

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

+ + + + +

TUESDAY

FEBRUARY 5, 2008

+ + + + +

The Regular Public Meeting
convened in Room 220 South, 441 4th Street,
N.W., Washington, D.C., 20001, pursuant to
notice at 10:27 a.m., Ruthanne G. Miller,
Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

RUTHANNE G. MILLER, Chairperson
MARC D. LOUD, Vice Chairman
MARY OATES WALKER, Board Member
SHANE L. DETTMAN, Board Member (NCPC)

ZONING COMMISSION MEMBER[S] PRESENT:

MICHAEL TURNBULL, Commissioner
CURTIS ETHERLY, JR., Commissioner
GREGORY JEFFRIES, Vice Chairman

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY, Secretary
BEVERLEY BAILEY, Sr. Zoning Specialist
JOHN NYARKU, Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

LORI MONROE, ESQ.

The transcript constitutes the minutes from the Public Meeting held on February 5, 2008.

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

10:27 a.m.

CHAIRPERSON MILLER: Good morning,
ladies and gentlemen.

This is the February 5, 2008
public meeting of the Board of Zoning
Adjustment of the District of Columbia. My
name is Ruthanne Miller, I'm the Chair of the
BZA. To my right is Mr. Mark Loud, he's our
Vice Chair, and next to him we are happy to
have Mr. Curtis Etherly, representing the
Zoning Commission on the first two cases that
we will be deciding. And, to my left is Ms.
Mary Oates Walker, and Mr. Shane Dettman on
the Board, and then also joining us is Mr.
Clifford Moore from the Office of Zoning, Lori
Monroe from the Office of Attorney General,
and Ms. Beverley Bailey from the Office of
Zoning.

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

1 We do not take any public
2 testimony in our meetings, unless the Board
3 asks someone to come forward.

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

11 Does the staff have any
12 preliminary matters?

13 MR. MOY: Good morning, Madam
14 Chair, members of the Board.

15 We do, but I think it would
16 expedite matters just to handle the
17 preliminary matters case by case.

18 CHAIRPERSON MILLER: Thank you,
19 Mr. Moy.

20 And, I'd like to say with respect
21 to the schedule, we will be switching the
22 schedule around a little bit to accommodate

1 the different Zoning Commissioners who have
2 participated in specific decisions.

3 So, as we have Mr. Etherly here
4 with us at this time, I believe we will be
5 hearing 17603 first, and then -- 17603-A, and
6 then 17446-A.

7 Okay, Mr. Moy, we are ready for
8 you to call whichever decision is first for
9 us.

10 MR. MOY: Yes, Madam Chair, good
11 morning.

12 The first case for decision is a
13 motion for reconsideration of Application No.
14 17603-A, pursuant to Section 3126 of the
15 Zoning Regulations. This is to the original
16 application, No. 17603 of Johnson Kunlipe,
17 pursuant to 11 DCMR 3104.1, for a special
18 exception under 353 to allow the development
19 of four, four (4 -- unit apartment buildings
20 in the R-5-A district at premises 5206 and
21 5208 F Street, S.E. and 5210 and 5212 F
22 Street, S.E. (Square 5316, Lots 25, 26, 805,

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1 and 807).

2 On December 26, 2007, the Board
3 received a request for reconsideration to
4 Application No. 17603. This is identified in
5 the case folders as Exhibit 45. This motion
6 is from the opposition party from Ms. Rosa
7 Green.

8 As of this write here, no other
9 filings in the record other than two other
10 filings from Ms. Rosa Green, one is dated
11 January 29, 2008, received in the office
12 January 31st, identified as Exhibit 46, and
13 also for the Board's note from Ms. Rosa Green
14 a copy of a letter that was submitted to the
15 D.C. Office of Planning, which is Exhibit No.
16 47.

17 The Board is to act on the merits
18 of the reconsideration request, pursuant to
19 provisions in 3126, and the Board will
20 conclude its briefing.

21 CHAIRPERSON MILLER: Thank you,
22 Mr. Moy.

1 This case involves a special
2 exception that was granted pursuant to 353 for
3 the development of four, four unit apartment
4 buildings in the Marshall Heights area, and
5 under our Motion for Reconsideration a party,
6 pursuant to 3126, needs to state, you know,
7 all respects in which the final decision was
8 claimed to be erroneous, and then a request
9 for a hearing is considered only when there's
10 new evidence submitted that could not
11 reasonably have been presented at the original
12 hearing.

13 And, I want to say that in general
14 this Motion for Reconsideration does raise
15 concern with new apartment buildings in this
16 area, and, in fact, Mr. Etherly is quite
17 familiar that there has been a set down that
18 does change, or that will change the
19 regulations with respect to apartment
20 buildings being able to locate in this area.

21 However, when we considered the
22 case there wasn't such a set down, and the set

1 down, as far as I understand, doesn't require
2 us to change our decision. So, therefore, we
3 will be looking at, primarily, issues that she
4 has raised in her Motion for Reconsideration,
5 to determine if there's anything new or if we
6 made any errors in our decision.

7 Mr. Etherly, would you like to
8 address the issue, with respect to the motion?

9 COMMISSIONER ETHERLY: Thank you
10 very much, Madam Chair, I'd be more than happy
11 to.

12 I trust that my colleagues and I
13 most certainly remember this case very, very
14 well. It was, indeed, a very difficult case
15 from the standpoint of I think a fair amount
16 of clarity among a number of neighbors of the
17 surrounding -- some of the surrounding
18 neighboring property owners with respect to
19 concerns about the introduction of additional
20 development, and a particular multi-unit
21 development, into this community. And, I
22 think this Board walked very deliberately and

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1 very diligently through many of the issues
2 that were raised.

3 We want to speak, perhaps, along
4 the contours of the request for
5 reconsideration that was submitted by the
6 Applicant, and as you indicated, Madam Chair,
7 the Zoning Commission has, indeed, set down
8 Case No. 07-30, to take a look at this issue,
9 but I most certainly agree with you that that
10 particular set down action has no import here.

11 Does it, indeed, touch upon some
12 of the issues that are raised by the party in
13 opposition with regard to their Motion for
14 Reconsideration, it absolutely does. But,
15 from a procedural standpoint, one does not
16 have anything to do with the other in terms of
17 the posture of this case when it came before
18 us.

19 That being said, as you move
20 through the party in opposition's submission,
21 and you begin to look at some of the other
22 issues that were raised, inclusive of low

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1 density, hydrological problems, integrity
2 issues as relates to the Applicant,
3 consistency among the ANC, and then additional
4 photographic evidence, I'll have to say quite
5 directly and candidly, Madam Chair, that I do
6 not see grounds that would suggest that there
7 have been material changes with respect to any
8 of the evidence or circumstances that the
9 Board considered at the time of its original
10 hearing, and at the time of its order.

11 That is most certainly not to say,
12 as the party in opposition indicates, that
13 there, indeed, will be some -- could
14 conceivably be some impacts.

15 As was discussed by this Board,
16 the central question was whether or not there
17 were adverse impacts that would affect
18 neighboring property owners and their ability
19 to enjoy the use of their properties. This
20 Board, I think, talked in very clear detail
21 about issues surrounding light, about issues
22 surrounding air, about issues surrounding

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1 water. There was considerable discussion on
2 the part of this Board about storm water
3 concerns, I believe this Board went into
4 detail as much as to discuss particular drain
5 locations and what would be happening, given
6 the topographic layout of the subject
7 property, and I think this Board found in its
8 consideration of all of the evidence that
9 there were no water concerns that rose to the
10 level of being adverse in nature.

11 My colleagues will recall that at
12 Exhibit No. 39 there was a geotechnical report
13 that was submitted, and I believe that was
14 submitted on behalf of the agent for the
15 owner, which walked through some of the sub-
16 surface conditions, some of the ground water
17 conditions, spoke to issues around footings,
18 floor slabs, gradings, et cetera. And, while
19 there was some identification of what the
20 report referred to as, I believe, perched
21 water, the report did not identify that there
22 were any concerns which would rise to the

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1 level of being adverse in nature.

2 I recall very specifically a
3 considerable amount of discussion, not only
4 with the party in opposition, but also other
5 witnesses, about issues around site lines. As
6 was indicated in the overview of the case, and
7 as my colleagues are very familiar with
8 regarding the record, there are a number of
9 single-story residential properties that are
10 in the immediate vicinity of the subject
11 property. This Board discussed at length site
12 lines, the issue of what other residents will
13 see from the rear of their properties, from
14 the side of their property, inclusive of Ms.
15 Green's property.

16 Clearly, there's going to be a
17 changed landscape, relative to what Ms. Green
18 sees now versus what Ms. Green would have seen
19 before the construction of the subject
20 properties, and what she and her husband,
21 perhaps, see now. But, from the standpoint of
22 our standard for reconsideration, Madam Chair,

1 I find that the record does not support,
2 again, any material new information or changes
3 that would suggest the Board reconsider its
4 consideration.

5 But, I want to be very clear in
6 saying that, that that is not to say that this
7 is not a different circumstance compared to
8 what the party in opposition saw before the
9 application moved forward.

10 I believe I said on the record, as
11 I indicated in the Zoning Commission set down
12 case, there are, indeed, pressures that many
13 of our neighborhoods are feeling with respect
14 to infill development, and that is one of the
15 reasons that the Zoning Commission moved
16 forward in the manner that it did with the set
17 down case, but the Zoning Commission's
18 movement, again, has no bearing on this
19 particular case. It was not before the Board
20 to consider as part of its deliberations, and
21 it's not before the Board now for
22 consideration in terms of its deliberations.

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1 But, there are most certainly
2 pressures that many of our neighborhoods and
3 communities are feeling, and that is precisely
4 what the special exception inquiry is meant to
5 get at. In the context of the special
6 exception inquiry before this Board, at the
7 time that it ruled on this particular case, I
8 believe the record and evidence fully
9 supported the Board's decision at that time,
10 and I believe the record continues to support
11 the Board's decision at this time.

12 Thank you, Madam Chair.

13 CHAIRPERSON MILLER: Thank you,
14 Mr. Etherly, and I just briefly want to say
15 that I agree that the Motion for
16 Reconsideration doesn't cite any error that we
17 made in our legal analysis with respect to the
18 relief that was granted under 353 and has not
19 offered any new evidence that couldn't have
20 been offered at the hearing.

21 You already discussed the
22 hydrology, the low density was front and

1 center before us at the hearing, that was
2 something we certainly addressed and
3 considered. The ANC filed a report in this
4 case that we consider the pictures that were
5 referenced in No. 6, that she said she has
6 enclosed. There's no reason that those
7 pictures couldn't have been presented in the
8 hearing.

9 So, and as far as intentions of
10 the Applicant, I don't really believe that
11 that's really appropriate for us to be
12 considering a Motion for Reconsideration, I
13 don't really see the bearing here.

14 I think there also was an issue
15 with respect to whether or not a permit may
16 already have been issued in this case, but if
17 that's the case that's really an issue with
18 respect to whether DCRA, you know, properly
19 issued a permit based on our order before
20 there was this Motion for Reconsideration and
21 an order after that, but that's really not an
22 issue for the Motion for Reconsideration in

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1 any event.

2 So, I think that if that's the
3 case, Applicant always proceed at their risk
4 if there's not an order in place granting the
5 relief.

6 Okay, are there further comments
7 on this?

8 Okay, then not hearing any, I
9 would move denial of Application of 17603,
10 Motion for Reconsideration of Application No.
11 17603, rather, of Johnson Kunlipe, and do I
12 have a second?

13 COMMISSIONER ETHERLY: Second,
14 Madam Chair.

15 CHAIRPERSON MILLER: And, is there
16 further deliberation?

17 Okay, all those in favor of the
18 Motion to Deny the Motion for Reconsideration
19 say aye.

20 (Ayes.)

21 CHAIRPERSON MILLER: All those
22 opposed? All those abstaining?

1 And, would you call the vote,
2 please?

3 MR. MOY: Yes, Madam Chair.

4 Staff would record the vote as
5 3:0:2, this is on the motion of the Chair, Ms.
6 Miller, to deny the request for
7 reconsideration, seconded by Mr. Etherly, also
8 in support of the motion Mr. Loud. We have no
9 other Board member or Zoning Commission member
10 participating on this motion.

11 The next case for decision is
12 another Motion for Reconsideration,
13 Application No. 17446-A, pursuant to Section
14 3126 of the Zoning Regulations. The original
15 application number is 17446 of Pauline Ney,
16 pursuant to 11 DCMR 3104.1 for variances from
17 lot occupancy requirements under 403, and
18 nonconforming structure provisions under
19 subsections 2001.3 and 2002.4, to construct
20 four residential units above an existing one-
21 story retail structure in the R-5-B District
22 at premises 2160-2162 California Street, N.W.

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1 (Square 2530, Lots 99 and 100).

2 On December 18, 2007, the Board
3 reconvened Application No. 17446-A. After
4 deliberation, the Board decided to rescheduled
5 its decision to February 5th.

6 The Board requested parties for
7 further supplementals from the Intervenor and
8 other parties. This was filed into the
9 record, first filing from the property owner,
10 the Intervenor, and it is identified in the
11 case folders as Exhibit 135, dated January 25,
12 2008.

13 Subsequently, the Board has also
14 received a letter from the opposition party
15 requesting an extension of time for their
16 filing, and that is a letter dated January 28,
17 2008, identified as Exhibit 136.

18 The Board also received two other
19 filings subsequently, one from the property
20 owner, the Intervenor again, a letter dated
21 January 29, 2008, identified as Exhibit 137.
22 This is their response to the request from the

1 opposition party, and finally, a response to
2 that response from the opposition party dated
3 -- a letter dated January 31, 2008, identified
4 as Exhibit 138 in the record file.

