales at that particular  
12 location are permitted or not.

13 MEMBER DETTMAN: Thank you.

14 MEMBER LOUD: Just to follow-up  
15 Mr. Dettman's question, has a C of O -- a C of  
16 O has not been issued in this case yet.  
17 Correct?

18 MR. LEGRANT: That's correct.

19 MEMBER LOUD: At some point is the  
20 plan to issue a C of O in this case?

21 MR. LEGRANT: Well, just to give a  
22 little overview of the process, the -- when --

1       except for a single-family home in the  
2       District to use the -- the premises or a  
3       building on the premises for use must obtain  
4       and maintain a valid certificate of occupancy.

5               That certificate is the District's  
6       recognition that it meets all the building and  
7       zoning codes that are applicable to that  
8       structure and that use and like this case, a  
9       building permit first comes to us that  
10      identifies the use and proposes a building  
11      configuration. Once -- if the building permit  
12      is issued, it's -- the -- both the building  
13      department -- the permitting division and the  
14      zoning -- Office of Zoning Administrator's  
15      approval of that structure and use  
16      represented.

17              As construction occurs, there's an  
18      intermediary step prior to the issuance or at  
19      the issuance of the final inspections which --  
20      final inspection or approvals in which a round  
21      of inspections occur. We have to go out and  
22      see if it was built according to plans where

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1 the use is represented in the application, in  
2 fact, constructed. Was the building built to  
3 the right footprint? Was the parking that was  
4 required provided?

5 At which point, we have a -- an  
6 administrative mechanism that -- that denotes  
7 that that allows a person to proceed with  
8 their certificate of occupancy application.  
9 Then that certificate -- that process helps  
10 informed the approval or the consideration of  
11 the certificate of occupancy before it's  
12 issued that, in fact, this construction  
13 reflects what was approved in the building  
14 permit. You see what is represented in the  
15 certificate of occupancy application to insure  
16 that nothing new has -- has come, you know, to  
17 -- to light or if -- something that has  
18 changed. If such -- if so, then there would  
19 be specific analysis of that.

20 But, once we come to the point of  
21 saying that the building permit's been  
22 followed, the building permit -- the building

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1 code and the zoning regulations have all been  
2 satisfied, we issue the certificate of  
3 occupancy.

4 MEMBER LOUD: One final question.  
5 This may be a little far afield, but it's  
6 helpful to me to sort get my arms around all  
7 of the issues. So, in this case, a  
8 certificate of occupancy could be issue at  
9 some point and could a party who's not --  
10 could someone who's not a party to these  
11 proceedings right now appeal that certificate  
12 of occupancy?

13 MR. LEGRANT: Yes.

14 MEMBER LOUD: Okay.

15 CHAIR MILLER: I have one more  
16 question, Mr. LeGrant.

17 MR. LEGRANT: Okay.

18 CHAIR MILLER: And that is in Mr.  
19 Crews' letter he does refer to the Alcohol  
20 Beverage Control Law and I think you made  
21 reference to you, but I'm just wondering how  
22 that bears on your interpretation and

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1 application of the zoning regulations in 1400?

2 MR. LEGRANT: Well, again it's not  
3 determinant, but it -- it's evidenced that  
4 another -- a District agency recognizes that  
5 it's incidental and it's --

6 CHAIR MILLER: It's more than the  
7 agency. Right? It's the -- it's the D.C.  
8 Council. Correct?

9 MR. LEGRANT: Right.

10 CHAIR MILLER: Okay.

11 MR. LEGRANT: And that the class  
12 of ABC license is a particular class that only  
13 permits up to 15 percent sales and we can give  
14 you the citation if we -- if necessary and the  
15 class and to be -- you know, I don't know the  
16 name of the class. I think it's class B and  
17 so forth under ABC regulations, but the point  
18 here is the standard. There's an incidental  
19 standard and Mr. Crews looked at that and say  
20 well, okay, here's evidence to me that this  
21 is, in fact, an incidental use.

22 CHAIR MILLER: It's incidental

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1 because it falls in that class?

2 MR. LEGRANT: That this is  
3 evidence that it's -- it's -- the fact that it  
4 falls in this class is evidence it's  
5 incidental.

6 CHAIR MILLER: Thank you.

7 MR. LEGRANT: Yes.

8 CHAIR MILLER: Okay. Is there  
9 cross by the Appellant?

10 MR. LYDEN: Yes, Mr. LeGrant, you  
11 reviewed the file on this --

12 CHAIR MILLER: You need to put  
13 your microphone on. Is it on?

14 MR. LYDEN: Mr. LeGrant, when you  
15 reviewed the file on this application, was the  
16 application of paragraph 1400.4 which  
17 restricted -- went for the most restrictive  
18 use within the zoning regulations, was that  
19 considered in your analysis or did it give you  
20 pause to think that this might be a very  
21 special case?

22 MR. LEGRANT: It was considered in

1 my analysis. I believe it was considered in  
2 Mr. Crews' analysis. The question revolves  
3 around -- I would go back to whether it's a  
4 principal use. Principal use I would fully  
5 agree is subject to the most restrictive  
6 analysis when it's -- that is the question.  
7 Is the use listed in the prohibited uses a --  
8 a use that is prohibited? You can't have a  
9 principal use of alcoholic sales -- beverage  
10 sales here and if that was the case, then it  
11 would -- should not have been an issue.

12 MR. LYDEN: Would that restrictive  
13 prohibition coupled with the opportunity to  
14 seek a special exception through the BZA  
15 process, did that trigger any thought that  
16 again maybe this was a very -- very special  
17 case?

18 MR. LEGRANT: Well, simply that  
19 there are -- there is the mechanism of the  
20 appeal of a Zoning Administrator's decision  
21 that brings us before the Board and I think  
22 that is cognizant in, you know, any decision

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1 that -- I'm -- I'm happy that the -- anytime  
2 that the Board needs to look at something.  
3 That there's a feeling that that needs to be  
4 tested and brought before the Board. You  
5 know, I don't have any problem with that  
6 process.

7 MR. LYDEN: Well, I -- maybe I  
8 missed. I didn't get the intent of my  
9 question. Would that kind of a very  
10 restrictive application across all regulations  
11 and coupled with a very special opportunity to  
12 seek an inspection, would that be kind of an  
13 aha moment that maybe this baby's a hot potato  
14 and we really ought to take a good long look  
15 at it or was this just accessory incidental  
16 use? We go with it.

17 MR. LEGRANT: It's a judgment call  
18 that was made and --

19 MR. LYDEN: Okay. Okay.

20 MR. LEGRANT: -- and we're  
21 continuing this -- you know, that's the -- the  
22 call that was made was one that spoke to the

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1 principal use and that was -- that was the  
2 issue before us.

3 MR. LYDEN: Okay. Thank you very  
4 much.

5 CHAIR MILLER: Intervener?

6 MR. GLASGOW: I have no cross  
7 examination of the Zoning Administrator.

8 We do have an expert witness to  
9 put on in this matter Mr. Steven Sher.

10 CHAIR MILLER: Okay. Yes. I just  
11 want to ask Mr. Reynolds. Are you -- were you  
12 seeking to participate any further in this?

13 MR. REYNOLDS: If that be allowed.

14 CHAIR MILLER: I think the rules  
15 provide that you can participate provided that  
16 you get confirmation that you represent the  
17 ANC. If you think you're representing the  
18 ANC, you can get written confirmation  
19 afterwards to put in the record.

20 If you're not representing the ANC  
21 -- if you don't feel like you actually would  
22 be representing the ANC as a whole, you're not

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1 a party as a matter of right.

2 MR. REYNOLDS: I am confident that  
3 the ANC would give me permission to ask  
4 questions --

5 CHAIR MILLER: Okay.

6 MR. REYNOLDS: -- to pursue this  
7 matter.

8 CHAIR MILLER: Okay. Does any of  
9 the parties have objections to that?

10 MR. GLASGOW: I guess given the  
11 length of time, Madam Chair, I don't  
12 understand why -- they've had months to get  
13 that.