5 The Board can go through these
6 filings if the Board desires.

7 The Board is to act on the merits
8 of its June 6, 2006 decision, as referenced in
9 its final order issued on May 4, 2007.

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

12 CHAIRPERSON MILLER: Thank you
13 very much, Mr. Moy.

14 So, I believe the first person
15 that we have before us the request for a
16 motion for extension of time of the interested
17 party opponents to respond to the Board's
18 request on December 18th, with respect to
19 whether further relief as possibly identified
20 by the Board was appropriate in this case, and
21 then whether or not moving the grocery store
22 from one location in the building to another

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1 created an adverse impact, and if so what were
2 they?

3 And then, I believe, whether or
4 not a hearing would be required, since this
5 was a new relief that was being identified, or
6 whether the extensive hearing that we had on
7 the case already provided the records from
8 which to make that determination.

9 And, we got a request for an
10 extension of time based on their lead, this
11 attorney, attorney, attorney party
12 representative being ill, that's Ms. Beggs,
13 and that's very unfortunate. And without
14 knowing too much of the details I would say
15 that the Board is certainly sorry to hear
16 about that illness. And, I don't believe that
17 I see in the audience any of party opponents.
18 If I'm mistaken, please identify themselves.

19 Okay, so they are not here to
20 argue this motion any further.

21 I just want to review at least
22 some of the facts, dates that I have in my

1 mind with respect to this motion. Certainly,
2 you know, number one consideration is Ms.
3 Beggs is sick. However, looking at the dates,
4 it was on December 18th at the meeting that we
5 raised these questions, and I think that they
6 were fairly simple questions, certainly with
7 respect to whether moving a grocery store
8 created any adverse impacts. And, the
9 deadline that we gave them was January 25th,
10 and we did that in order to accommodate, in
11 part, a January 14th ANC meeting.

12 In their letter, they identified
13 that Ms. Beggs got sick on January 24th, and
14 so I would just question whether they would
15 have had some information before the 24th that
16 they could have shared with the Board that
17 wasn't necessarily legal in nature.

18 The Applicant has stated in their
19 filing that, while they don't believe a
20 special exception is required, they were
21 willing to seek it in any event to really put
22 this case to rest, and they show how they

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1 would meet it.

2 Since that legal question is put
3 to rest, there really are very simple
4 questions, I think, left for the opposition,
5 which would be, you know, do they think a
6 change in the location of the grocery store
7 would have an adverse impact, and do we need
8 a hearing to determine if any adverse impacts
9 would arise from changing its location, and
10 if so, why?

11 So, I guess I don't necessarily
12 see why Ms. Beggs was the only one that could
13 answer those questions, and I'm concerned that
14 part of the reason we extended the time to
15 respond was for the ANC to have input, and
16 that we don't have any record of an ANC
17 meeting or report in our records being filed
18 by the opposing party.

19 So, you know, I think that we are
20 here then to determine at this juncture, you
21 know, should we leave the record open a little
22 longer for them to put this information in, or

1 has sufficient time really been given with no
2 -- with not sufficient, I guess, reasons for
3 not filing anything to us until on this day.

4 So, I think, you know, their
5 reason is that Ms. Beggs is ill, but I'm not
6 sure that I see the connection totally to this
7 total lack of filing anything that addresses
8 the concerns that the Board raised.

9 COMMISSIONER ETHERLY: Madam
10 Chair, I'd love to weigh in on your comments,
11 and I think you hit the nail precisely on the
12 head here.

13 This Board most certainly is very
14 sensitive to the challenges, be they health
15 related, be they scheduling, be they any
16 number of issues that we all have to grapple
17 with on a daily basis. And so, most certainly
18 our thoughts and -- our thoughts are with Ms.
19 Beggs, as she works through her personal
20 situation.

21 But, I would agree with you that,
22 perhaps, in another set of circumstances I

1 might be more inclined to actively contemplate
2 the issue of postponement somewhat more
3 favorably. This case has had such an
4 extraordinary history, in terms of time
5 spent, resources, on the part of both the
6 Applicant and the parties in opposition, the
7 discussion, the deliberations on some parts,
8 on the part of this Board, and the record have
9 been amply and, I think, so fully developed
10 that I, too, am concerned that there is a
11 complete absence of some discussion or some
12 submittal, be it on the part of the ANC or
13 other facets of the opposition apparatus with
14 regard to, as you put it, what is a very, I
15 think, focused question at this point in time.

16 It is, thus, my inclination that
17 this board continue to move forward with its
18 activities on this case today, because, quite
19 frankly, as I indicated at our last proceeding
20 on this matter, I think we've run the full
21 route. This is beyond a marathon. This is
22 beyond just about any type of descriptive term

1 I could come up with to capture how long this
2 case has dragged on.

3 And, I want to be very clear that
4 a case dragging on is not problematic for this
5 Board member if there are still issues and
6 questions of fact, questions of law even, to
7 be ferreted out. But, I think we are
8 absolutely at the end of the road here, and
9 have just about parsed this case and the
10 questions surrounding it to their finest
11 degree.

12 So, I just can't be more
13 unequivocal in my desire to move forward
14 today. Again, that is with all due
15 consideration and sensitivity for the
16 situation that Ms. Beggs finds herself in.
17 This Board is no stronger to parties in
18 opposition, as well as parties in support,
19 relying upon one or two primary leaders to
20 walk through a particular case, and Ms. Beggs
21 has served ably, more than ably, in that
22 capacity for the opposition. But, I think in

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1 this instance this record is so fully
2 developed the question before this Board at
3 this juncture in the case is such a focused
4 one, that I think I just simply don't see a
5 need for the postponement at this particular
6 juncture, Madam Chair, but I'm open to further
7 discussion from my colleagues.

8 Thank you.

9 MEMBER DETTMAN: I would concur
10 with every -- every comment that Mr. Etherly
11 just stated. I think that the Board has
12 enough information in the record to continue
13 on with our deliberations.

14 CHAIRPERSON MILLER: Okay, and I
15 would also like to state that, you know, for
16 the most part we say that parties don't need
17 to be here for a meeting, but on the other
18 hand when they file a motion that's new for
19 the Board's consideration I think that it
20 would serve them well to be here.

21 And so, I note that, you know,
22 their absence here -- I also think that while

1 Ms. Beggs, you know, played the lead here,
2 certainly Ms. Driscoll and Ms. French were
3 always here with them, and would certainly be
4 capable of responding to the basic questions
5 at issue here.

6 Okay, so I guess there's a
7 consensus that we proceed, and what's left in
8 this case is really the question that was
9 raised by the Board with respect to whether
10 further relief might be necessary in light of
11 moving the non-conforming use of a grocery
12 store to replace the non-conforming use which
13 was the realtor, a realtor's office. And so,
14 the Applicant did respond to that issue, and,
15 basically, I believe said that they didn't
16 necessarily believe that relief was required,
17 but they would address 2003, changing uses
18 within structures, and did so, and under that
19 analysis they met the special exception, or
20 they met the requirements of 2003.1.

21 And, I would agree that they do,
22 we can look at those provisions. 2003.1 says,

1 "Is approved by the Board of Zoning Adjustment
2 as authorized in Section 3103 and 3104 for
3 variances and special exceptions,
4 respectively, a non-conforming use may be
5 changed to a use that is permitted as a matter
6 or right in the most restricted districts in
7 which the existing non-conforming use is
8 permitted as a matter of right, subject to the
9 conditions set forth in this section."

10 So, what we have here is a grocery
11 store going in where a realtor's office was,
12 and they do address this specifically, and I
13 am looking for this, but, in general, where
14 the realtor's office is allowed as a matter of
15 right in the first zone, so is the grocery
16 store, as far as I understand, so that was in
17 accordance with the regs.

18 Yes, basically, I can read it from
19 their pleading, and it says, "The portion of
20 the existing building that will be occupied by
21 the grocery store is currently used as a real
22 estate office. General office uses are first

1 permitted as a matter of right within the C-1
2 District," and citing 701.6D.

3 Grocery stores are also allowed
4 within C-1 District as a matter of right,
5 701.41. Therefore, it meets that requirement.

6 The proposed use grocery store is
7 allowed as a matter of right in the most
8 restrictive district in which the existing
9 non-conforming use real estate office is
10 permitted as a matter of right.

11 So, that's 2003.1.

12 Next is 2003.2, "The proposed use
13 shall not adversely affect the present
14 character or future development of the
15 surrounding area in accordance with this
16 title. The surrounding area shall be deemed
17 to encompass the existing uses and structures
18 within at least 300 feet in all directions
19 from the non-conforming use."

20 Okay, in this instance, the
21 grocery store has been here, I don't know how
22 many years, but for the whole -- for a very,

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1 very, very long time, and the record shows
2 that the community enjoyed the grocery store,
3 and that was really something that they wanted
4 preserved.

5 This was one of the issues that we
6 left open for the opponents to address if
7 they wanted to, you know, whether moving it
8 would create some kind of adverse impact, and
9 I think the reason that we are not that
10 concerned that we don't have anything further
11 from the opposition is that the record is full
12 with respect to the positive impact that the
13 grocery store has on the community, and it's
14 hard to imagine even an argument against it,
15 with just respect to moving it in such close
16 proximity as to where it was.

17 2003.3, "The proposed use shall
18 not create any deleterious external effects,
19 including, but not limited to, noise, traffic,
20 parking and loading considerations,
21 illumination, vibration, odor, design and
22 citing effects."

1 Again, I think we have the full
2 record to draw on, and no evidence that moving
3 it would add any new deleterious external
4 effects of this sort.

5 Do others have comments on that?

6 Okay, I think it is kind of --
7 this is kind of basic, and that's really why
8 I was hoping we would get some response, but
9 I think the lack of response from the
10 opposition may say something in and of itself.

11 But, in any event, 2003.5, "In
12 residence districts proposals shall be either
13 a dwelling flat apartment house or a
14 neighborhood facility," and Applicant's make
15 the point that this is a neighborhood
16 facility. A neighborhood facility is not
17 necessarily defined in the regs, but I think
18 even, you know, based on our record, and even
19 our common knowledge, the grocery stores do
20 act for the neighborhood, and should be
21 considered a neighborhood facility.

22 The Applicant does say that we

1 have previously held that a community grocery
2 store is a neighborhood facility, citing
3 Application No. 15119 of Ho Chai, May 7, 1990,
4 because it does serve the residents in the
5 area.

6 Okay, 2003.6, "For the purpose of
7 this section, the districts established by
8 this title are listed in the following order
9 of decreased use restriction." Okay, that's
10 just the references there.

11 And then, 2003.7 says that we can
12 require provision of, or direct changes,
13 modifications, or amendments to any design
14 plans granting landscaping, type of lighting,
15 nature of any signs, pedestrian or vehicle
16 access, parking and loading, hours of
17 operation or any other restrictions or
18 safeguards it deems necessary to protect the
19 value, utilization and enjoyment of the
20 property and neighborhood.

21 I don't have any to suggest, I
22 don't know, do others? I don't think so.

1 Okay.

2 Okay, so I think that they have
3 met the standards of that provision.

4 We talked about 2002.3, and
5 whether or not that applies, and I think that
6 that was the provision that Ms. Brown said
7 that we had already looked at earlier in the
8 proceedings. 2002.3, "A non-conforming use
9 shall not be extended to portions of the
10 structure not devoted to that non-conforming
11 use at the time of enactment or amendment of
12 the title, or to another structure."

13 I don't think that was really
14 briefed, but upon looking at the provisions
15 here I would suggest that 2003.1 is the one
16 that's more applicable, that extending
17 sometimes, or often, means -- can mean
18 increasing, and that that might apply to where
19 you have a use and then you are increasing the
20 use in area or whatever. But, this is not an
21 increase, it's a swap in locations, so I think
22 that falls more under 2003.1.

1 Do others feel otherwise on that
2 point? Okay.

3 All right, so then procedurally, I
4 think that we are at a point where we would --
5 well, what might be before us is the Motion
6 for Reconsideration, which was based on --
7 just a second -- okay, where I think we are at
8 is, we had a Motion for Reconsideration, I
9 think for us to deny relief that was granted
10 in our previous order, based on the fact that
11 a conforming use was being changed to a non-
12 conforming use, and, therefore, a use variance
13 would be required.

14 And then, that's number one, and I
15 think what -- we have deliberated this one
16 pretty much already, but I don't think we
17 ruled on it, but, basically, if that's not
18 happening that they did this little swap, so
19 now we don't have that situation.

20 And then, number two, I guess
21 would be that their application was amended
22 to include relief from 2003, and that we would

1 grant the relief for that.

2 Is that how you understand it?

3 Okay.

4 Is there further deliberation on
5 those two avenues of relief? Okay.

6 Then, I would move to deny the
7 Motion for Reconsideration, and grant the
8 amendment to the application to grant special
9 -- to grant relief from 2003.

10 COMMISSIONER ETHERLY: Seconded,
11 Madam Chair.

12 CHAIRPERSON MILLER: Okay. Any
13 other deliberation?

14 Okay, all those in favor say aye.

15 (Ayes.)

16 CHAIRPERSON MILLER: Those
17 opposed?

18 All those abstaining?

19 And, would you call the vote,
20 please?

21 MR. MOY: Yes, Madam Chair. the
22 staff would record the vote as 3:0:2, on the

1 motion of the Chair, Ms. Miller to deny the
2 reconsideration and to add -- amend the
3 application to grant relief to Section 2003,
4 seconded by Mr. Etherly, in support of the
5 motion Mr. Dettman. There's no other Board
6 members or Zoning Commission members
7 participating on this case.

8 Again, the vote is 3:0:2.

9 CHAIRPERSON MILLER: Okay, we are
10 going to have a change in Zoning Commissioners
11 at this time for the other cases, so we are
12 going to take a very short break, just to make
13 that change, and Mr. Turnbull will be coming
14 out for the cases that he's sitting on.