14 CHAIR MILLER: Is there some  
15 reason you don't have confirmation by the ANC  
16 at this point to participate on behalf of  
17 them?

18 MR. REYNOLDS: No, there is on  
19 reason. I mean I could get it.

20 CHAIR MILLER: Wait. Is your mic  
21 on?

22 MR. REYNOLDS: I -- I could see no

1 reason why I would not get confirmation and as  
2 a matter of fact, we're having a general  
3 session tomorrow night.

4 CHAIR MILLER: I think the  
5 question is why haven't you gotten  
6 confirmation and then is there good cause why  
7 we should let your participate under that  
8 scenario anyway then?

9 MR. REYNOLDS: Oh. The issue has  
10 not been brought forth to the Commission to be  
11 asked for an opinion above and beyond what was  
12 negotiated in a voluntary agreement with the  
13 ABC Board.

14 There are issues being raised here  
15 though, however, based on this appeal where  
16 there is enough concern where I would at least  
17 like to initiate a process through the  
18 Commission myself to be able to explore this  
19 further if the opportunity arises.

20 However, I do not want to be a  
21 cause of holding these procedures up. So, if  
22 the Chair would allow me to submit written

1 questions, I would certainly be acceptable to  
2 that.

3 CHAIR MILLER: I don't think we're  
4 going to go that route. So, just for -- let  
5 me just ask you this so we don't delay this  
6 too much, are there just a few questions  
7 you're going to ask or is it --

8 MR. REYNOLDS: Yes.

9 CHAIR MILLER: Okay. Let me just  
10 confer with my Board Members. Okay. If you  
11 just have a few questions, then the Board is  
12 amenable to your just asking a few questions.

13 MR. REYNOLDS: Thank you, Madam  
14 Chair. Ms. Miller, I just wanted to ask in  
15 your citation of Sevilla v. -- I'm sorry. Ms.  
16 LeGrant. No. No. The young lady sitting  
17 next to you.

18 CHAIR MILLER: No, you can't cross  
19 the lawyers though. You can cross the  
20 lawyers. It's only the witness Mr. LeGrant.

21 MR. REYNOLDS: This is a question  
22 on -- well, I understand. I'll withdraw on

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1 this, ma'am. Thank you.

2 CHAIR MILLER: Okay. Then now  
3 we're ready for the intervener's case.

4 MR. GLASGOW: Madam, I'm going to  
5 introduce Mr. Steven Sher. He's been accepted  
6 as an expert witness in zoning and land  
7 planning in many, many cases before the Board  
8 and before the Zoning Commission to testify in  
9 this matter.

10 CHAIR MILLER: That's correct.  
11 So, you want us to recognize him as an expert  
12 in those areas?

13 MR. GLASGOW: Yes. Yes, I do.

14 CHAIR MILLER: Okay. We do.

15 MR. SHER: Good evening, Madam  
16 Chair and Members of the Board. For the  
17 record, my name is Steven E. Sher, the  
18 Director of Zoning and Land Use Services with  
19 the law firm of Holland & Knight.

20 I'd like to associate a lot of  
21 what I'm about to say with -- with the remarks  
22 of the Zoning Administrator, but I -- I think

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1 I want to just organize it a little  
2 differently and then add a couple of things  
3 which may be responsive to some of the  
4 questions I've heard asked.

5 We looked at -- at this in terms  
6 of -- of two principal questions. Number one,  
7 is the sale of beer and wine or the off-  
8 premise -- the sale for off-premise  
9 consumption of alcoholic beverages, a.k.a.  
10 beer and wine and maybe I'll just shorthand it  
11 that way, is that a legitimate accessory use  
12 to a grocery store and then the second  
13 question, do the regulations of the Reed-Cooke  
14 Overlay apply to principal uses or to  
15 accessory uses or to both?

16 So, let me go at the first  
17 question first. We know that a grocery store  
18 is permitted as a principal use as a matter of  
19 right in a C-1 District under Section 701.4(1)  
20 as in Larry which says food or grocery store.

21 We know that that same food or  
22 grocery store is permitted as a matter of

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1 right in a C-2 District by the carryover  
2 provisions of Section 721.1.

3 The Reed-Cooke Overlay does not  
4 change the use provisions for a grocery store.  
5 So, whatever else it does, a grocery store is  
6 a permitted use in the Reed-Cooke -- in the  
7 Reed-Cooke Overlay.

8 A modern grocery store includes  
9 the sale of many items which formerly would  
10 have been sold and are sometimes still sold in  
11 separate establishments. It sells meat which  
12 you might have bought in a butcher shop  
13 somewhere. It sells fish and seafood which  
14 you might have gotten from a fishmonger. It  
15 sells drugs and sundries that you might have  
16 gotten in a drug store or pharmacy. It sells  
17 cosmetics or toiletries which you might also  
18 get in a drug store or pharmacy. It sells  
19 flowers that you might get in a florist shop.  
20 It sells prepared foods for on and off-  
21 premises consumptions which you might have  
22 gotten in a delicatessen somewhere and it --

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1 they sell alcoholic beverages, beer and wine,  
2 which you might have gotten in a liquor store.

3 Modern grocery stores also offer  
4 services that formerly would have been  
5 separate establishment. You can go in a  
6 grocery store these days and go to the bank.  
7 You can go into a grocery store and get your  
8 film developed. You can go to a grocery store  
9 and rent movies or DVDs. All of which would  
10 have been and in some cases still are separate  
11 establishments.

12 So, when you look at what is a  
13 grocery store, it does lots of things and it  
14 sells lots of things and it provides lots of  
15 services.

16 Now, the grocery store is not a  
17 defined term in zoning regulations and zoning  
18 regulations tell you that you got to look at  
19 Webster's Unabridged Dictionary when a term  
20 isn't defined. So, I went and looked in  
21 Webster's and I looked at the terms. Grocery  
22 store is a place of business of a retail

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1 grocer. That doesn't help a whole lot. Now,  
2 groceries are articles of food and other goods  
3 sold by a grocer and a grocer is a dealer in  
4 staple food stuffs. It says coffee, sugar,  
5 flour and usually meats and other foods as  
6 fruits, vegetables, dairy products and many  
7 household supplies as salt, matches, paper  
8 napkins. So, a grocer sells a lot of  
9 different things within the -- the overall  
10 rubric of a grocery store.

11 We looked at establishments which  
12 have class B alcoholic beverage licenses, that  
13 is, for the sale of beer and wine off premises  
14 and we found that there are 64, at least 64.  
15 We found 64 establishments having certificates  
16 of occupancy for a grocery store, for a  
17 grocery store and delicatessen, but not one of  
18 those has listed on it sale of alcoholic  
19 beverages. So, there are groceries and  
20 groceries and delicatessens and 64 of them  
21 sell beer and wine with class B licenses, but  
22 not one has listed on it sale of alcoholic

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1 beverages.

2 That includes the big guys, Giant,  
3 Safeway, Whole Foods, Sutton Place. That  
4 includes a whole lot of smaller, what I'll  
5 loosely call mom and pop, individual  
6 neighborhood, one-of-a-kind grocery stores.

7 I think that was a question that  
8 somebody, I think Mr. Dettman asked. Does a  
9 C of O for a grocery store typically identify  
10 the sale of alcoholic beverages and at least  
11 in the District of Columbia, the answer is no.

12 In this proposed store which is  
13 proposed to be a Harris Teeter as shown on the  
14 plans and you have the plans, the area for the  
15 sale of beer of wine totals approximately 1500  
16 square feet out of the total of approximately  
17 38,500 square feet of the store as a whole.  
18 So, about 4 percent of the total floor area of  
19 the store is devoted to the sale of beer and  
20 wine. Again, we think that's an indication of  
21 the relatively small percentage of floor space  
22 and the incidental nature of the sale of one

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1 component within this larger facility that  
2 sells all these other things that I've been  
3 talking about, toilet paper, Coca-Cola and  
4 everything else and you've also heard some  
5 discussion before, by law, the sale of beer  
6 and wine cannot account for more than 15  
7 percent of the grocery store's expected  
8 revenue.