15 (Whereupon, at 11:06 a.m., a
16 recess until 11:17 a.m.)

17 CHAIRPERSON MILLER: We are back
18 on the record.

19 I would just like to go back to
20 the last case for a minute, that's the Ney
21 case, 17446-A, that we just voted on, and I
22 think I may have been a little bit cryptic.

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1 I think the Board members knew what we were
2 voting on, but I think for purposes of the
3 record and the parties I want to just lay it
4 out more specifically, and if my Board members
5 disagree we can always revote or whatever.

6 But, when I said that we were
7 denying the Motion for Reconsideration, that
8 went to the substance in the Motion for
9 Reconsideration, that being that a use
10 variance was required.

11 In fact, we granted the Motion for
12 Reconsideration originally, in that we did
13 reconsider our previous order, and had a
14 hearing on this, if not more than one hearing,
15 and, therefore, that part was granted.

16 But, when we voted just now we
17 were voting to deny the substantive arguments
18 that were made in that, and then we also -- I
19 would say by implication, but now I'll say,
20 specifically, we were reaffirming the relief
21 that was granted in the original order and
22 adding relief from 2003.

1 And, I would also suggest that
2 OAG, you know, has flexibility to amend,
3 certainly, some of the facts that were set
4 forth in the original order. However it works
5 in another order and revising this order,
6 however it works with OAG, but to reflect
7 accurately that there has been a change in
8 facts in this case.

9 Is that clear? Okay. All right,
10 thank you.

11 Then we are ready -- no, is Mr.
12 Turnbull here?

13 MR. MOY: The next case for
14 decision is Application No. 17679 of Jemal's
15 TP Land, LLC, pursuant to 11 DCMR 3104.1, for
16 special exceptions under sections 353 and
17 2516, to permit the construction of a new
18 residential development (two multiple
19 dwellings, each containing 38 dwelling units)
20 in the R-5-A District at premises 6923-6953
21 Maple Street, N.W., and 6916-6926 Willow
22 Street, N.W. (Square 3357, Lots 26, 27, 28,

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1 29, 40, 808, 811, 814, 815, 818, 819, 820,
2 824, 825, 840 and 843).

3 The Applicant amended the
4 application to also include special exception
5 relief from roof structures that do not meet
6 set-back requirements, are not in a single
7 enclosed area, and for walls of an equal
8 height pursuant to Section 411.

9 At its public meeting on January
10 8, 2008, the Board convened Application 17679.
11 After discussion, the board rescheduled its
12 decision to February the 5th, and requested
13 Applicant and parties to file post-hearing
14 documents.

15 Filing was submitted from the
16 Applicant on -- and that is identified in the
17 case folders as Exhibit 44, it's dated January
18 9, 2008, and there are no other filings in the
19 record.

20 The Board is to act on the merits
21 of the special exception relief to Sections
22 353, 2516 and 411.

1 That completes the staff's
2 briefing, Madam Chair.

3 CHAIRPERSON MILLER: Thank you,
4 Mr. Moy.

5 Okay, this application goes to
6 three different regulations for special
7 exception relief, 353, 2516 and then the
8 restructures under 411. I think we ought to
9 discuss 353 and 2516 first.

10 353 is invoked because all new
11 multi-family residential developments require
12 referrals under this provision to the D.C.
13 Board of Education, DDOT, Office of Planning,
14 and filing of site plans and floor plans, and
15 then consideration under special exception
16 standards.

17 2516, actually, is the more
18 specific regulation that governs this
19 application, and that one applies because the
20 Applicant is proposing to subdivide the
21 existing property into five lots, each with a
22 principal building. There are going to be two

1 multi-family buildings, a combination of one
2 and two-bedroom units, totaling 38 units, and
3 they also, in this case, are relocating three
4 one-family dwellings.

5 And, this is an historic district,
6 and HPRB staff has recommended that the
7 conceptual site plan, height, mass, and
8 general architectural treatment be approved.

9 ANC-4B is in support, and we also
10 have a DHCD report, that's Exhibit 30, in
11 support.

12 We did admit party status to Mr.
13 Werner, who is a neighbor of this property,
14 and I think he certainly raised concerns that
15 often are present with respect to multi-family
16 buildings being built in residential areas
17 with single-family houses. So, he raised a
18 lot of concerns that I think that we can
19 address as we go through, perhaps, 2516.

20 2516 is rather lengthy, so I think
21 maybe we'll touch on, certainly, what is
22 significant. 2516 says, "If approved by the

1 Board of Zoning Adjustment as a special
2 exception under 3104.2, 3104, two or more
3 principal buildings or structures may be
4 erected on a single subdivided lot subject to
5 the provisions of this section."

6 Okay, so that's what's going on,
7 and then I know Office of Planning did an
8 extensive analysis based on each of these
9 sections, as did the Applicant. We can start
10 to take a look at some of the -- 2516.2 talks
11 about construction on a lot located within 25
12 feet of a residence district. This is
13 actually within a residence district, so it
14 applies. It's located in R-5-A District.

15 2516.3 talks about the requirement
16 for Applicant to submit site plans for all new
17 rights of way and easements, and landscaping
18 and grading plans. My notes reflect that
19 there aren't any new rights of way, that all
20 the buildings will front on existing rights of
21 way.

22 They did -- we did ask them for a

1 revised landscaping plan, I think they said
2 they were preparing that for HPRB, and they
3 also indicated that they went back to the
4 community and tried to revise a plan that met
5 some of the concerns, and I think some of them
6 went to more plantings along the walkway and
7 things of that sort. So, we do have that.

8 2516.4 goes to meeting the
9 requirements of the chapter with respect to
10 height, use and open space, and they do meet
11 that, that's shown in the OP report. They
12 have specific tables, 1 and 2, pages four and
13 five, which lays that out really well.

14 Let's see, street frontage, each
15 principal building does face a street, though
16 not all units face a street.

17 Feel free to jump in anyone, if
18 you want to address anything in particular.

19 I think it -- I'm unsure if we
20 want to go through each one or not, 2516.6
21 says, "In providing net density pursuant to
22 2516.11, the Board shall require at least the

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1 following . . .," and it goes to needs in
2 ingress and egress, and driveways, and I
3 believe that Office of Planning has found that
4 all of these are met.

5 2516.7 says, "Not in conflict with
6 the act to regulate the height of buildings in
7 the District of Columbia, height of building
8 governed by the provision of this section and
9 all zoned districts shall be measured from the
10 thinnest grade up the middle of the front of
11 the building."

12 The height limit of this zone is
13 40 feet, and Office of Planning has found that
14 they multi-family buildings would have a
15 height of 40 feet, measured from the front of
16 the buildings along Willow and Maple Streets,
17 and that the single-family houses are all
18 below 40 feet in height.

19 2516.8, this goes to, "The
20 development shall comply with the substantive
21 provisions of this title, and shall not likely
22 have an adverse effect on the present

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1 character and future development of the
2 neighborhood." Okay, this is where we get
3 into, you know, concerns of the neighborhood,
4 and we have here in the record that the design
5 and the layout, according to Office of
6 Planning, is sensitive to the topography of
7 the property. HPRB staff has recommended
8 approval, so that it does meet with the
9 historic character of the neighborhood.

10 We have a revised landscaping plan
11 that I think looks very positive to me, and
12 the most recent one.

13 They meet the parking
14 requirements. They have 38 spaces for 38
15 units, and then each house has a parking
16 space. They have bicycle storage areas in the
17 cellars of the buildings, to encourage bicycle
18 use. There's been no indication that there
19 would be adverse impact on traffic. I believe
20 that they are near Metro as well.

21 2516.9 goes to referring to the
22 D.C. Office of Planning. They've obviously

1 had this.

2 There are enough schools in the
3 area. There's recreation in the area, though
4 there's no recreation on site.

5 I think, certainly, Office of
6 Planning has found that they meet with all the
7 requirements, I don't believe it's necessary
8 to go through all of them at this point, but
9 they even find, you know, that the roofing
10 material and such is in accordance with the
11 historic character.

12 Any other comments on this? I
13 don't believe there were really any adverse
14 impacts. They certainly did address concerns
15 that we raised with respect to landscaping,
16 and there are no traffic concerns, no parking
17 concerns, no historic character concerns.

18 COMMISSIONER TURNBULL: I would
19 agree, Madam Chair. I think the relocation of
20 the three single-family homes and the siting
21 that they've done with the two new buildings,
22 as reflected on their latest site plan, I

1 think is very well done. I think they've tried
2 to integrate and keep the neighborhood
3 character. I think the design of the
4 building, of the multi-family dwellings, do
5 reflect the residential character, and as HPRB
6 has annotated, and I think from a site
7 planning standpoint it's very well done.

8 CHAIRPERSON MILLER: Okay,
9 anything else on that point, before we get to
10 the roof structure issue? Okay.

11 They are also seeking relief under
12 411, our roof structures provision, because
13 they don't meet the requirements relating to
14 setbacks, more than one enclosures, and
15 enclosures of equal height.

16 They, and Office of Planning, went
17 through the requirements under 411.11. I
18 think that they made their case as to why they
19 had a practical difficulty in complying with
20 those requirements.

21 Mr. Turnbull, maybe you can
22 articulate that better than I can, with

1 respect to the restructures.

2 COMMISSIONER TURNBULL: Well, the
3 major difficulty when you are dealing with a
4 multi-family dwelling is the location of the
5 exits, and the Code would like you to have
6 them located as far from each other as you
7 can, that adequately can address the exit
8 needs of the size of the dwelling.

9 So, when you have a building such
10 as this, which is long, which is a long
11 horizontal building, you are going to end up
12 with two roof structures, you are going to
13 have two stair towers that are going to be
14 farther apart.

15 So, I think they've tried to --
16 and plus, there is access to the roof, so to
17 minimize that they've tried to create the
18 screens to make it appear as less cumbersome
19 and noticeable as possible.

20 So, I think -- and you can argue
21 until you are blue in the face about the
22 design quality and how you can do that, but

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1 when you have two structures like that, and
2 you are trying to minimize the effect, I think
3 they've tried to the best of their ability,
4 design ability, to minimize the effect on the
5 roof.

6 CHAIRPERSON MILLER: Okay, are
7 there other comments on that?

8 Okay, so I think that there's
9 probably no dispute here with respect to the
10 practical difficulties that led them to have
11 the roof structures where they are, correct,
12 and that this actually --

13 COMMISSIONER TURNBULL: No, the
14 stair towers are, actually, and the elevators,
15 I mean, that's a result of the --

16 CHAIRPERSON MILLER: Right.

17 COMMISSIONER TURNBULL: -- nature
18 of the way the plan develops, and I think with
19 the number of dwellings that they are trying
20 to accommodate in the size of the buildings
21 these two stairs are remote from each other as
22 far as they can be. And, I don't think --

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1 there really isn't any way around that.

2 CHAIRPERSON MILLER: Okay, so when
3 we look at 411.11, we've already been
4 discussing the practical difficulties that
5 have required them to be where they are, and
6 then it asks us to look and make sure that
7 they don't undermine the intent and purpose of
8 the chapter, and don't impair the light and
9 air of adjacent buildings.

10 And, I think that's certainly the
11 case here, unless anyone feels differently.
12 Okay.

13 So, I think that the issue then,
14 why don't we get to the issues then, that
15 brought us to hearing today, and I think that
16 was that one of our Board members, Mr.
17 Dettman, is reading 411 in a way that's
18 different from the way it's been interpreted,
19 I think always. Our language in many of these
20 regulations are somewhat convoluted and
21 subject to different interpretations, and so
22 why don't I let you address, you know, how you

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1 read this regulation.

2 MEMBER DETTMAN: Thank you, Madam
3 Chair.

4 I guess I'd like to start off by
5 saying that, you know, I agree in terms of the
6 quality of this project and this design, I
7 agree, it's a good project. I agree with Mr.
8 Turnbull's comments that when dealing with
9 multi-family dwellings it's difficult to
10 provide the necessary amount of egress in the
11 appropriate places.

12 And so, I guess in the end I'm
13 going to end up -- I'll abstain from the
14 project, but -- and I'll need a few minutes to
15 sort of read into the record sort of my
16 thoughts on the interpretation of 411.11, 411
17 in general.

18 As you said, I see it differently
19 in terms of how the Board thinks that they
20 should analyze this project as a special
21 exception. My reading of 411.11 tells me that
22 I think it should be a variance, and again,

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1 that's my interpretation. And, my
2 interpretation, actually, doesn't need to go
3 past just the plain language of the
4 regulation.

5 The Applicant, however, when we
6 requested a briefing, their argument, in terms
7 of this question, special exception versus
8 variance, their January 9th somewhat
9 voluminous filing, basically, did exactly what
10 I did after the previous hearing. They
11 provided us with copies of the orders of cases
12 that were before the Board, as well as the
13 Zoning Commission, with respect to 411.11.

14 And, I guess the premise of their
15 argument is the historical interpretation of
16 this regulation. They also referenced the
17 1976 amendments made by the Zoning Commission,
18 and they say that the purpose of those
19 amendments were in part to reduce the work
20 load of the Board by creating regulations
21 which allowed projects to be approved as a
22 matter of right.

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1 And so, again, I didn't have to go
2 past, for my own personal interpretation, I
3 didn't have to go past the plain English
4 reading of that regulation, but I thought
5 since my interpretation is going against 30
6 years of interpretation of this reg I thought
7 it would be worthwhile to go back and sort of
8 analyze this historical interpretation.

9 You know, at the end of the 1976
10 amendments, when they were amended, or when
11 they were adopted, essentially, 411.2 reads
12 the exact same way as it does today. The
13 basic intent of that provision is to require
14 the normal setback requirements regardless of
15 the location of the roof structure in relation
16 to the top floor of the building.