9           So, when you combine all of those  
10 things, the square footage involved, the  
11 limitation on the revenue, the very nature of  
12 what is a grocery store, the fact the grocery  
13 stores do not separately identify the sale of  
14 beer and wine, I reach the conclusion that  
15 sale of beer and wine is customarily  
16 incidental and subordinate to the primary use  
17 of a grocery store and is, therefore, a  
18 permitted accessory use. Customarily  
19 incidental and subordinate obviously the key  
20 words in the definition of accessory use.

21           Okay. Second question then. Does  
22 the prohibition on the sale of beer and wine

1 or alcoholic beverages in general apply to  
2 principal uses, accessory uses or both and to  
3 attempt to answer that question, I looked at  
4 the structure of the zoning regulations in  
5 commercial districts and if you go back and  
6 start with C-1 District, there's a Section 701  
7 that talks about uses permitted as a matter of  
8 right. The there's a Section 702 that talks  
9 about accessory uses in buildings and then  
10 there's a Section 704 and following that talks  
11 about uses permitted as special exceptions  
12 with BZA approval.

13 When you go to the C-2 District  
14 and this is a C-2-B District, you've got  
15 Section 721 that talks about uses permitted as  
16 a matter of right. Seven twenty-two talks  
17 about accessory uses in buildings. Seven  
18 twenty-four and following talks about special  
19 exceptions with BZA approval.

20 When you go to C-3 Districts, 741  
21 matter of right, 742 accessory, 743 BZA.

22 So, in the underlying zone

1 districts, there is a very clear  
2 differentiation between matter of right,  
3 accessory, special exception.

4 The uses that are permitted as a  
5 matter of right and even by special exception  
6 are not identified as principal uses. That  
7 term isn't used in those sections, but it's  
8 pretty clear from the operation of the  
9 regulations on all structure that that's what  
10 they are. Those are the uses that are  
11 permitted in those particular zone and you can  
12 do the same analysis in residential zones and  
13 in other zones, but I focused on those three  
14 because they are the commercial zones that are  
15 most similar to what's going on here. I took  
16 C-2 and then I took one higher and one lower.  
17 That was my rationale.

18 The uses that are permitted as  
19 accessory uses are clearly called out as such.  
20 So, if you look at 702, 722 or 742, there's no  
21 question what's an accessory use. The  
22 regulations are very specific about what is

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1       accessory.

2                   The reason for defining and  
3 calling out accessory uses is that these are  
4 uses which would not otherwise be permitted in  
5 the underlying zone, but for the fact that  
6 they're incidental to a use which is permitted  
7 and let me -- let me give you a couple of  
8 examples.

9                   Could I have an office or a  
10 catering hall or a store in a residential  
11 district? The answer to that is generally no,  
12 but if I had a church which is a use permitted  
13 as a matter of right, in that church, I could  
14 have offices. I could have a catering hall  
15 which is a social hall that -- that the church  
16 uses for religious institutions, weddings, bar  
17 mitzvahs, christenings, 60th birthday parties,  
18 whatever and I can have a store selling  
19 religious artifacts. You can go to the Shrine  
20 or the National Cathedral or almost any local  
21 church and find that they sell things like  
22 that.

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1           Independent of the church, you  
2           couldn't have those things in a residential  
3           district. They not permitted or looked at  
4           another way, they're prohibited. But, if  
5           they're accessory to a use that is permitted,  
6           then they are permitted.

7           Could I have a conference center  
8           or a hotel or a restaurant or a book store in  
9           a residential district? Ordinarily, I'd say  
10          no, but if I had a college or university, all  
11          of those uses are incidental to the college or  
12          university use and subject to the Board's  
13          approval of a campus plan and so forth. You  
14          can have those uses in a residential zone.

15          Could I have a florist shop or a  
16          gift shop or an office building in a  
17          residential district? Not ordinarily. No,  
18          but if I had a hospital in an R-4 or R-5  
19          District which is a use permitted as a matter  
20          of right, I could have an office building,  
21          Sibley Hospital or Washington Hospital Center.  
22          I could have a florist shop. There isn't a

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1 hospital around that doesn't have one or a  
2 gift shop or a news stand. All of which are  
3 uses which if they stood independent of the  
4 primary principal use wouldn't be allowed, but  
5 if they're customarily incidental and  
6 subordinate to the principal use, then they  
7 are allowed in that particular zone.

8 MEMBER LOUD: So, by implication,  
9 the argument would be that an overlay zone has  
10 no greater authority than a regular zone.  
11 Because all of the incidences that you just  
12 described I think are just regular --

13 MR. SHER: They're all regular  
14 zone.

15 MEMBER LOUD: -- zoning. So.

16 MR. SHER: Let me jump right to  
17 Reed-Cooke now.

18 MEMBER LOUD: Okay.

19 MR. SHER: Maybe I can try and get  
20 to your question.

21 MEMBER LOUD: Okay.

22 MR. SHER: In the Reed-Cooke

1 Overlay District, there's only one section  
2 that talks about uses and that's Section 1401  
3 and it doesn't say whether it's prohibiting  
4 accessory uses or principal uses. It just  
5 says the following uses are prohibited.

6 When you look at that list of uses  
7 and you go back and you look at the underlying  
8 zone, i.e. C-2 which also incorporates uses  
9 permitted as a matter of right in C-1, every  
10 one of those uses that are listed in that list  
11 of things that are prohibited in the Reed  
12 Cooke Overlay are listed as principal uses in  
13 the underlying C-2 and C-1 zones. So, if you  
14 go --

15 CHAIR MILLER: Where's is that?  
16 Why don't we just look at that reg while  
17 you're talking?

18 MR. SHER: Well, I did it earlier  
19 and you got to -- you got to flip back and  
20 forth.

21 CHAIR MILLER: Seven twenty-one.

22 MR. SHER: But, if you look at

1 Section 140, whatever I just said, 1401.1.  
2 The following uses shall be prohibited in the  
3 Reed-Cooke Overlay District. Okay. And then  
4 you got to turn back to Sections 701.1 or 701  
5 and then Section 721 and for example, it says  
6 bar or cocktail lounge and bar or cocktail  
7 lounge is listed in Section 701.1(b) and then  
8 it says off-premises alcoholic beverage sales  
9 and that's -- I got to remember where I found  
10 that. That's listed in Section 701.4(u) and  
11 then it says restaurant or fast food  
12 restaurant and that's listed in 701.4(q) and  
13 then it goes on to hotel or inn and that's  
14 listed in Section 701.6(h) and if -- and I can  
15 keep going, but I've been through this list  
16 and --

17 CHAIR MILLER: But, my point was  
18 okay, so, then tell us -- so, just look at --  
19 we'll just look at 701.4(u) that lists off-  
20 premises alcoholic beverage sales as permitted  
21 as a matter of right in the C-1 District.  
22 Okay.

1 MR. SHER: Right.

2 CHAIR MILLER: So, then -- and  
3 then we look at 1401.1(b) prohibited in the R-  
4 C Overlay District. Right?

5 MR. SHER: Right.

6 CHAIR MILLER: Okay. So, how are  
7 we suppose to reconcile those two?

8 MR. SHER: Well, I'm saying that  
9 everyone of those uses that are cited in  
10 1401.1 are principal uses permitted in the  
11 underlying zone districts and -- and that was  
12 the -- the sort of walking back and forth I  
13 did between 1401 and 701 and 721.