17 411.11, and back in '76 these
18 provisions were numbered incorrectly, or
19 differently, but I'll just refer to them in
20 today's standards, 411.11 read a little bit
21 differently back then as it does today.

22 Essentially, it states that, "The

1 Board of Zoning Adjustment is empowered to
2 approve the location and design of any or all
3 such structures, even if . . .," and it goes on
4 to list the necessary setback requirements.

5 And so, back then you don't see
6 any mention of special exception, you also
7 don't see any mention of 411.3 through .6. It
8 doesn't pinpoint anything.

9 Essentially, my reading of the
10 1976 version of 411.11 is it sort of opens up
11 every provision of 411 for the Board to grant
12 relief from, and again, it doesn't mention
13 special exception.

14 Since 1976, the Applicant goes on
15 to say that, you know, several applications
16 have come before the Board, the Zoning
17 Commission, as well as the National Capitol
18 Planning Commission for PUD review, text
19 amendment review, that have been analyzed as
20 a special exception.

21 There was a following set of
22 amendments that were taken up by the Zoning

1 Commission in 1986 that I spent some time
2 looking at. It was Zoning Commission
3 Order 476 as well as 508. The Zoning
4 Commission took this up in response to sort of
5 the evolution of the use of the roof for the
6 placement of roof structures, you know, based
7 on because this sort of evolution of roof
8 structures, and the advances in technology,
9 and the requirements of buildings.

10 And so, it says that they take
11 this up as to the use of -- the increased use
12 of the roof and the chaotic development where
13 the building meets the sky, and so it was
14 really sort of a visual concern, and they
15 wanted to address this. And, they tasked the
16 Department of Planning, the Office of
17 Planning, to look at this issue.

18 The Office of Planning considered
19 increasing the setback requirements, the
20 Zoning Commission thought the existing setback
21 requirements work as they are, they didn't
22 want to change those.

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1 OP also indicates that
2 improvements could be made by allowing greater
3 flexibility in the choice of materials in
4 introduction of rooftop landscaping, and so
5 sort of what's the enclosure, what materials
6 the roof structures are enclosed in.

7 I thought it was interesting in, I
8 think it was Order 476, that the Zoning
9 Commission actually goes on to say, "Under the
10 current Zoning Regulations the developer would
11 have to seek an area variance to add
12 additional height and hope to justify on the
13 basis of unusual circumstances and
14 requirements of the project," and that was
15 when they were addressing this improving the
16 access to the roof for active use. They would
17 need to provide elevator access to the roof,
18 which, essentially, would require additional
19 height on the elevator override.

20 However, they do go on to say
21 that, you know, they would have to seek an
22 area variance to get that relief, and again,

1 at that point with the language of 411.11 not
2 saying anything about a special exception, and
3 with the assumption that that would,
4 basically, open up all of the provisions of
5 411 to be analyzed by the Board as a variance,
6 I think that you can maybe make the assumption
7 that that would also apply, that statement
8 would also apply to setbacks.

9 Shortly after Order No. 476 was
10 issued, at the request of a Zoning
11 Commissioner Order No. 508 was issued, and it
12 was sort of to provide some clarity on the
13 language of 411.11, the special exception
14 authority of the Board.

15 That order reads, in a DCOP
16 memorandum to the Commission, they really
17 address this idea of all other aspects, and if
18 you read 411.11 it talks about the number, the
19 location, the design, and all other aspects of
20 such structures regulated by 411.3 through .6.

21 A response to that all other
22 aspects phrase, DCOP says that at this point

1 -- I'm sorry, essentially, it would say that
2 the phrase all other aspects provides a nice
3 catch all for the Board of Zoning Adjustment
4 to address unforeseen types of roof
5 structures, as well as unforeseen aspects of
6 roof structures.

7 I guess my response to that
8 statement would be that, since roof structure
9 setbacks are so adequately addressed in the
10 regs up to that point, I wouldn't consider
11 roof structure setbacks an unforeseen aspect
12 of a roof structure.

13 And again, at that time you don't
14 see anything about special exception authority
15 or pinpointing what regulations or what
16 provisions fall under the special exception
17 authority of the Board.

18 When you finally do see that, some
19 time after 1986 you see the language of 411.11
20 change again, you see the word special
21 exception in there, and it pinpoints 411.3
22 through 411.6, which all have to do with sort

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1 of the aesthetics, the enclosure, the
2 materials of the enclosure, and some other
3 sort of location-related aspects, but not
4 setbacks.

5 I find it interesting that when
6 that did happen, when they did pinpoint 411.3
7 through .6, they opted to not include 411.2,
8 which speaks, specifically, to when roof
9 structure setbacks do apply, and it's wherever
10 they may be in relation to the top floor.

11 Just sort of as a final note, and
12 again, I'll just reiterate my comment that I
13 think this is a good project, that there's
14 this issue of building heights, roof top
15 structure setbacks, and potential conflicts of
16 the Height of Buildings Act, and this is why
17 I will abstain from this project, as well as
18 the next case, I believe, that's coming up, is
19 that reading of the Height of Buildings Act
20 currently, and it's being analyzed by DCOP
21 and NCPC, and a lot of these issues are being
22 flushed out, and, hopefully, they'll come to

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1 some resolution.

2 However, right now, as the
3 building is designed, there are two roof
4 structures, and they do not meet the one-to-
5 one setback requirements.

6 Reading of the Building Height Act
7 does mention that waivers can be granted by
8 what was then the Commissioners of the
9 District of Columbia. I assume -- and today
10 it says the Mayor, and I assume that that
11 authority would be delegated to the Zoning
12 Administrator, but in the absence of any
13 waiver, and the unclarity that that provision
14 provides, and that's being worked out
15 currently, that would give me even greater
16 pause with respect to the relationship of the
17 regulations and the Building Height Act, and
18 lead me to have to abstain.

19 Thank you, Madam Chair.

20 CHAIRPERSON MILLER: Thank you.

21 I just want to address a couple of
22 points, and one is, I mean, the reason that

1 your initial remarks gave me pause was because
2 I could see the logic in your interpretation
3 of 411.11. But, my understanding of statutory
4 construction is that when there have been 30
5 years of interpreting a regulation a certain
6 way by the BZA, by the Zoning Commission, and
7 confirmation by the Court of Appeals, that
8 that is controlling, that we are looking in
9 this case at what the Zoning Commission
10 intended, and over all these years they have
11 never indicated that they intend this
12 regulation to be read as a variance.

13 And, what I find interesting about
14 this regulation is, I don't think it's
15 strictly special exception. I mean, it builds
16 into the regulation itself a standard from the
17 variance standard, that being where
18 impracticable because of operating conditions,
19 size of building lot, or other conditions
20 relating to the building or surrounding area
21 that would tend to make full compliance unduly
22 restrictive, prohibitively costly, or

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1 unreasonable. And, that's not typical special
2 exception language. That is more typical
3 variance language, and I think that I recall
4 your commenting in probably the next case
5 that's coming that the analysis seemed to
6 follow almost a variance case.

7 And so, I believe that the proper
8 interpretation of this regulation is as the
9 language leads us, it's almost a hybrid, it
10 leads us to looking at this impracticable
11 standard, and then it leads us to special
12 exception standard, in that it tells the Board
13 that we need to be looking at the effect on
14 the light and the air of adjacent properties,
15 and that's special exception language, and
16 then it says to treat it as a special
17 exception.

18 So, there's a lot going on in this
19 regulation, but I think it tells us how to do
20 it, and in no instance has it been treated as
21 a variance per se. And, teh Zoning Commission
22 has had a couple of opportunities, as you

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1 referenced, to look at roof structures and to
2 indicate that it should, if that's what was
3 intended.

4 So, again, I think that this is
5 different from, for instance, our appeals,
6 where we get a regulation that is being
7 interpreted in the first instance, and then we
8 -- and that's how we look at it, and though we
9 can look at legislative history, et cetera, in
10 this case there's not just one case that has
11 ever applied it the other way, and I think
12 the courts have recognized when that's the
13 case that parties, communities, business,
14 whatever, they all rely on that interpretation
15 that's been applied as the law, and,
16 therefore, it would be, I think, grossly
17 unfair to interpret it otherwise when there
18 isn't a situation that distinguishes this
19 case.

20 And, that's, basically, what, you
21 know, the Drow case said. So, I think that
22 would be up to the Zoning Commission to do.

1 Any other comments?

2 COMMISSIONER TURNBULL: Thank you,
3 Madam Chair.

4 I would agree with you, and I
5 guess I'm following the logic that the
6 Applicant submitted on its January 9th
7 submittal, as Mr. Dettman was referring to.
8 And, on page two of that, under Section B, the
9 headline of that is called, "Consistent
10 Treatment of Roof Structure Relief." And,
11 summarizing, they, basically, said we've
12 attached 23 odd cases that, basically, get
13 back to what you were just saying, is that
14 over these past 30 years these cases, and I'm
15 sure they could have cited, you know, maybe
16 twice that amount or more, that the land use
17 attorneys have been looking at this as a
18 special exception, that the Zoning Commission
19 and the BZA have consistently interpreted this
20 as a special exception.

21 And, I think that that in and of
22 itself is enough -- is convincing enough to me

1 that not to change and look at this as a
2 variance. I understand Mr. Dettman's dilemma
3 on this, in looking at the language, but I
4 think that the common understanding of this
5 for the past 30 years is that this really is
6 best addressed as a special exception,, and I
7 would go along with that interpretation.

8 MEMBER WALKER: Madam Chair, let
9 me just say for the record that while I did
10 not hear the original case back in November,
11 as I was not a member of the Board then, I
12 will be participating in the decision today,
13 and I've had an opportunity to review the
14 entire record.

15 I, too, am persuaded by the
16 history of 411.11, in particular, the specific
17 reference to special exception in the text of
18 the regulation, and the extensive body of case
19 law that's been decided there under.

20 MEMBER DETTMAN: Madam Chair, I'd
21 just like to just say that I do agree with
22 what you said about the current language of

1 411.11, and that it's almost like a hybrid.
2 It raises the standard on a typical special
3 exception, but doesn't necessarily reach the
4 three prongs of the variance test.

5 And so, with that I'm pleased to
6 see that this particular issue, special
7 exception from these roof top structures, has
8 held to a slightly higher standard.

9 If 411.2 was incorporated into
10 411.11, instead of limiting it to .3 through
11 .6, I'd probably see it differently.

12 And, just a final comment with
13 respect to your reference to the Drow case and
14 the Applicant's reference to the Drow case,
15 quoting the consistent interpretation for an
16 extended period of time. You know, it's hard
17 to argue with the legislative history here.
18 I mean, 30 years without one single case
19 seeing it my way I guess is tough to argue
20 with.

21 But -- and I tried to sway myself
22 here, and base my judgments on legislative

1 history, but I just couldn't get over the idea
2 that this argument that if a mistake was being
3 made, and I'm not saying it is, but if a
4 mistake was being made, after a certain amount
5 of time if it's discovered that a mistake was
6 being made it's too late, and then that
7 interpretation will have to continue on
8 forever.

9 CHAIRPERSON MILLER: Okay, I just
10 want to respond to that, and make one other
11 point.

12 It doesn't have to continue on
13 forever. My point is that it would be the
14 Zoning Commission that should make the change
15 in this case, and that anyone is free to bring
16 that to the attention of the Zoning Commission
17 and ask for a text amendment.

18 My second point is, and I meant to
19 say this earlier, I think what's missing, you
20 know, from the variance test in this
21 regulation is that of proving uniqueness each
22 time, and I believe that was intentional, that

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1 this is probably not as unique as we've seen
2 problem. So, I think that that was
3 intentional.

4 Okay, anything else?

5 Any other comments on any aspect
6 of this application?

7 COMMISSIONER TURNBULL: No, Madam
8 Chair, I'm in favor of getting on with this.

9 CHAIRPERSON MILLER: Okay, and let
10 me just say this, because 2516 is so
11 extensive, I didn't go through every single
12 one, I went through a lot of the key ones.
13 So, I would feel comfortable adopting the
14 findings of the Office of Planning, if you all
15 would, and then I think we would be done with
16 this.

17 COMMISSIONER TURNBULL: I concur.

18 CHAIRPERSON MILLER: Okay, all
19 right, in which case then I would move
20 approval of Application No. 17679 of Jemal's
21 TP Land, LLC, pursuant to 11 DCMR Section
22 3104.1, for special exceptions under 353 and

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1 2516, to permit the construction of a new
2 residential development (two multiple
3 dwellings, each containing 38 dwelling units)
4 in the R-5-A District at premises 6923-6953
5 Maple Street, N.W., and 6916-6926 Willow
6 Street, N.W.

7 Do we have a second?

8 COMMISSIONER TURNBULL: Second.

9 CHAIRPERSON MILLER: Further
10 deliberation?

11 All those in favor say aye.

12 (Ayes.)

13 CHAIRPERSON MILLER: All those
14 opposed?

15 All those abstaining?

16 MEMBER DETTMAN: Abstaining.

17 CHAIRPERSON MILLER: Did you get
18 the vote?

19 MR. MOY: Yes, ma'am, the staff
20 would record the vote as 3:0:2, that's on the
21 motion of the chair, Ms. Miller, to approve
22 the application for special exceptions under

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1 353, 2516 and 411, seconding the motion, Mr.
2 Turnbull, also in support of the motion, and
3 Ms. Walker.

4 Shall I continue?

5 CHAIRPERSON MILLER: Oh, I just
6 think I heard you say something that I think
7 I didn't say. I think I didn't, we vote also
8 on relief under 411, I believe that the
9 application was amended to include special
10 exception relief under 411, and I read the
11 original heading.

12 So, why don't we revote. Okay, to
13 include the 411 relief.

14 Do we have a second for that?

15 COMMISSIONER TURNBULL: Second.

16 CHAIRPERSON MILLER: Okay. All
17 those in favor say aye.

18 (Ayes.)

19 CHAIRPERSON MILLER: All those
20 opposed?

21 All those abstaining.

22 MEMBER DETTMAN: Abstaining.

1 MR. MOY: Well again, to
2 reiterate, the vote is 3:0:2, on the motion of
3 the Chair, Ms. Miller, to approve, seconded by
4 Mr. Turnbull. In support of the motion Ms.
5 Walker. We have Mr. Dettman abstaining, and
6 no other Board member participating.

7 Again, 3:0:1 -- 3:0:2.

8 The next case for decision is
9 Application No. 17706, of D.C. CAP, C-A-P,
10 Hotelier, LLC, pursuant to 11 DCMR 3104.1, for
11 a special exception to allow additions to an
12 existing hotel under section 5123, in the SP-2
13 District at premises 1200 16th Street, N.W.
14 That's in Square 182, Lot 826.

15 Staff notes the application was
16 amended to include special exception zoning
17 relief on the roof structure under Section
18 411.

19 On January 29, 2008, the Board
20 completed public testimony, closed the record,
21 and scheduled its decision on February the
22 5th. No additional information to supplement

1 the record was required.

2 There is one preliminary matter,
3 in that staff notes that ANC-2B filed a letter
4 to correct -- in correction of Chairman
5 Estraud's January 7, 2008 letter to correct
6 the date of an ANC meeting and the number in
7 attendance, and that's identified as Exhibit
8 35, dated January 30, 2008, received in the
9 office February 1, 2008.

10 The Board is to act on the special
11 exception relief, and that completes the
12 staff's briefing, Madam Chair.

13 CHAIRPERSON MILLER: Thank you,
14 Mr. Moy.

15 Is it the consensus of the Board
16 that we allow the record open to accept the
17 ANC's letter correcting information in its
18 previous letter? Okay. That being said --
19 done, we can get to the merits of this case.

20 This case involves special
21 exception relief under 512, to expand a hotel
22 in the SP-2 Zone District, and then the roof

1 structure relief under 411.

2 Basically, this application
3 involves minor renovations to the hotel,
4 including putting sky lights over two non-
5 conforming closed courts in the lobby area,
6 and expanding the kitchen, and expanding a
7 bridge, and adding two new bridges to connect
8 the main hotel and townhouse annexes.

9 Because they are adding square
10 footage to the hotel, it triggers provisions
11 under 512.

12 Does anybody want to make any
13 comments under that one right now? Okay.

14 Before I get the provision in
15 front of us, I would note that Office of
16 Planning is in support, as well as ANC-2B.

17 Both the Applicant and Office of
18 Planning do go through the provisions of 512,
19 and we can take a look at that.

20 Okay, 512.1 says that a hotel or
21 inn is permitted as a special exception in an
22 SP District if approved by the Board of Zoning

1 Adjustment under 3104, and this has been
2 interpreted, I believe rightly so, to apply to
3 any additions to hotels or inns in an SP
4 District, and that's why we are here.

5 512.3 says, "The height, bulk and
6 design of the hotel or inn shall be in harmony
7 with existing uses and structures on
8 neighboring property."

9 These are very minor, minor
10 changes, so they really don't affect, I
11 believe, you know, bulk and height too much
12 with respect to neighboring properties, and
13 if I understand it, it's in the record that
14 neighboring properties are in support of the
15 application.

16 We have a letter from the
17 University Club, and we have a letter from NEA
18 in support. Those are two that come to my
19 mind right here.

20 VICE CHAIRMAN LOUD: Add to your
21 list Boston Properties, I don't know if you
22 said National Geographic Society, American

1 Chemical Society. I know that you mentioned
2 the University Club and the NEA. I think all
3 of the immediate neighbors support it, in
4 fact, there's no opposition in the record at
5 all, which speaks to 512 as you alluded to
6 512.4, in terms of impacts on neighboring
7 properties.

8 CHAIRPERSON MILLER: Which reg?

9 VICE CHAIRMAN LOUD: Section
10 512.4.

11 CHAIRPERSON MILLER: Oh, 512.4,
12 "To ensure that the height, bulk and design of
13 the hotel or inn shall be in harmony with
14 existing uses and structures and neighboring
15 property. The Board may require special
16 treatment in the way of design building set
17 backs, screening, landscaping, sign controls
18 and other features it deems necessary to
19 protect neighboring property."

20 VICE CHAIRMAN LOUD: Well, I think
21 what I'm alluding to is that there are no
22 adverse impacts as to which the neighboring

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1 properties are trying to bring to our
2 attention, and that they've done a good job of
3 going around and pretty much getting support
4 of the local ANC and all of their neighbors.

5 CHAIRPERSON MILLER: Right, and
6 also, their alterations have been approved by
7 HPRB staff.

8 512.5, "The approval of the hotel
9 or inn shall result in a balance of
10 residential office and hotel or inn uses in
11 the SP District in the vicinity of the hotel
12 or inn."

13 I mean, again, because it's an
14 existing hotel, it really doesn't change the
15 balance at all.

16 512.6, "The gross floor area
17 devoted to function rooms and exhibit space
18 shall not exceed 15 percent of the gross floor
19 area of the hotel."

20 In this case, they've indicated
21 that the gross floor area devoted to function
22 rooms and exhibit space within the hotel will

1 actually be decreased. I think that does seem
2 to be one of the main concerns I've seen when
3 hotels have come before the Board, about this
4 increase in exhibit space, and that's not
5 happening here.

6 Section 512.7, "The hotel or inn
7 shall be located within 1,300 feet of the
8 central employment area or Metro rail
9 station," and this hotel is within the central
10 employment area, and it's in walking distance
11 of Metro.

12 Okay, 512.8 just talks about how
13 that distance is measured, and it's in the
14 central employment area, so it doesn't have to
15 really be measured to it.

16 512.9, "The Board may require more
17 or less off street parking spaces and loading
18 berths required by Chapter 21 and 22 of this
19 title, to accommodate the activities of the
20 hotel or inn, so as to avoid unduly impact on
21 parking or traffic on the surrounding
22 streets."

1 Okay, this is an historic
2 property, so no additional parking is
3 required.

4 512.10, "The location and design
5 of driveways, access roads and other
6 circulation elements of the hotel or in shall
7 be to avoid dangerous or other objectionable
8 traffic conditions."

9 The Applicant says that this has
10 been reviewed by DDOT, and elements have been
11 designed to avoid dangerous traffic
12 conditions. I don't believe that, you know,
13 anything has changed that would even affect
14 this, and we do have review by DDOT, which did
15 not raise that concern.

16 Okay, anything else on this one?

17 Roof structures, anyone want to
18 describe what they are doing on this roof?
19 They are seeking 411 relief as well.

20 COMMISSIONER TURNBULL: Well,
21 basically, Madam Chair, what they are trying
22 to do is that in upgrading the facility,

1 renovating, and all their upgrading of the
2 mechanical systems, and in order to upgrade
3 the mechanical systems they have to upgrade
4 the penthouse structure or the roof structure
5 to accommodate the equipment on the roof.

6 Since the existing roof structures
7 are non-conforming, they can't line up the new
8 penthouse structure or the screen wall with
9 the height of those buildings. So, they are
10 lining up to conform to the regulations, and
11 that's, basically, what they've tried to do,
12 and then also working, they are asking for
13 relief from the set back requirements, because
14 of the expansion of the penthouse area.

15 CHAIRPERSON MILLER: They have the
16 unequal heights here?

17 COMMISSIONER TURNBULL: Yes, let
18 me clarify that.

19 CHAIRPERSON MILLER: Okay.

20 COMMISSIONER TURNBULL: Because
21 they are -- because they can't match the
22 existing height of the original roof

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1 structures, they will now have unequal
2 heights, and that's the other relief that they
3 are looking for.

4 CHAIRPERSON MILLER: All right,
5 because the existing one is already too high,
6 so they wouldn't make it that high.

7 COMMISSIONER TURNBULL: That's
8 correct.

9 CHAIRPERSON MILLER: Right.

10 COMMISSIONER TURNBULL: That's
11 correct.

12 CHAIRPERSON MILLER: Okay. Yes, I
13 believe that there were trade offs in this
14 case, and that also the trade off that they
15 made made for the more aesthetically pleasing
16 massing and roof.

17 COMMISSIONER TURNBULL: That's
18 correct.

19 CHAIRPERSON MILLER: Okay.

20 COMMISSIONER TURNBULL: And, we
21 get into some of the same issues that we saw
22 previously in the Jemal case.

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1 MEMBER DETTMAN: Mainly for the
2 record, I won't try to sway the Board again,
3 just to reiterate my sort of stance on this,
4 that I think that set back relief for roof
5 structures should be handled as a variance.

6 And so, from this case as well,
7 I'll be abstaining, and not because I think
8 it's a bad project. I think it's a great
9 project, the Applicant did a great job, and I
10 commend their efforts in trying to improve the
11 situation on the roof by enclosing the
12 existing non-conforming penthouses, as well as
13 the new construction up there.

14 And, for all intents and purposes,
15 they do meet the set back requirements on
16 almost all of the new construction, except for
17 a little small piece on the northern side.

18 And so, my abstaining from the
19 project is this, because of the question of
20 special exception versus relief, as well as a
21 side issue, a potential conflict between the
22 regs and the Height of Buildings Act, with

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1 respect to the question when does the 1:1 set
2 back kick in, when the building and the
3 penthouse is below the maximum allowable
4 height allowed under the Act?

5 CHAIRPERSON MILLER: Okay, and I
6 think in general it would be fair to say that
7 evidence in the record shows that there is
8 adverse impact on neighboring properties as
9 a result of the roof structure relief or the
10 minor renovation changes to the hotel.

11 Okay, any other comments?

12 COMMISSIONER TURNBULL: Madam
13 Chair, I guess the only thing, and I know Mr.
14 Dettman made reference to the north side of
15 the penthouse, and I remember at the time Mr.
16 Collins from Holland & Knight had brought up
17 the point that the lower building, the four-
18 story building adjacent to it, is now part of
19 the hotel -- has been part of the hotel, and
20 the whole lot is now considered as one
21 building.

22 So, I guess I'm not troubled by

1 giving relief from that sense, because it's
2 not adjacent to another neighbor, it's part of
3 their own structure, even though it's a lower
4 height, I think it's de minimis and it's in
5 the relief that they are looking for on that,
6 so I'm not -- I'm not troubled by the fact
7 that it's not a complete one-to-one set back
8 from the exterior -- what was once an exterior
9 building, but now can almost be considered an
10 interior wall, even though it's of differing
11 heights.

12 CHAIRPERSON MILLER: Was that the
13 one where if they changed the heights they
14 could cure the set back problem, but that
15 would create a greater disparity in the roof
16 height?

17 COMMISSIONER TURNBULL: That then
18 creates a third line on the roof variation,
19 which can be done on the one elevation, you
20 could handle it fairly well because you run
21 into an existing penthouse. The problem is
22 when you turn the corner you have a long --

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1 which is by the alley side I think -- there
2 you have a long screen wall, which is not
3 interrupted by an existing building. So, you
4 definitely see kind of a funny little jog.

5 So, I guess I'm just concerned
6 that that kind of gymnastics, I would rather
7 see it all at one height, I think, of giving
8 the two kinds of things to look at, I think
9 the aesthetic appearance of keeping the roof
10 line, the penthouse roof line as minimal as
11 possible, without interjecting another drop,
12 would be the preferred. That's my own stance
13 on it, without trying to make them meet the
14 other test of going lower.

15 CHAIRPERSON MILLER: I agree, and
16 I remember that these were the plans that were
17 shown to neighboring properties that they had
18 no problem with as well.

19 COMMISSIONER TURNBULL: Yes.

20 CHAIRPERSON MILLER: Okay. Any
21 other comments?

22 Okay, then I would move approval

1 of Application No. 17706, of D.C. CAP
2 Hotelier, LLC, pursuant to 11 DCMR 3104.1, for
3 a special exception to allow additions to an
4 existing hotel under section 512, in the SP-2
5 District, and special exceptions zoning relief
6 from roof structure requirements under Section
7 411, at premises 1200 16th Street, N.W.

8 Do I have a second?

9 VICE CHAIRMAN LOUD: Second, Madam
10 Chair.

11 CHAIRPERSON MILLER: Further
12 deliberation?

13 All those in favor say aye.

14 (Ayes.)

15 CHAIRPERSON MILLER: All those
16 opposed?

17 All those abstaining?

18 MEMBER DETTMAN: Abstain.

19 MR. MOY: Madam Chair, staff would
20 record the vote as 4:0:1. This is on the
21 motion of the Chair to approve, seconded by
22 Mr. Loud. In support of the motion Ms. Walker

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1 and Mr. Turnbull, with Mr. Dettman abstaining.
2 Again, 4:0:1.

3 CHAIRPERSON MILLER: Thank you,
4 and I don't believe there was any opposition
5 in this case, so this can be a summary order.

6 MR. MOY: The next application for
7 decision is Application No. 17757 of Fifth
8 Street, LLC, pursuant to 11 DCMR 3103.2, for
9 a variance from the floor area ratio
10 requirements under section 402, a variance
11 from the lot occupancy requirements under
12 section 403, and a variance from the open
13 court requirements under section 406, to allow
14 an eight (8) - unit apartment building, in the
15 DD/R-5-B, at premises 1130-1132 5th Street,
16 N.W., (Square 482, Lot 93. These were
17 formerly Lots 76 and 77).

18 On January 15, 2008, the Board
19 convened the application. After discussion,
20 the Board rescheduled its decision to February
21 the 5th. This would allow further filings on
22 the part of the Applicant. The Applicant did

1 file with its document dated January 29, 2008,
2 identified the case folders as Exhibit 39.