14 So, everyone of those uses and  
15 there's only one exception and that exception  
16 happens to be video game parlors which I guess  
17 is to new a use to be listed as a matter of  
18 right in the C-1 or C-2 Districts. Every  
19 other one of these uses is listed as a  
20 principal permitted use in the underlying zone  
21 and I found that to be very instructive.

22 Because what it says to me is when

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1 the Zoning Commission was going through hand  
2 compiling this list of things that were  
3 prohibited, it went through or -- or in  
4 consolidation with everybody who was involved  
5 in the case, you went through and you  
6 identified all these uses that are listed as  
7 principal uses in the underlying C-2 District  
8 and said these are the ones we don't want.

9           And so, I concluded from that that  
10 these -- this list of prohibited uses was  
11 intended to and meant to and was specifically  
12 drawn from the list of principal uses and not  
13 the list of accessory uses and, therefore,  
14 that -- since the principal use here is a  
15 grocery store, a grocery store selling the  
16 whole -- providing the whole range of goods  
17 and services that I went through in part A  
18 which would include the off-premises sale of  
19 beer and wine, doesn't change the nature of  
20 the principal use. It's still a grocery store  
21 and, therefore, the limitations on the Reed-  
22 Cooke Overlay to limiting principal uses don't

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1 apply to the sale of beer and wine in this  
2 grocery store and in that respect, I support  
3 the conclusion of the Zoning Administrator.

4 Now, he and I or Mr. Crews and Mr.  
5 LeGrant and I sort of went around a lot of the  
6 same issues. I think I've tried to address it  
7 in the sequence that I saw it as appropriate,  
8 but I'm not -- the only thing I think I  
9 fundamentally differed with him on was the  
10 fact that C of O generally don't identify sale  
11 of beer and wine in grocery stores in the  
12 District.

13 MEMBER LOUD: Do you need both  
14 prongs of your analysis in order to conclude  
15 the beer/wine is a matter-of-right use? In  
16 other words, do you need both the customary  
17 incidental use prong of your analysis and the  
18 second leg of your analysis where you went  
19 very -- I thought very helpfully through the  
20 principal use listings in the underlying zone?

21 MR. SHER: Yes, in my mind, the  
22 two together lead me to the conclusion that

1 the sale of beer and wine in a grocery store  
2 is not a restricted use.

3 If I had come in here with a 35  
4 whatever -- it's 38,500 square foot  
5 establishment that sold only alcoholic  
6 beverages, I don't get there.

7 MEMBER LOUD: Okay. Does it make  
8 a difference to you -- I should say what  
9 difference does it make if the grocery store  
10 as in this case is 38,000 square feet and the  
11 comparable universe of grocery stores 38,000  
12 square feet/25,000 square feet as opposed to  
13 say corner little grocery stores do not have  
14 beer/wine components? Was that unclear?

15 MR. SHER: Yes. I missed --

16 MEMBER LOUD: You about I think 64  
17 establishments that are groceries in D.C. that  
18 also sell beer and wine I think you said and  
19 you said many of those -- you didn't break it  
20 down, but you said many of those are I think  
21 mom and pop grocery stores and so, my question  
22 was in your -- what you're including in your

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1 comparables takes in a lot of stores that are  
2 not 38,000 square feet, that are not large  
3 supermarket grocery store-type facilities and  
4 if in just that universe of stores, if we're  
5 looking just at that, does it make a  
6 difference for your first prong of your  
7 analysis that many of the stores in that size  
8 range would not necessarily yoke alcohol  
9 beer/wine sales to grocery sales?

10 MR. SHER: I don't think it does.  
11 We were trying to figure out if it was  
12 customary in the District to identify the sale  
13 of beer and wine on a C of O for an  
14 establishment that sold groceries.

15 MEMBER LOUD: Okay.

16 MR. SHER: And so, we looked at  
17 the universe and, in fact, the universe we  
18 started with was a larger universe because we  
19 looked at establishments that had other  
20 licenses and so forth and we narrowed it to  
21 what's going on here, the sale of beer and  
22 wine. So, class B licenses only and we looked

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1 at all the class B license and then tried to  
2 figure out which were the ones that had C of  
3 O for grocery stores and delicatessens and  
4 that narrowed the universe somewhat further  
5 and as I said, we have a number of these which  
6 include Giant Food, Safeway, Whole Foods and  
7 so forth which --

8 MEMBER LOUD: Um-hum. Um-hum.

9 MR. SHER: -- I don't have here  
10 square footage numbers on these establishments  
11 and I also clearly don't have what percentage  
12 of that overall square footage is actually  
13 devoted to beer and wine. I don't -- I don't  
14 have that. I think I've made the case in my  
15 own mind and I hope to you that in this  
16 particular case with a 38,500-square-foot  
17 store of which 1500 square feet is devoted to  
18 the sale of -- of beer and wine that that in  
19 this case is incidental.

20 If I was selling -- if I had 1500  
21 square feet of -- of space in a 1600-square-  
22 foot store, I don't know that I'd be making

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1 the same argument and I don't know -- but, I  
2 don't need to make that argument because in  
3 almost any other zone, the sale of beer and  
4 wine is permitted as is the sale of groceries.

5 In this case, I have to -- as we  
6 just went through, I have to get to both parts  
7 of my test and the first part of my test says  
8 I got a big store and a little bit of  
9 alcoholic beverage sales both in terms of  
10 floor space and in terms of percentage of sale  
11 or estimated revenue and having gone through  
12 all the rest of the analysis, to me that's  
13 clearly incidental.

14 MEMBER LOUD: I'm with you on the  
15 argument about incidental and I'm not saying  
16 I'm not with you on customary. I just -- as  
17 we deliberate this later, I just want to make  
18 sure I understand. Clearly, it's incidental.  
19 It's like 4 percent I think you said of 38,000  
20 square feet.

21 MR. SHER: Yes, 3.9 or something  
22 like that. Four percent.

1                   MEMBER LOUD: Three point nine.  
2                   But, it seems like what would make it  
3                   customary or not customary depends on the size  
4                   of the grocery store.

5                   MR. SHER: I haven't done it. I  
6                   don't attempt an analysis of how many other  
7                   grocery stores are there that don't sell beer  
8                   and wine if that's where you're going. Is it  
9                   that -- if there's an additional 10,000  
10                  grocery stores in the District and the other  
11                  -- those 10,000 don't sell beer and wine, does  
12                  that mean that I'm no longer customarily  
13                  incidental and subordinate? I don't think I  
14                  need to do that, but -- because I don't think  
15                  there are -- I'd stake my credibility that  
16                  there aren't 10,000 other grocery stores in  
17                  the District of Columbia.

18                  MEMBER LOUD: Right.

19                  MR. SHER: There are some other  
20                  number perhaps, but I don't know what that  
21                  number is. Okay.

22                  Having been in -- I'm not going to

1 tell you I can count the number of grocery  
2 stores I've been in in the District of  
3 Columbia both large and small. My personal  
4 impression born out by the statistical  
5 evidence is a lot of those stores sell beer  
6 and wine and that -- that enough of them do  
7 that it's customarily incidental and  
8 subordinate.

9 I don't -- I don't think that a  
10 grocery store has to sell every one of the  
11 things I enumerated as -- as what's going to  
12 be in this Harris Teeter to be customarily  
13 incidental and subordinate. Some will develop  
14 film and some won't. Some will sell fresh  
15 fish and others won't. Some will sell flowers  
16 and others won't. Some may sell three or four  
17 or ten or twenty of those items, but to me I  
18 think the -- the idea of a grocery store is  
19 that it sells a lot of these different kinds  
20 and particularly a grocery store of this  
21 scale, 38,000 square feet, is going to sell  
22 and do a lot of different things and one of

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1 those lot of different things is the sale of  
2 beer and wine.

3 MEMBER LOUD: Okay. Final  
4 question, in the universe of comparable  
5 grocery stores we should be looking at for the  
6 purposes of the language in the regulation, is  
7 it the modern grocery store per your  
8 testimony? Is it grocery stores in the  
9 District of Columbia or does it make a  
10 difference?