3 There are no other filings. Staff
4 would say there is a preliminary matter, in
5 that staff is holding an exhibit filed by one
6 of the partners, a Saxon & Zerkel, whether to
7 accept that into the record I'll leave that to
8 the Board's decision. The Board does not have
9 copies of that document.

10 Other than that, the Board is to
11 act on the merits of the requested variance
12 relief.

13 That completes the staff's
14 briefing, Madam Chair.

15 CHAIRPERSON MILLER: Thank you,
16 Mr. Moy.

17 Okay, let's talk about the first
18 matter that Mr. Moy raised, some document
19 filed by an attorney we are not familiar with,
20 who is not of record in this case, and none of
21 us have seen this document as far as I know.

22 We didn't leave the record open

1 for any documents, other than what the
2 attorney of record has filed in this case, and
3 that's what we've all considered and are ready
4 to deliberate on. So, I would recommend that
5 we not open the record for this other
6 document.

7 Do others have an opinion on this?
8 Is that the consensus of the Board? Okay.

9 So, okay, this is a variance case,
10 and it is an unusual case. We were here
11 before and felt that we didn't have the pieces
12 to rule on a variance in this case, and asked
13 the Applicant or gave them the opportunity to
14 go back to the drawing board and provide us
15 the information, and we weren't even sure what
16 we would get, because there seemed to be many
17 allusions to, you know, hands being tied as to
18 what could be said.

19 In any event, we did get, in my
20 view, a very comprehensive filing from the
21 Applicant that addresses the issue of zoning
22 history, as it may apply to the uniqueness

1 factor in the variance test, and the Applicant
2 also submitted great documentation in response
3 to our request, and also in support of the
4 arguments that are before us.

5 I think as we said before, that
6 based on the testimony that we've heard there
7 was a lot that was compelling here, but we
8 needed to approach this as a variance case,
9 that that's what this Board does, and if they
10 could make the case for a variance we wanted
11 to hear it.

12 So, in my view, the document they
13 submitted supported by an affidavit, and many
14 permits and applications, and newspaper
15 articles, et cetera, fully puts forth their
16 case. So, we have it to evaluate now.

17 In general, to make a variance you
18 need to have, first, a unique or exceptional
19 condition, and the courts have held that
20 that's not necessarily one that's tied to the
21 topography of the land, or the property, but
22 can go circumstances, and that's what we are

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1 going to be considering here.

2 The second prong is practical
3 difficulty, that the strict application of any
4 regulation adopted under 6-641.01 through 6-
5 651.02 would result in peculiar and
6 exceptional practical difficulty to the owner
7 of the property.

8 And, in this case the Applicant
9 would need to make the case that the practical
10 difficulty derives directly from the unique
11 condition. In this case, that would be the
12 zoning history that we are going to be
13 considering.

14 And then, we would be authorized
15 to grant it provided there wouldn't be
16 substantial detriment to the public good, or
17 impairing intent, purpose and integrity of the
18 zone plan.

19 Okay, so the Applicant has
20 submitted quite an extensive zoning history in
21 this case, and, you know, showing that DCRA
22 approved at least 20 permits, even though many

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1 of them were based on what appears to be
2 flawed applications. And, I think that part of
3 this Board's concern before was the bad faith
4 on the part of the Applicant, that they
5 misrepresented their building permit
6 applications such that the DCRA justifiably
7 relied on those applications, and that,
8 therefore, DCRA wasn't at fault, but the
9 Applicant may have been at fault.

10 And, in this case, supported by an
11 affidavit, the Applicant, I believe, made a
12 very strong case that they acted in good faith
13 throughout the process, that they were not
14 experts in permits, or permit applications,
15 and they hired someone that was highly
16 recommended to file for them, and that they
17 had no knowledge of the -- any
18 misrepresentations or flaws in the permits
19 when they were originally filed.

20 You know, I think we also need to,
21 you know, consider, well, any messages that we
22 would be sending, can you just rely on

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1 someone, and then, you know, it doesn't matter
2 what they do, and then be free of all blame or
3 whatever for the flaws of the permits.

4 But, I think that this case is
5 extraordinary in many ways. I mean, one is,
6 certainly, that the whole bribery scheme is
7 involved here, and, certainly, the Applicant
8 demonstrated good faith with respect to the
9 bribery scheme as soon as a bribe was
10 attempted, they contacted the FBI.

11 I think that there is fault on
12 DCRA in that they didn't notify the Applicant
13 in time for the Applicant to make corrections
14 from what was put on the permit. We have
15 documented that Mr. Cruz took eight months to
16 issue a letter explaining what was wrong, and
17 in the meantime all the Applicant's bills were
18 piling up and piling up, and the interest on
19 the loan, and, you know, and considering this
20 kind of zoning history whether -- this really
21 is a first for this Board, you know, this type
22 of situation, you know, we want to be careful

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1 that, you know, it doesn't send any kind of
2 message, like it doesn't matter what you --
3 whoever files for you does, if you get it
4 built, you know, you can get away with it.
5 And, that really does not seem to be the case
6 here that this Applicant is trying to get away
7 with anything, and, in fact, it's very
8 compelling, the losses that these Applicants
9 has suffered, you know, with respect to DCRA
10 not getting back to them, that some, you know,
11 they have lost their homes, they have
12 liquidated daughter's college funds, they've
13 invaded retirement accounts in order to cover
14 for the costs here. So, this isn't anything
15 -- I was convinced when the Applicant said
16 this isn't anything that they would choose to
17 do, I found that convincing.

18 I mean, and I do think this is
19 quite extraordinary, you know, with the whole
20 bribery thing. It's amazing.

21 So, meanwhile, there is a
22 practical difficulty now, because the

1 buildings were built in reliance upon these
2 permits, and to comply with the regulations
3 they will demolish these buildings, and that
4 doesn't seem to be -- that's a practical
5 difficulty that arises specifically out of
6 this unique situation, and there's no adverse
7 impact from granting the relief, because HPRB
8 has found it to be compatible with the
9 district, and all the -- no neighbors are
10 complaining, they are all in support, there's
11 been no evidence of any adverse impact that
12 would ensue from granting relief in this case.

13 Okay, others?

14 COMMISSIONER TURNBULL: Madam
15 Chair, I would agree with you, although I
16 could -- you know, in fact, I think in the
17 Applicant's last submittal you can see where,
18 obviously, her consultant didn't do his due
19 diligence in some of these reports, but I
20 think that the overarching aspect of this is
21 what happened after the filing and the
22 issuance of 20 odd permits or whatever.

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1 I think there is -- I think there
2 is, call it naivety or whatever involved in
3 this process, but we come, but people come to
4 rely on the regulatory authorities as offering
5 advice or catching things and looking at
6 things, and pointing these things out, and I
7 think when things go so far down the line that
8 these things are missed, I think you can no
9 longer look at the Applicant and say that this
10 is your fault.

11 I think that at some point in
12 time, for whatever reasons, some of the
13 omissions in the early stage, and I think
14 these things are -- it gets to be troubling
15 when something gets this far along and
16 somebody is ready to open, and someone comes
17 along and says, well, no, you made a flaw back
18 here on page, you know, on step A, and we are
19 at step Z.

20 So, I think you are right, I think
21 there is an alliance upon an applicant looking
22 for incite, and the professional review that

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1 is due them, and I think that in this case it
2 didn't happen.

3 So, I would agree with what you'd
4 said so far, I would agree totally, that it's
5 a troubling situation, but I think that the
6 reliance that was -- that the Applicant came
7 to entrust with DCRA just didn't happen.

8 And again, as you say, even the
9 shake down or the fraud, bribes, and all that,
10 I think was -- is even more troubling. I
11 think the Applicant has been put through a
12 hell of a lot.

13 CHAIRPERSON MILLER: I want to add
14 that, you know, I think that it seems to me
15 that there was, you know, detrimental alliance
16 and good faith, because, you know, it would be
17 a different circumstance if you had someone
18 experienced in our permits who, you know,
19 willfully, you know, misrepresented something
20 on the permit, and was trying to get away with
21 it, you know.

22 You know, so even it was eight

1 months down the road or something, in that
2 case that would be different, but we don't
3 have that here.

4 Are there other comments?

5 VICE CHAIRMAN LOUD: Would you
6 like some more comments? I think you guys
7 have spoken to it very eloquently.

8 There's a statement in Monaco that
9 I think jumps out at me, in terms of looking
10 at this case, and I'm going to paraphrase,
11 which I know lawyers hate, but I'm a lawyer so
12 I can do it.

13 It says that variance law is
14 designed to avoid harsh and unjust results in
15 extraordinary situations, and when you think
16 about this case it kind of just strips all of
17 the stuff we do as lawyers a lot really down
18 to the essence of what the variance law is
19 designed to do, and then the case, obviously,
20 goes on to talk about how zoning history
21 should be used in certain situations to
22 satisfy the uniqueness element.

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1 But, I think that this is a clear
2 case where this Applicant needs relief from
3 strict application of the zoning laws. And,
4 far from discouraging other citizens who find
5 themselves in the same situation, I hope that
6 this is a really clear message to all of our
7 citizens, that if they encounter this type of
8 process going through the regulatory agencies
9 to get their permits, that this is a body, BZA
10 is a body that will not be timid or reluctant
11 to provide the kind of relief that our
12 statutory framework gives us to provide
13 applicants like this.

14 You both have spoken to the
15 bribery, and the 20 permits issued, and the
16 eight-month delay between the permits and the
17 efforts to stop the construction, the project
18 being nearly complete, it's sitting on a party
19 wall that would also be damaged if there were
20 an attempt to demo the project, et cetera, et
21 cetera.

22 So, those would be my only

1 comments, that we are here to provide relief
2 in situations like that, and, certainly, we
3 ought to use that hammer every time that we
4 get a legitimate opportunity to use it.

5 CHAIRPERSON MILLER: Thank you.

6 Anything else? Okay.

7 Then I would move to approve
8 Application No. 17757 of Fifth Street, LLC,
9 pursuant to 11 DCMR, Section 3103.2, for a
10 variance on the floor area ratio requirements
11 under section 402, a variance in the lot
12 occupancy requirements under section 403, and
13 a variance on the open court requirements
14 under section 406, to allow an eight-unit
15 apartment building in the DD/R-5-B at premises
16 1130-1132 Fifth Street, N.W.

17 Do I have a second?

18 COMMISSIONER TURNBULL: Second.

19 CHAIRPERSON MILLER: Further
20 deliberation?

21 All those in favor say aye.

22 (Ayes.)

1 CHAIRPERSON MILLER: All those
2 opposed?

3 All those abstaining.

4 MR. MOY: Staff would record the
5 vote, Madam Chair, as 4:0:1, this is on the
6 motion of the Chair, Ms. Miller, to approve
7 the variances request for this application,
8 seconded by Mr. Turnbull, also in support of
9 the motion are Mr. Dettman and Mr. Loud. We
10 have no other Board member participating.

11 Again, the vote, 4:0:1.

12 CHAIRPERSON MILLER: And, since
13 there's no opposition in this case, this will
14 be a summary order.

15 MR. MOY: Yes, ma'am.

16 CHAIRPERSON MILLER: Thank you.

17 MR. MOY: Madam Chair, the final
18 three cases for decision, Mr. Jeffries is
19 participating, and I received a phone call,
20 he is on the way, he should be here shortly.

21 CHAIRPERSON MILLER: Okay, so the
22 Board is going to take a break at this point

1 then and wait for Mr. Jeffries.

2 (Whereupon, at 12:31 p.m., a
3 recess until 12:31 p.m.)

4 CHAIRPERSON MILLER: Okay, since
5 Mr. Jeffries is not here the board has decided
6 that this would be a time to break maybe for
7 45 minutes, so we will be back, hopefully,
8 then to continue.

9 (Whereupon, at 12:31 p.m., a
10 recess until 2:33 p.m.)

11

12

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

14 2:33 p.m.

15 CHAIRPERSON MILLER: This is
16 actually a continuation of the Board's
17 February 5th public meeting. We have three
18 more cases left on our agenda, which I think
19 will go fairly quickly.

20 We had a break because there were
21 different Zoning Commissioners sitting on
22 different cases that we were deciding today,

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1 so I apologize for any delays that ensued as
2 a result of our juggling really different
3 Zoning Commissioners.

4 So, now --

5 COMMISSIONER JEFFRIES: And, that
6 would be me, by the way.

7 CHAIRPERSON MILLER: It's all Mr.
8 Jeffries fault, no, just kidding.

9 Okay, so, Mr. Moy, we are ready
10 for our next case on the agenda.

11 MR. MOY: Yes, Madam Chair,
12 Members of the Board.

13 The first of the three final cases
14 for decision is Application No. 17652 of
15 Emanuel and Marcia Finn, pursuant to 11 DCMR,
16 3104.1 and 1555.2 for a special exception to
17 establish a child development center. This
18 application was amended to change the number
19 of children from 30 to 20 children, and four
20 teachers, under Section 205, and a special
21 exception for an accessory apartment under
22 Subsection 202.10, in the SSH/R-1-B District.

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1 This is at premises 5707 14th Street, N.W.,
2 (Square 2796, Lot 833).

3 On December 11, 2007, the Board
4 completed public testimony, closed the record,
5 and scheduled its decision on February 5,
6 2008.

7 The Board requested a number of
8 post-hearing documents, and I'm going to hold
9 off on that unless the Board wants me to go
10 through every one of those.

11 Staff will say that the filing --
12 post-hearing documents that have been filed
13 are as follows: two filings from the
14 Applicant, identified as Exhibit 45, and the
15 proposed summary report, which is identified
16 as 46 in your case folders.

17 Also filed from the Office of
18 Planning is their supplemental report, dated
19 January 29, 2008. That exhibit is identified
20 as Exhibit 47.