11 MR. SHER: Well, the regulations  
12 don't use the term modern anything. They  
13 don't say modern grocery store, modern drug  
14 store, modern, you know, office building.

15 I remember a case before this  
16 Board a long time ago. So many years ago that  
17 I won't shame either one of us into saying how  
18 long ago it was. Where a guy came in and  
19 wanted to put a personal computer in his  
20 house. Okay. The Board found that that was  
21 not customarily incidental because the  
22 personal computer was about the size of -- of

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1 a bedroom. Nowadays and I'm obviously dating  
2 how long ago that was.

3 MEMBER LOUD: Um-hum.

4 MR. SHER: Okay. Nowadays every  
5 -- not everybody. The great majority of  
6 people somewhere in their home have a computer  
7 and so, if I were to look at that today and  
8 someone were to complain that -- that so and  
9 so had a computer in his house and that wasn't  
10 customarily incidental anymore, I think the  
11 answer would be entirely different.

12 So, I think you have to evaluate  
13 it in the context of -- of what's going on  
14 today.

15 If -- if 20 years ago no grocery  
16 stores rented DVDs because there was no such  
17 thing as a DVD, does that mean that's not  
18 incidental today? If -- if people were  
19 processing film in groceries stores and they  
20 don't process film anymore because everybody  
21 got digital and there is no such thing a film,  
22 does that -- I think you have to look at in

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1 the -- in the current context.

2 I believe that the -- that the  
3 most comparable analysis is of a -- of a store  
4 of approximately the size that we're talking  
5 here if you're trying to figure out what's  
6 customarily incidental and subordinate. The  
7 typical mom and pop grocery store isn't going  
8 to have a branch bank. It might have an ATM  
9 machine, but it's not going to have a branch  
10 bank like a -- a Chevy Chase Bank or a  
11 SunTrust or whatever. But, a store of 38,000  
12 square feet is likely to have the range of  
13 things I talked about before.

14 CHAIR MILLER: Mr. Sher, can I  
15 follow up here. The Zoning Administrator's  
16 letter references the Council's ABC law and  
17 references that that law addresses a  
18 limitation of 15 percent of the total volume  
19 of gross receipts on an annual basis.

20 So, I haven't seen that law yet,  
21 but I would assume that that this law  
22 recognizes, but correct me if I'm wrong, that

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1 this would be an incidental or accessory use  
2 if it only sells up to 15 percent. Is that  
3 correct?

4 MR. SHER: I think that's one of  
5 the criteria. As has been discussed briefly  
6 before, there have been rulings by the -- the  
7 BZA and the courts that up to 20 percent of  
8 activity could still be considered incidental  
9 and, in fact, there are other rules that say  
10 the amount of floor space isn't really  
11 relevant to determining what's incidental.

12 CHAIR MILLER: But, this does --

13 MR. SHER: But --

14 CHAIR MILLER: I'm sorry. But,  
15 this does limit the store's to 15 percent.  
16 Correct?

17 MR. SHER: Yes, and -- and --

18 CHAIR MILLER: So, they can never  
19 exceed that.

20 MR. SHER: Right. Right.

21 CHAIR MILLER: I just ask that  
22 because I didn't know whether that went into

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1 your consideration of whether it's different  
2 from a principal in that when you're looking  
3 at the intent of the overlay and how much  
4 sales you have of alcoholic beverages that in  
5 this particular case, the store can never go  
6 beyond 15 percent. So, therefore, it is in  
7 somewhat of a different category.

8 MR. SHER: Yes, there would -- two  
9 factors, one was the size, the amount of floor  
10 space devoted to sale of beer and wine and the  
11 other was the -- the limitation that it  
12 couldn't be more than 15 percent of the gross  
13 sales. So, those two factors.

14 Now, as Mr. LeGrant said and as  
15 the Board has recognized, that's an ABC law.  
16 It's not a zoning law, but I think it's  
17 instructive for the purpose of -- of looking  
18 at what is incident and what was the intent of  
19 the Council certainly in saying you could have  
20 a grocery store here that could sell beer and  
21 wine.

22 CHAIR MILLER: Okay. Because I

1 think that part of the question though is why  
2 should we treat an accessory use different  
3 from a principal use in looking at the  
4 regulations and one thing you said well, the  
5 structure of the regulations, but when I look  
6 at the structure of the regulations, I mean  
7 it's a little bit different because when you  
8 look at the normal uses allowed in the  
9 different districts, they go through the  
10 pattern that you said. You know, matter of  
11 right. What did you say next?

12 MR. SHER: Accessory.

13 CHAIR MILLER: Prohibited,  
14 accessory.

15 MR. SHER: BZA.

16 CHAIR MILLER: BZA. Okay. This  
17 doesn't do that. This just goes prohibited.

18 MR. SHER: That's right and that's  
19 -- that's why I think you have to look at what  
20 -- what is the relationship of that to the  
21 other structure or the regulations in the  
22 underlying zone.

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1           As -- as Mr. LeGrant said easier  
2           -- said earlier, if this were easy, if this  
3           had been an easy decision for him, we probably  
4           wouldn't be sitting here, but it -- it is as  
5           -- and this is partly in anticipate -- well,  
6           I won't anticipate.

7           The Zoning Administrator has the  
8           obligation to make those decisions in his  
9           review of building permit applications and  
10          certificates of occupancy and in allegations  
11          of violations of the regulations. Does this  
12          comply with the regulations in their entirety  
13          and that always applies some exercise of  
14          discretion. Sometimes that discretion is more  
15          limited by the terms of the regulations and  
16          sometimes, it's -- it's more open ended by the  
17          terms of the regulations and I'm -- I -- for  
18          the reasons that he stated and that I've  
19          stated, I agree with him that I think he  
20          reached the correct decision in this  
21          particular instance.

22          CHAIR MILLER: Did you look at the

1 legislative history behind the overlay to see  
2 whether this issue was addressed?

3 MR. SHER: We did do some digging  
4 into that and it wasn't conclusive one way or  
5 the other. The -- the initial versions of the  
6 overlay did not actually include a prohibition  
7 on off-premises sales and it got added later  
8 and it's not entirely clear why. But, there's  
9 nothing that tells -- how do I want to say  
10 this? There's no smoking gun one way or the  
11 other. It doesn't say we meant to apply this  
12 only to principal uses because if I'd have  
13 found that, boy, I would have trotted it out.  
14 On the other hand, I'm not hiding the one in  
15 my back pocket that said this applies to  
16 everything. Didn't find it either way.

17 CHAIR MILLER: Okay. Thanks.  
18 Other questions? Okay. Cross examination  
19 from the Appellant.

20 MR. LYDEN: Yes. Have you read  
21 the original zoning orders?

22 CHAIR MILLER: Is your mic on?

1 Yes, okay.

2 MR. LYDEN: Have you read the  
3 original order that -- zoning order that  
4 created the Reed-Cooke Overlay District?

5 MR. SHER: I have.

6 MR. LYDEN: Then you're aware that  
7 it leans heavily to residential use and  
8 expresses concerns about impacts on  
9 residential uses.

10 MR. SHER: I'm not sure I heard a  
11 question there, but --

12 MR. LYDEN: Yes, are you aware  
13 that there was concern about impact and abuses  
14 on residential uses within the Reed-Cooke  
15 Overlay Zone or contiguous to it?

16 MR. SHER: That was one of the  
17 concerns. Yes.

18 MR. LYDEN: Would the special  
19 concerns raised -- expressed by an overlay  
20 district give you pause to think that this  
21 would rule -- overrule the customary  
22 incidental or accessory uses if they were

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1 permitted? Because given that an overlay  
2 district is basically a real fine grain  
3 document to treat -- treat specific problems.

4 MR. SHER: Having worked with the  
5 zoning regulations for more than 37 years and  
6 having written a good number of them, but not  
7 this particular one, I have become accustomed to  
8 looking at the printed page as it exists and  
9 trying to figure out how to apply it.

10 Sometimes things are written in a  
11 way that perhaps people didn't intent them to  
12 apply, but that's what they say and other  
13 times they're crystal clear about what they  
14 mean.

15 We had occasion to look at the  
16 issue of whether we thought that the sale of  
17 beer and wine in a grocery store was  
18 prohibited by the terms of the regulations  
19 we've been talking about and I concluded that  
20 it wasn't. I don't know if I can say anymore  
21 than that.

22 MR. LYDEN: I guess I would get

1 into testifying if I said --

2 CHAIR MILLER: Get into  
3 testifying.

4 MR. LYDEN: Well, could a -- could  
5 a prohibition be specifically enumerated in  
6 the Reed-Cooke Overlay to remain in force if  
7 the -- in spite of a change in the underlying  
8 -- if the -- if that use -- that prohibition  
9 was removed from the underlying zoning?

10 MR. SHER: Hit me with that one  
11 more time.

12 MR. LYDEN: I said would a  
13 prohibition be put into the -- into an overlay  
14 to remain in force in case underlying zoning  
15 which was a prohibition was -- that was  
16 removed? Chapter 14 would remain if Chapter  
17 7 had many changes -- change to it.

18 MR. SHER: Well, there has to be  
19 some underlying zoning and you have to read an  
20 overlay in conjunction with whatever the  
21 underlying zoning is. If the underlying  
22 zoning was changed from C-2-B to something

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1 else, I don't know what that would mean. If  
2 it was changed to a residential zone or  
3 changed to a different commercial zone, it  
4 would mean lots of different things. So, I --  
5 I don't know.

6 MR. LYDEN: Okay. Let me start  
7 over again. Right today, there are changes --  
8 there are prohibitions within the underlying  
9 zoning and would you agree that they could be  
10 changed over time if they were challenged or  
11 the Zoning Commission decided to modify them?

12 MR. SHER: Would I agree that the  
13 Zoning Commission could change the -- yes.

14 MR. LYDEN: Good. So, if a  
15 prohibition was specially set forth in an  
16 overlay, could that be to insure that this  
17 special case remained in force even if the  
18 underlying zoning was changed?

19 MR. SHER: It could mean that.  
20 Yes.

21 MR. LYDEN: Okay. I think the  
22 impact -- would the impact of alcohol sales in

1 an area that was surrounded by residential or  
2 -- no, wait a minute. I got to -- I'm trying  
3 to craft some -- this is late -- late hour --

4 CHAIR MILLER: I'm sorry. What?

5 MR. LYDEN: -- Madam Chair and I  
6 hate to say it, but I'm getting a little foggy  
7 here.

8 My concerns are that -- well --

9 MR. REYNOLDS: May I ask a  
10 question?

11 MR. LYDEN: Go ahead.

12 CHAIR MILLER: Okay.

13 MR. REYNOLDS: Thank you. That  
14 was very informative. You are aware though --

15 CHAIR MILLER: Are you deferring  
16 to Mr. Reynolds?

17 MR. LYDEN: Yes, I am. I defer to  
18 Commissioner Reynolds.

19 CHAIR MILLER: Okay.

20 MR. REYNOLDS: You're aware that  
21 in the District of Columbia beef and toilet  
22 paper is not held in the same category as

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1 alcohol? That alcohol is a regulated  
2 commodity in the District of Columbia and the  
3 sale of alcohol is indeed a privilege?

4 MR. SHER: Not under the zoning  
5 regulations, but under other laws of the  
6 District. Yes.

7 MR. REYNOLDS: Okay. So, it isn't  
8 the same as selling toiletries or produce?

9 MR. SHER: It is the same in the  
10 sense that it is part of the overall bundle of  
11 thing -- goods and services that you can get  
12 in a grocery store in the District of  
13 Columbia.

14 To get there, you need to have a  
15 separate license approving that.

16 MR. REYNOLDS: Okay.

17 MR. SHER: And the suitability and  
18 all the things that go into the ABC process  
19 are something that the ABC Board will decide.

20 If the Board were to decide that  
21 that was suitable, then I don't think the  
22 zoning regulations in the circumstances that

1 I've decided them preclude that in this  
2 location.

3 MR. REYNOLDS: Could you please  
4 help us understand though given the section  
5 here that keeps getting cited over and over  
6 again about the more restrictive use shall  
7 apply, how that is not addressed by the  
8 regulations that you've been proposing or by  
9 the interpretation of the regulations? That  
10 given everything that you've said still when  
11 it comes to Section 1400.1, you could still  
12 find yourself in a situation where you'd have  
13 to get a variance from the Board of Zoning.  
14 How would that differ?

15 MR. SHER: Because the use at  
16 issue is grocery store and the use at issue  
17 under the overlay and the use at issue under  
18 the C-2-B District is grocery store. So,  
19 there's no -- started out at the very  
20 beginning. There's no inherent conflict or  
21 restriction on grocery stores and since I  
22 don't believe the prohibition on the sale of

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1 beer and wine applies to a grocery store, then  
2 it's not inconsistent.

3 MR. REYNOLDS: So, you would say  
4 then that the -- that 1400.4 does not apply  
5 here? That it is --

6 MR. SHER: I'm saying that there  
7 -- that there is no more restrictive provision  
8 in the overlay compared to the underlying zone  
9 as it relates to a grocery store.

10 MR. REYNOLDS: There is no more  
11 restrictive provision?

12 MR. SHER: In the overlay as  
13 compared to the underlying C-2-B District as  
14 it relates to a grocery store. That was my  
15 full statement. I'll repeat it again.

16 MR. REYNOLDS: No. No, I got it.  
17 I got it.

18 MR. SHER: Okay.

19 MR. REYNOLDS: So, basically,  
20 1400.4 here is covered in the underlying  
21 zoning? The more restrictive measure --

22 MR. SHER: They're equal. One is

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1 not more restrictive than the other.

2 MR. REYNOLDS: Although, 1400.4  
3 says the more restrictive shall apply.

4 MR. SHER: If there is a more  
5 restrictive.

6 MR. REYNOLDS: Thank you.

7 CHAIR MILLER: Okay. Any other  
8 questions from the Board?

9 MEMBER LOUD: I just want to ask  
10 Mr. Sher one -- one final follow-up question  
11 for real.

12 If we buy into the argument that  
13 beer/wine sales are a matter of right  
14 accessory use in the Reed-Cooke Overlay, what  
15 is -- not what is there. Do you see anyway  
16 under Reed-Cooke to stem the proliferation of  
17 these grocery stores with beer/wine  
18 departments that meet accessory use criteria  
19 under Reed-Cooke?

20 MR. SHER: I'll try to answer that  
21 in a couple of ways.

22 Number one, as the ANC

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1 representative just said, the sale of beer and  
2 wine is a strictly regulated commodity in the  
3 District of Columbia. Not under zoning, but  
4 under other restrictions and so, if there was  
5 a concern that there was a proliferation of  
6 establishments selling beer and wine, there  
7 have been moratoriums established on new  
8 licenses, both restaurant and others, in lots  
9 of different areas of the city, Georgetown,  
10 Dupont Circle, Adams Morgan and upper Glover  
11 Park or something like -- there are a number  
12 of them where there are moratoriums. So, if  
13 -- if the Council with the collaboration of  
14 the ABC Board feel that there are too many  
15 then restrict the issuance of any new ones and  
16 that takes care of that.

17 Number two, the Reed-Cooke Overlay  
18 is frankly a fairly small geographic area.  
19 Mr. LeGrant's map doesn't even show the full  
20 extent of it, but it doesn't go for blocks and  
21 blocks and blocks. It is a -- was -- was  
22 designed to address a fairly small area that

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1 was -- that had a lot of industrial zoning in  
2 it and uses which were more industrial than  
3 commercial. They were auto repair and -- and  
4 -- and color tone press and other things like  
5 that in that area. Even the prior uses of the  
6 -- of the Citadel building had, you know,  
7 motion picture sound studio and stuff like  
8 that. Had -- had more of a heavy  
9 commercial/light industrial flavor than --  
10 than what the C-2-B District generally allows.