21 The party in opposition, the 16th
22 Street Heights civic Association, filed

1 proposed findings of fact and conclusions of
2 law, dated January 29, 2008, and that is
3 identified as Exhibit 48.

4 Madam Chair, we also have two
5 filings as a preliminary matter. They are two
6 motions. The first is from the opposition
7 party, and it is a Motion to Strike Exhibits
8 A and Exhibit C, as contained in the
9 Applicant's filing of January 15th, which is
10 their Exhibit 49, and second and finally, from
11 the Applicant opposition to the Motion to
12 Strike, and in your case folders that is
13 identified as Exhibit 50. It is from the
14 Applicant, and it's dated February 4, 2008.

15 So, very quickly with that, staff
16 is going to conclude its briefing, Madam
17 Chair.

18 CHAIRPERSON MILLER: Thank you,
19 Mr. Moy.

20 Why don't we start off with the
21 preliminary matter, which is the Motion to
22 Strike Exhibits A and C that are attached to

1 Applicant's January 15, 2008 letter to the
2 Board of Zoning Adjustment. That's Exhibit
3 49, I believe, and filed by 16th Street
4 Heights Civic Association.

5 And also then, in response to that
6 we did get this opposition dated February 4,
7 2008, and I will say that part of the Board's
8 delay in getting out here earlier was trying
9 to deal with last minute submissions which
10 create issues, and that does contribute to
11 time that the board needs to figure out how to
12 handle them.

13 In this case, the Motion to Strike
14 goes to acoustical -- an acoustical analysis
15 that the Applicant submitted, and I dare say
16 that the Applicant did submit that in response
17 to the Board's keeping the record open, and
18 I'm just going to read from my notes as to
19 what our staff has identified as to what we
20 left the record open for with respect to
21 noise, that being, "Applicant to address noise
22 impact concerns potentially generated by

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1 school children on adjacent and surrounding
2 properties, including detailed description and
3 implementation of proposed sound attenuation
4 measures."

5 So, when the Applicant submitted
6 that, then the 16th Street Heights Civic
7 Association has filed for a motion, they filed
8 a motion to strike it because they say that
9 there's no showing that Mr. Shade, who was the
10 author of this memo that accompanied some
11 other materials, this noise issue, is a
12 witness qualified as an expert by knowledge,
13 skill, experience, training or education.

14 And then, I believe in the
15 February 4th submission by the Applicant the
16 Applicant then submitted evidence of expertise
17 in this area of Mr. Shade.

18 So then, I believe that there is
19 an issue now that, and correct me if I'm
20 wrong, that 16th Street Heights Civic
21 Association thinks that it should be stricken
22 because in addition to the expert status,

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1 which has been remedied, they now don't have
2 a chance to cross examine this witness, as
3 they normally would in a hearing.

4 So, I believe that, perhaps, this
5 report has risen to a greater stature than
6 what we anticipated, but that's where we are
7 now, and so really the question is, what do we
8 do with respect to this report.

9 Do I have any comments on that at
10 this point?

11 I think that one possible way of
12 handling this fairly is to reopen the record
13 for a hearing just on this particular issue,
14 if, in fact, the 16th Street Civic Association
15 actually -- 16th Street Heights civic
16 Association actually would like to pursue that
17 opportunity.

18 So, at this point, perhaps, we
19 ought to see if anybody is here in the
20 audience on this case.

21 Oh good, okay, especially if we
22 have both sides represented. Could you just

1 come forward? Since this is -- you know, this
2 was a motion that was filed after our hearing,
3 we haven't had a chance to really hear from
4 you, and I may not even be characterizing it
5 the way you intend it.

6 Would you identify yourself for
7 the record, and then we could address this.

8 MR. BROWN: Patrick Brown for the
9 Applicant.

10 MR. LETZKUS: Tim Letzkus for the
11 16th Street Heights Civic Association.

12 CHAIRPERSON MILLER: Okay. Why
13 don't we start with you then, is this -- what
14 is it that you would seek the Board to do in
15 this case, now that this analysis has been
16 filed?

17 MR. LETZKUS: Let's see, we are
18 just talking about the Motion to Strike A,
19 correct? We are going to deal with C later?

20 CHAIRPERSON MILLER: Correct.

21 MR. LETZKUS: Well, it does pose
22 that problem that you identified, and part of

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1 what got us going was that, while you
2 accurately described the transcript, the other
3 part of the transcript describes that -- and
4 it might have been Commissioner Jeffries, was
5 interested in ensuring that whoever did the
6 report had the qualifications to do so.

7 The original January 15th filing
8 didn't show that. So, that's how that
9 started.

10 I'm perfectly satisfied with the
11 qualifications as submitted.

12 CHAIRPERSON MILLER: Okay, and,
13 you know, maybe we were reading something in
14 it that isn't in there. Are you satisfied
15 then with withdrawing your Motion to Strike A,
16 because the Applicant has shown his expert's
17 credentials, and you are not interested in a
18 further hearing on this case, on that issue?

19 MR. LETZKUS: Let's see, it's a
20 little more complicated than that, Madam
21 Commissioner, in that in both the January 15th
22 filing by Applicant and the February 4th

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1 filing by Applicant they have introduced other
2 information as well, which then complicates,
3 because I want the Motion to Strike to stand
4 because it eliminates the February 4th, or
5 could eliminate the February 4th memo, which
6 came in after the filing date.

7 CHAIRPERSON MILLER: I guess, you
8 know, there's the question of then where's the
9 line drawn. We invited them to submit
10 additional acoustical information, which they
11 did.

12 MR. LETZKUS: which they did, and
13 that was fine, but part of that information
14 was additional acoustical information, I have
15 no problem with that, but the other part of
16 the information to be submitted was -- and the
17 other question before the Board was, who is
18 submitting it. There's a whole discussion
19 about, I believe it's Mr. Belton's, who is the
20 architect, his qualifications to articulate
21 acoustical information, and so Applicant went
22 out and found someone and created a memo that

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1 purports to say that sound won't leave an open
2 backyard.

3 First of all, just on the face of
4 that I find that difficult, and yet, the other
5 part of it was, who is actually speaking that?

6 So, the Motion to Strike I think
7 depends on whether or not the Board is willing
8 to allow the February 4th after the deadline
9 filing to occur. Our deadline was January
10 29th, correct?

11 CHAIRPERSON MILLER: Correct, I
12 thought -- right, I think the February 4th
13 filing responded to your concern about the
14 credentials, so we have made a decision on
15 that, but I think that that's what it goes to.
16 So --

17 MR. LETZKUS: Well, let's see if
18 we can narrowly define that portion of the
19 February 4th that provides the credentials,
20 then I'm okay with eliminating the Motion to
21 Strike A, if we can make that narrow
22 definition, because the February 4th also

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1 raises other issues, which I want to respond
2 to.

3 CHAIRPERSON MILLER: Does the
4 Applicant have any response to this?

5 MR. BROWN: Well, the February 4th
6 letter, as it relates to Mr. shade's CV, is in
7 direct response to their motion, and I think
8 I have the right, even outside the time
9 parameters that were established by the Board,
10 because they didn't include the motions
11 practice is entirely appropriate.

12 I was concerned by the
13 characterization by Mr. Letzkus that our
14 expert, and he is, in fact, an expert as the
15 documentation shows, that no sound will travel
16 beyond the rear yard, and that's just not
17 incorrect. The report attempts to, one,
18 quantify that noise, based on the remediation
19 steps so that their view that somehow a
20 blanket of silence will occur isn't correct.

21 The Board's question is, quantify
22 that sound, and do so in a way that's based on

1 expertise, which, quite frankly, Mr. Belton
2 had to seek counsel elsewhere from an expert.

3 And, the report is clear that it
4 doesn't make this backyard silent, but it
5 quantifies it in terms of the reduction in
6 noise and in relationship to the noise
7 standards that are applicable. So, I think
8 it's important that we look at the report in
9 its proper context.

10 The other thing is, and maybe we
11 ought to take it in steps, but I have
12 additional comments on my February 4th filing.

13 CHAIRPERSON MILLER: Well, I'm
14 just wondering, it sounds like Mr. Letzkus, is
15 that right, okay, it sounds like you are okay
16 with the credentials being in the record, and
17 then you are okay then with Exhibit A, but
18 there's something you are not okay with now in
19 the February 4th filing. So, maybe we can
20 just narrow it to that.

21 MR. LETZKUS: Yes, that would be
22 good.

1 CHAIRPERSON MILLER: Okay, what is
2 that then?

3 MR. LETZKUS: Let's see, the
4 February 4th filing adds clarification to
5 child/elderly development, which I see as new
6 information, or additional information, to
7 which we would like the opportunity to
8 respond.

9 CHAIRPERSON MILLER: Okay.

10 MR. LETZKUS: It was not part of
11 Motion A or C.

12 CHAIRPERSON MILLER: Okay. Mr.
13 Brown, why shouldn't they be able to respond?

14 MR. BROWN: Sure, in the context,
15 and again, the Board's schedule was January
16 15th for the report from the acoustical
17 expert, and January 29th for findings of fact
18 and conclusions of law.

19 Upon, one, on January 29th when I
20 received correspondence from 16th Street
21 association, there was a motion to exclude two
22 items, which I think I have an absolute right

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1 to respond to, and, two, if you look at their
2 proposed findings of fact and conclusions of
3 law, and, perhaps, I've been doing this too
4 long, but it's really an argumentative piece,
5 it's not in keeping with the Board's kind of
6 standard for proposed findings of fact and
7 conclusions of law, it's an opposing brief in
8 many respects.

9 And, I particularly needed to
10 highlight in my clarification a distinction
11 with the difference, and that's all I'm doing.
12 Again, I think their proposed findings of fact
13 compared to mine, which I think is in line
14 with the Board's standard, didn't go beyond
15 the record. I, in fact, believe that what was
16 submitted by 16th Street went beyond the
17 record, and was argumentative, particularly,
18 on a number of points, and that's why I
19 responded.

20 CHAIRPERSON MILLER: Okay. It
21 looks to me like there may be narrower issues
22 than we thought, so I think the Board is

1 prepared to give the opposition an opportunity
2 to respond.

3 So, therefore, I would think in
4 this particular case, you are talking about
5 ending this concern with striking Exhibit A
6 and just being able to respond to this legal
7 argument here. I don't think that that is a
8 problem, and we can, you know, when we finish
9 this hearing we can resolve everything.

10 But, again, this is kind of like a
11 legal argument, and you both have legal
12 arguments, but if you feel like something new
13 was raised here, I think the Board, because we
14 got this Motion to Strike last minute, and it
15 raised all these issues, and we were wondering
16 whether or not we even needed to have another
17 hearing, that there was a concern about, you
18 know, all this expert witness evidence, we
19 have -- we had made a decision before we came
20 out here finally to postpone the decision in
21 this case to February 19th, to allow for any
22 outstanding issues like this to be addressed.

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1 So, there is room for something like that.

2 So, I think Exhibit A is
3 resolved, am I correct? Do you -- the 16th
4 Street Civic Association feel they need an
5 opportunity to respond more to what's been put
6 in the record by the Applicant?

7 MR. LETZKUS: No, I think we are
8 fine. I think we are fine with that.

9 CHAIRPERSON MILLER: Okay. Then I
10 guess we go to C, the photographs.

11 MR. BROWN: Madam Chair, just so I
12 can put it on the table, the Office of
13 Planning submitted a supplemental report,
14 which I have not seen, I'm not sure why, but
15 also, just to put this in context since we are
16 parsing what was expected and what wasn't, I
17 won't speak for the Board, but I haven't seen
18 it, so as we forward, and if we are going to
19 allow more time here, I would certainly want
20 to be able to, one, review that and respond to
21 the Office of Planning's supplemental report.

22 MR. LETZKUS: We are in the same

1 position, matter of fact, we are here --

2 MR. BROWN: Have you seen this
3 report?

4 MR. LETZKUS: I haven't, sir, and
5 it was a shock to me, because we were here
6 physically on the 29th, and there was nothing
7 new filed.

8 CHAIRPERSON MILLER: Okay, we'll
9 add that to the list. Okay.

10 Now, with respect to Exhibit C,
11 which seemed to be some photographs that were
12 submitted, when I review the list as the staff
13 prepared it, based on the record, I don't see
14 that we allowed the Applicant to file
15 additional photographs, and I'm not sure, but
16 I do recall a conversation where that was
17 brought up, and that we decided, no, that that
18 would create a problem because then the
19 opposition would want to respond, and so,
20 therefore, we did not approve that, or leave
21 the record open for that.

22 Do you have -- do you want to say

1 something, Mr. Brown?

2 MR. BROWN: Among the questions
3 that were left unanswered at the hearing was,
4 and in my filing of February 4th, included
5 what's already in the record, a picture of
6 Monagee Street, and the question was raised,
7 and forgive me I don't recall which Board
8 Member raised the question, but it became
9 somewhat of a contentious issue about the
10 picture we provided of Monagee Street and when
11 it was taken, and whether, in fact, that was
12 representative of relevant conditions, you
13 know, that it wasn't taken on a Sunday
14 afternoon or what.

15 So, I thought the record was open
16 for that purpose.

17 In all honesty, I was not able to
18 confirm to my satisfaction the origin of it,
19 the date and time origin of that photograph.
20 I think I know when it occurred, but I'm not
21 sure, and that's what led me to provide the
22 additional photographs, to try to give you

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1 information that I knew was reliable.

2 I'll leave it to the Board's
3 discretion, certainly, I was attempting to
4 respond to a Board Member's question, and a
5 disputed matter.

6 CHAIRPERSON MILLER: Okay. I
7 mean, I guess I would say that, you know, if
8 we were just going to decide on the basis of
9 what was to be allowed in, that that was not
10 to be allowed in.