11 So, even -- notwithstanding the  
12 Reed-Cooke, you go a block this way or -- or  
13 I guess it's two blocks over that way, you get  
14 to 18th Street and you got that whole  
15 commercial strip of C-2 zoning along 18th and  
16 Columbia Road not covered by the Reed-Cooke  
17 Overlay. You go south down to Florida Avenue  
18 and south of that along 18th Street again and  
19 17th Street, you got more pieces of commercial  
20 zoning. So, the opportunity for more stores  
21 that sell beer and wine is out there.

22 I think there are very limited and

1 I almost want to say no other opportunities  
2 for a store of this size in the Reed-Cooke or  
3 almost anywhere else in that surrounding  
4 vicinity. So, you're going to get one grocery  
5 store of this size and that's it in this  
6 geographic part of the city whether it's  
7 within the Reed-Cooke Overlay or in a -- in a  
8 greater radius.

9 CHAIR MILLER: Does DCRA have any  
10 cross examination?

11 MS. BOLLING: No, Madam Chair.

12 CHAIR MILLER: Okay. Does -- Mr.  
13 Reynolds, are you putting on a case or you  
14 were just going to ask questions?

15 MR. REYNOLDS: I had my questions  
16 answered. Thank you.

17 CHAIR MILLER: Okay. Then that  
18 brings us to rebuttal and closing statements  
19 by the Appellant if I'm not mistaken. That's  
20 Reed-Cooke. Do you have anything further you  
21 want to say at this point?

22 I would add that I think the Board

1 does intend to leave the record open for some  
2 written submissions, proposed findings and  
3 conclusions of law. So, you will have one  
4 more opportunity to say something in writing.

5 MR. LYDEN: Okay. I cut my teeth  
6 on zoning matters in the mid-'80s when the  
7 whole Reed-Cooke case was brought up. As a  
8 matter of fact, it was case 8819 and the  
9 Zoning Order 1991 leans heavily to residential  
10 uses and expressed concerns about impact on  
11 the residential uses by other uses and what  
12 was sought was a harmony among the uses and  
13 there were a great debates among our -- within  
14 our association which is -- by this case is  
15 what founded it and extending to all the  
16 prohibitive uses and we were especially  
17 concerned -- it was heavy, heavy talk about  
18 the ABC sales because there had been real  
19 problems in the neighborhood with dance --  
20 with, you know, concerts and whatnot. We had  
21 shootings and whatnot.

22 And the basic fundamental came

1 down to put the prohibition in to keep ABC  
2 sales on the arterial streets not in the  
3 interior streets of a residential neighborhood  
4 and at that time, we thought saying no was  
5 sufficient. That n-o meant no in big N-O.

6 I understand the interpretations  
7 I've just heard, but the real concern is that  
8 and why the special exception was put in was  
9 if somebody really wanted to come in, they  
10 would really have to prove a really, really  
11 strong case to get another alcohol license  
12 because we already had a couple grandfathered  
13 in in an area that was surrounded 100 percent  
14 by residential properties and even now, we've  
15 had two unit built across the street at 1701  
16 and 1700 Kalorama Road that brought almost 100  
17 units of residential property in and to the  
18 north of the current Citadel Center where  
19 Harris Teeter's going to be, the parking lot  
20 on, I think you're probably involved or will  
21 be involved, at the Dorchester House is slated  
22 for 140 more units of residents to be built

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1 there and we are going to -- this really puts  
2 this commercial use which is intensive.

3 As I've said before, a grocery  
4 store is a high-class warehouse. In the  
5 official technical logistics terms, it's a  
6 redistribution warehouse. You bring in big  
7 boxes, take things out, sell them off one at  
8 time.

9 So, one of our concerns about the  
10 off-premises alcohol sales is the additional  
11 traffic that's going to be brought into this  
12 area. The concerns have already been  
13 recognized to the point that there's -- a one-  
14 way grid is being put in. Streets -- Kalorama  
15 Road's going to be one-way west from 16th  
16 Street to 17th Street. Seventeenth Street  
17 will be made one-way north to Euclid Street  
18 and Euclid Street's going to be made one-way  
19 north. So -- or one-way east. So, if you  
20 take a look, these streets right now are going  
21 to be affected by this use and we're concerned  
22 that adding alcohol sales because ABC means

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1 alcohol brings customers will add even more  
2 traffic into the interior streets of our  
3 neighborhood.

4 Other stores in another site the  
5 Whole Foods and the Giant store up on Park  
6 Road, both of those stores have an arterial  
7 street at each end of the block. We don't  
8 have that. You're going to dumping traffic  
9 into the neighborhood streets and it's -- you  
10 can read the order. Go back and take a look  
11 at the original zoning order and they express  
12 extreme concern about that.

13 So, I understand this niceties of  
14 principal use and accessory use, but the  
15 ultimate thing comes down to what is going to  
16 be the impact on the land -- land use and as  
17 I was once told, zoning regulations state what  
18 the city can tolerate in the way of land use.

19 So, we take a very strict  
20 construction that no means no.

21 Thank you.

22 CHAIR MILLER: Okay. Thank you.

1 Mr. Cooper, let's just see what's happening  
2 with you now. I think this case is concluded.  
3 Did you want to add anything for your case?

4 MR. COOPER: Well --

5 CHAIR MILLER: I believe that DCRA  
6 has --

7 MR. COOPER: -- it's not really  
8 fair to put me -- everybody's husbands and  
9 wives are mad already and we've consumed a  
10 considerable amount of time here and am I to  
11 impose upon you all with putting on my case at  
12 this late hour?

13 CHAIR MILLER: Let me ask you.  
14 It's the same decision that's being appealed  
15 and I think that a lot of the issues have been  
16 flushed out. Certainly, Mr. LeGrant's been  
17 cross examined extensively about the reasons  
18 for his decision.

19 MR. COOPER: Not to the degree I  
20 have in mind for him.

21 CHAIR MILLER: Why don't you tell  
22 us what you have in mind that's different and

1 then we can assess how we want to proceed?

2 MR. COOPER: Well, I can just  
3 start on him if you'd like.

4 CHAIR MILLER: No, I think that it  
5 is a late hour. It's 6:30 and what we often  
6 do at this hour is assess like how much --

7 MR. COOPER: Well --

8 CHAIR MILLER: -- or how much do  
9 you want to do.

10 MR. COOPER: -- I intend to  
11 examine Mr. LeGrant, the Government, the  
12 witness that just finished. I don't intend to  
13 cover any new ground, but -- I mean any old  
14 ground. But, I have -- I don't buy into this  
15 entertaining, but wrong legal analysis of the  
16 Reed-Cooke Overlay presented by -- presented  
17 by Mr. Sher. So, I would be -- it's  
18 reasonable to expect that I would take as much  
19 time as has been taken to try to pull these  
20 guys apart.

21 CHAIR MILLER: Okay. So, you want  
22 the opportunity to cross examine Mr. Sher and

1 Mr. LeGrant and --

2 MR. COOPER: And to input my  
3 affirmative issues on. I won't duplicate --

4 CHAIR MILLER: Right.

5 MR. COOPER: -- the very excellent  
6 introduction of the other Appellant and I'll  
7 try to cover new ground, but there is new  
8 ground at least to my small mind that I will  
9 cover.

10 CHAIR MILLER: Um-hum. Okay. And  
11 just to get a feel for what's left to do in  
12 your appeal which is a separate appeal, but  
13 we've kind of put them together.

14 MR. COOPER: Um-hum.

15 CHAIR MILLER: We try to a certain  
16 extent. Am I correct though that the  
17 intervener and DCRA's case are done? It would  
18 be the same case? You may have different  
19 cross examinations, but as far as your general  
20 case, would you be putting on a different  
21 case?

22 MR. GLASGOW: Not any kind of

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1 significantly different case.

2 CHAIR MILLER: You have a  
3 different case?

4 MR. GLASGOW: No.

5 CHAIR MILLER: No, I didn't think  
6 so.

7 MR. GLASGOW: I mean the only  
8 things that we would be doing is probably if  
9 there's anything from this hearing that -- if  
10 there's another hearing that we think we  
11 should get into the record.

12 CHAIR MILLER: Um-hum. Okay.

13 MS. BOLLING: Our case would  
14 remain the same.

15 CHAIR MILLER: Okay. All right.  
16 We're going to look at our calendar and just  
17 make an assessment.

18 Okay. We're just going to take a  
19 five-minute break and look at the calendar.  
20 We're inclined not to continue this evening  
21 with Mr. Cooper's appeal, but you can look at  
22 your calendars as well in the meantime and

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1 we're just going to figure out where we can  
2 put in his appeal which doesn't sound like it  
3 will require all that much time since DCRA and  
4 the intervener's case isn't really changing  
5 too much. What?

6 MR. COOPER: If it were 3:30 in  
7 the afternoon --

8 CHAIR MILLER: Right.

9 MR. COOPER: -- it would be a  
10 different story.

11 CHAIR MILLER: Right and I know  
12 it's -- you know, it's difficult for everybody  
13 to come again, but it is kind of late. So,  
14 we're just going to take a look at our  
15 calendar and come back in about five minutes.

16 MR. GLASGOW: And, Madam Chair,  
17 from our standpoint, you know, obviously, the  
18 sooner we get back in, the better as is on the  
19 record. We are under construction and we have  
20 some time constraints.

21 MR. COOPER: They don't plan to  
22 open until after March. I'm sorry.

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1 CHAIR MILLER: Well, Mr. Cooper,  
2 wait.

3 MR. COOPER: I'm sorry. I --

4 CHAIR MILLER: These are other  
5 parties. I mean do you think we're talking  
6 about two hours or less to do your appeal  
7 considering --

8 MR. COOPER: On another occasion?

9 CHAIR MILLER: On another  
10 occasion?

11 MR. COOPER: Two hours or less  
12 easy.

13 CHAIR MILLER: Yes. Okay. So,  
14 we're going to look at our calendar and see  
15 where we can slide that in.

16 (Whereupon, at 6:38 p.m., off the  
17 record until 6:51 p.m.)

18 CHAIR MILLER: We have a very busy  
19 schedule. So, that's why it took us awhile to  
20 try to figure out where we could slide this in  
21 and according to our assessment, the best  
22 place to slide it in would be December 18th,

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1 first in the afternoon. Well, first in the  
2 afternoon means about 1:00.

3 Is that all right with everybody?

4 MS. BOLLING: Yes, from the  
5 District Manager.

6 MR. COOPER: Yes.

7 CHAIR MILLER: Okay. And it's our  
8 view that we shouldn't -- you shouldn't be  
9 doing your proposed findings of fact and  
10 conclusions of law necessarily at this point  
11 even with respect to the first appeal because  
12 it's a combined record. So, I'm not sure we  
13 need to set those dates right now.

14 We can set the date based on  
15 December 18th hearing date if you want at this  
16 time in, you know, anticipation of the whole  
17 thing.

18 Yes, we intend to finish that day.  
19 Then, of course, we run into the holidays.  
20 So, our thinking was though that we would set  
21 this for a decision making on February 5th and  
22 that would just be a deliberation meeting.

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1                   Is that a problem? Do you have a  
2 problem with time?

3                   MR. GLASGOW: Yes.

4                   CHAIR MILLER: Okay. What's that?

5                   MR. GLASGOW: Because the store is  
6 proposed to open in March. You know, fully  
7 stocked, open, ready to go.

8                   CHAIR MILLER: All right. We have  
9 another -- we have -- we were wondering if you  
10 might say that. So, we can back up to a  
11 January 8th decision. That would be the first  
12 decision date after December 18th.

13                   MR. GLASGOW: Um-hum.

14                   CHAIR MILLER: And our only  
15 concern was that, and perhaps you can help out  
16 with this, that there would need to be an  
17 expedited transcript probably made available  
18 to everyone and perhaps, you might be able to  
19 bear the cost of that or something.

20                   MR. GLASGOW: Yes.

21                   CHAIR MILLER: I don't know.

22                   MR. GLASGOW: Okay.

1 CHAIR MILLER: Okay. And there is  
2 time, you know, now to even start preparing  
3 findings of fact, but the record wouldn't be  
4 completed until after the hearing on the 18th.

5 Okay. So, that's what we'll do.  
6 I think we -- on the 18th, we could set the  
7 deadlines for submissions if that's all right  
8 with you all, but that will be what the big  
9 picture is then.

10 MR. GLASGOW: That's fine.

11 CHAIR MILLER: Hearing on the 18th  
12 to do Mr. Cooper's appeal. Though this part  
13 will be a part of your record in your appeal.  
14 Okay. And then decision on January 8th and  
15 then, Mr. Cooper, you have the opportunity to  
16 file in opposition to the motion to dismiss  
17 that was filed against you.

18 MR. COOPER: Okay.

19 CHAIR MILLER: Normally, there are  
20 not -- there aren't rules and our regulations  
21 don't set time limits, but we often look to  
22 the court rules and so, a normal amount of

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1 time would be ten days.

2 Do you have any problem with that?

3 MR. COOPER: Well, there is the  
4 surprise element and there are complications,  
5 engineering drawing, what have you.

6 CHAIR MILLER: Well, how much time  
7 do you need and then I'll see if Mr. Glasgow  
8 has --

9 MR. COOPER: I will certainly need  
10 -- I will certainly have responded by the  
11 hearing.

12 CHAIR MILLER: No, you have to  
13 respond before that.

14 MR. COOPER: Well --

15 CHAIR MILLER: That's a really  
16 long time and --

17 MR. COOPER: Okay. How about two  
18 weeks from today?

19 CHAIR MILLER: Two weeks from  
20 today. I think that sounds reasonable. Does  
21 that -- is that okay with DCRA and the  
22 intervener?

1 MR. BOLLING: That's fine with the  
2 District.

3 CHAIR MILLER: Okay. So --

4 MR. COOPER: That would be -- got  
5 a calendar up there?

6 MS. BAILEY: November 20th.

7 MR. COOPER: Thank you very much.

8 CHAIR MILLER: Okay. Is there  
9 anything else the parties need to bring to our  
10 attention?

11 MS. BAILEY: Madam Chair, I just  
12 have a quick. Are we leaving the record open  
13 for anything from the ANC?

14 CHAIR MILLER: Yes, we are.  
15 Confirmation that Mr. Reynolds has the  
16 authority to represent the ANC in this matter.

17 MS. BAILEY: Okay.

18 CHAIR MILLER: Thank you, Ms.  
19 Bailey. Anything else?

20 MEMBER LOUD: I'd like to ask Mr.  
21 Glasgow if his client could identify the 64  
22 establishments if you have it?

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1 MR. GLASGOW: Yes, we will submit  
2 those for the record.

3 MEMBER LOUD: Thank you.

4 MR. GLASGOW: And then, Madam  
5 Chair, the expedited transcript you were  
6 thinking about was the expedited transcript  
7 from the December 18th hearing?

8 CHAIR MILLER: Right. So that the  
9 other parties could have time to prepare the  
10 proposed findings and conclusions of law.

11 MR. GLASGOW: Okay.

12 CHAIR MILLER: Thank you. Okay.  
13 Anything else? All right. Then this  
14 hearing's adjourned. We'll see you on the  
15 18th of December.

16 (Whereupon, the hearing was  
17 concluded at 6:56 p.m.)

18  
19  
20  
21  
22