11 So, unless others feel
12 differently, but the question is now, you
13 know, we are opening the record again for a
14 few items, and so is there a reason, Mr.
15 Letzkus, that you would oppose that coming in,
16 those photographs coming in, would they still
17 create the same kind of concerns that we were
18 talking about before, whereas, you know, in a
19 hearing you get to cross examine a witness who
20 is presenting the photographs, and, you know,
21 have that opportunity.

22 MR. LETZKUS: Presumably, Madam

1 Commissioner, we'll have the opportunity to
2 now, if we put that on the list, we'll have an
3 opportunity to address that on the 19th. Is
4 that not correct?

5 CHAIRPERSON MILLER: No, I --

6 MR. LETZKUS: No?

7 CHAIRPERSON MILLER: -- okay, let
8 me back up.

9 MR. LETZKUS: Okay, sorry.

10 CHAIRPERSON MILLER: No, that's
11 okay.

12 MR. LETZKUS: I'm a procedural
13 neophyte here.

14 CHAIRPERSON MILLER: We need to be
15 clear. Okay.

16 MR. LETZKUS: Sorry.

17 CHAIRPERSON MILLER: We thought
18 there might be a reason for a hearing on the
19 acoustical analysis, if you wanted to cross
20 examine their expert or whatever.

21 I don't hear that from you, and if
22 that's not the case, then we would do our

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1 decision on the 19th.

2 MR. LETZKUS: Okay.

3 CHAIRPERSON MILLER: So,
4 therefore, any written documents, for
5 instance, I think that if legal arguments come
6 in there's no problem with respect to their
7 coming in post hearing, but when you are
8 talking about evidence, like pictures, there
9 could be a problem, so that's what I'm asking
10 you.

11 Mr. Brown wants to, you know, put
12 them in for clarification, you know.

13 MR. LETZKUS: They pose a huge
14 problem.

15 CHAIRPERSON MILLER: Okay.

16 MR. BROWN: May I suggest in the
17 time that we are allowing ourselves going
18 forward, I have no objections to Mr. Letzkus
19 and his organization submitting photographs,
20 date and time stamped photographs. I don't
21 need to cross examine him on those
22 photographs.

1 I think that's a -- because,
2 apparently, it's a contested issue, I have no
3 problem with them submitting them as part of
4 their post-hearing submission that the Board
5 is going to authorize, and let the Board
6 decide.

7 CHAIRPERSON MILLER: Do you have a
8 response to that?

9 MR. LETZKUS: No, I don't, it's
10 really up to you, in terms of --

11 CHAIRPERSON MILLER: Well, the
12 problem is, you know, we would be weighing
13 prejudice to your party, if there is any, from
14 the submission of the documents, I mean the
15 photographs, and that's what we were
16 addressing before. You know, do you need an
17 opportunity to cross examine with respect to
18 the photographs? Do you object to -- Mr.
19 Brown is saying you could submit photographs,
20 too, and then you'd be on equal footing.

21 But, it's kind of in your ball
22 park, I would like a response from you whether

1 -- because we already did say that they
2 couldn't be admitted, but now we are providing
3 -- we have this window of time.

4 MR. LETZKUS: Right.

5 CHAIRPERSON MILLER: But, we are
6 not having a hearing, so the same concerns are
7 there. So, if you had the desire to submit
8 photographs as well, then, you know, we'd let
9 them both in, but if it's just going to be one
10 then I would, you know, ask my Board to
11 consider, you know, the prejudice to either
12 party.

13 MR. LETZKUS: I guess it might be
14 cleaner just to take them out, if it were up
15 to me, because then if we show something
16 different than, you know, that creates a
17 conundrum. My hesitation is, how do you put
18 the genie back in the bottle? You've already
19 seen them.

20 And, I have an opinion about them.

21 CHAIRPERSON MILLER: I don't think
22 you have to worry about putting the genie back

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1 in the bottle, we see so many documents that
2 it's very easy for us to have that taken out.

3 So --

4 COMMISSIONER JEFFRIES: Madam
5 Chair?

6 CHAIRPERSON MILLER: Yes.

7 COMMISSIONER JEFFRIES: I guess
8 I'm somewhat prone, I'm trying to understand
9 the importance of this -- I mean, I feel like
10 I've seen this picture before, but maybe I
11 haven't. I'm just trying to understand what
12 exactly is being let out of the bottle.

13 MR. LETZKUS: The pictures in
14 Exhibit C, not the February 4th, but Exhibit
15 C, support the Applicant's view that Monagee
16 Street is unused.

17 In our view, and the people who
18 live there, that's not true. And, in fact, I
19 think our testimony supports, and I'm going to
20 try to keep this to testimony, our testimony
21 from neighbors who live on that block was that
22 the streets on 14th, and Monagee and Madison

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1 are extraordinarily well used, well parked.

2 COMMISSIONER JEFFRIES: Yes, but
3 that's on the record, you've said that many
4 times. You know, I have that information.

5 MR. LETZKUS: Words -- you know,
6 pictures are worth a thousand words. I mean,
7 I have --

8 COMMISSIONER JEFFRIES: They are
9 snapshots, right?

10 MR. LETZKUS: Right, that show an
11 empty street, as opposed to snapshots that
12 show a full street.

13 COMMISSIONER JEFFRIES: Okay, but
14 the record is real clear, as it relates to
15 the testimony about --

16 MR. LETZKUS: Yes.

17 COMMISSIONER JEFFRIES: -- you
18 know, all the residents that live there. I
19 mean, you know, at least to this Board Member,
20 I mean, that carries weight.

21 So, go ahead, do what you need to,
22 but --

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1 MR. LETZKUS: Well, that's my
2 concern, of course, thank you very much,
3 that's my concern, is how much weight, you
4 know, is that going to carry.

5 And so, again, I'll go back to
6 what I initially said, which was to make this
7 clean just take them out, and that way we
8 don't have to go back and forth with us adding
9 to the list of things before the 19th.

10 CHAIRPERSON MILLER: We do have
11 other photographs in the record, correct?

12 MR. BROWN: Yes, the one that was
13 attached to the February 4th, which was in my
14 prehearing statement, was also on our
15 presentation boards at the hearing.

16 I will say that Mr. Letzkus, who
17 has been, and his organization has been
18 incredibly active in this case, which is his
19 right, but chose not to in either his hearing
20 presentation to submit any other contesting
21 photographs.

22 So, I'm willing to stand on the

1 photographs that are in the record prior to
2 Exhibit C. I'm also willing to let him submit
3 other photographs, but I think it's cleaner,
4 we'll just stop where we are now. Exhibit C
5 is out, we'll exclude it, and we'll move on.

6 I'm not so sure what that leaves
7 us, other than the OP report, but maybe we
8 ought to get to that.

9 CHAIRPERSON MILLER: Yes, I don't
10 think it leaves us very much, and I think it
11 is the better course to end it with the
12 hearing, because that's where we get into
13 problems, and we don't need to go into those
14 problems, unless there was a pressing need to
15 get these photographs, which I don't hear.

16 Okay, so those will be stricken.
17 Okay.

18 So, okay, so we have an
19 opportunity to respond to the Office of
20 Planning's supplemental report for both
21 parties, and then the opposition wanted to
22 respond to your legal arguments in your

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1 February 4th filing.

2 What else is there?

3 MR. BROWN: Well, I think, make
4 sure we've resolved the expert acoustical
5 engineer. Now, I think you've accepted his
6 qualifications --

7 MR. LETZKUS: That's correct.

8 MR. BROWN: -- but we are not
9 leaving it open for them to provide their own
10 opinion on acoustical matters, are we? I'm
11 asking the Board.

12 CHAIRPERSON MILLER: As I
13 understand it, that was one of the things I
14 was exploring, but the opposition has not
15 indicated an interest in doing that, correct?

16 MR. LETZKUS: I don't think it's
17 the issue.

18 CHAIRPERSON MILLER: Okay.

19 MR. BROWN: So, I think we've
20 eliminated to the Office of Planning report,
21 and if 16th Street chooses to respond to the
22 legal discussion in my February 4th letter,

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1 that's acceptable.

2 MR. LETZKUS: It's just those two
3 things.

4 CHAIRPERSON MILLER: Those two
5 things, yes.

6 MR. LETZKUS: I just want to be
7 clear.

8 CHAIRPERSON MILLER: Last call.

9 MR. BROWN: And, are we setting it
10 up so that I'll have a chance to respond to
11 them, or we'll do simultaneous filing and that
12 will be it?

13 CHAIRPERSON MILLER: I think
14 simultaneous filing, I don't see a need to
15 have a responsive filing to their response to
16 your little legal argument here on page two,
17 and then you can file at the same time your
18 responses to the Office of Planning report.

19 Okay, so when would that be, Mr.
20 Moy? We are talking about a February 19th
21 decision.

22 MR. MOY: Well, if first there's a

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1 filing on parties response to the OP
2 supplemental, and to legal argument, and the
3 Applicant's February 4th filing, that could be
4 submitted to the office in a week's time,
5 which would be February the 12th.

6 CHAIRPERSON MILLER: Okay, we are
7 not going to have any responses, though.

8 MR. MOY: No responses?

9 CHAIRPERSON MILLER: No.

10 MR. MOY: This --

11 CHAIRPERSON MILLER: From what I
12 understood the parties were going to file
13 simultaneously. Is there any disagreement to
14 that?

15 MR. LETZKUS: Let's see, we are
16 going to file simultaneously, there's no
17 disagreement to that. I was hoping to get to
18 the 14th if we could.

19 CHAIRPERSON MILLER: Right, see,
20 we have more time then if we are not planning
21 for responses to the pleadings.

22 MR. LETZKUS: Yes.

1 CHAIRPERSON MILLER: So, you can
2 have later time, right?

3 MR. MOY: Well, yes, yes, if
4 that's the case --

5 MR. LETZKUS: The 14th or the
6 16th.

7 MR. MOY: It would help us to,
8 staff, if we receive everything simultaneously
9 on the 14th then, February the 14th.

10 MR. LETZKUS: Great.

11 MR. BROWN: Valentine's Day.

12 MR. LETZKUS: Valentine's Day.

13 CHAIRPERSON MILLER: Okay, any
14 questions?

15 MR. BROWN: We are in complete
16 agreement.

17 CHAIRPERSON MILLER: Okay, and
18 nothing else will be accepted into the record.

19 Good.

20 MR. BROWN: Just a quick statement
21 in response to Mr. Patrick's commentary. We
22 don't do this on a regular basis, and if a

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1 filing was in any way not to your liking, or
2 not procedurally correct, we apologize, if you
3 found it too aggressive.

4 CHAIRPERSON MILLER: The Board has
5 -- the Board hasn't expressed any concerns
6 with your filing.

7 So, okay, thank you very much.

8 MR. LETZKUS: Thank you.

9 MR. BROWN: Thank you.

10 MR. MOY: Madam Chair, staff's
11 understanding is that was for a special public
12 meeting on the 19th, or was that a public
13 hearing?

14 CHAIRPERSON MILLER: No, that's a
15 special public meeting.

16 MR. MOY: Okay, good.

17 CHAIRPERSON MILLER: I was just
18 wondering if we had to cross any Ts and, you
19 know, deny the Motion to Strike. Anyway, by
20 consensus I think that that's what has
21 occurred. Okay.

22 MR. MOY: Very good.

1 CHAIRPERSON MILLER: Actually, we
2 denied it and granted it in part, we denied it
3 with respect to the acoustical study, and then
4 we granted it with respect to the photographs.
5 Okay?

6 Do we need to vote on this? Why
7 don't we vote on it.

8 Okay, the motion, we granted -- we
9 denied it with respect to the acoustical
10 study, and we granted it with respect to the
11 photographs, Exhibit C.

12 All those in favor say aye.

13 (Ayes.)

14 CHAIRPERSON MILLER: All those
15 opposed?

16 All those abstaining?

17 Okay. Oh, a second, oh my, God.
18 Do it again. Motion to deny striking Exhibit
19 A, which was the acoustical study, and
20 granting striking Exhibit C, which were the
21 photographs.

22 Do I have a second?

1 VICE CHAIRMAN LOUD: Motion
2 seconded.

3 CHAIRPERSON MILLER: Further
4 deliberation?

5 All those in favor say aye.

6 (Ayes.)

7 CHAIRPERSON MILLER: All those
8 opposed?

9 All those abstaining?

10 MR. MOY: The staff would record
11 the vote as 5:0:0, on the motion of the Chair,
12 Ms. Miller, to move as discussed, seconded by
13 Mr. Loud, also in support of the motion Ms.
14 Walker, Mr. Jeffries and Mr. Dettman. 5:0:0
15 -- you are not -- oh, I'm sorry. Let me
16 rephrase that.

17 Again, to record the vote, it's
18 3:0:2, on the motion of the Chair, Ms. Miller,
19 seconded by Mr. Loud, in support of the motion
20 Mr. Jeffries, and we have two Board Members
21 not participating.

22 The next application, Madam Chair,

1 is Application No. 17701 of District-
2 Properties.com, LLCC, pursuant to 11 DCMR
3 3104.1, for a special exception to allow the
4 construction of a -- and this was amended to
5 reduce the number of apartment units from 20
6 to 17 units, apartment units, under section
7 353, in the R-5-A District, at premises 2825
8 Robinson Place, S.E. That's in Square 5875,
9 Lot 862.

10 On January 15,2008, the Board
11 completed public testimony, closed the record
12 and scheduled its decision on February the
13 5th.

14 The Board requested post-hearing
15 documents on the part of the Applicant and the
16 record was allowed to -- for the Office of
17 Planning to file a supplemental report.

18 The Applicant filed revised plans
19 January 28th, and that is recorded or
20 identified in your case folders as Exhibit 31.
21 The Office of Planning supplemental report is
22 identified as Exhibit 32.

1 The Board is also in receipt, as a
2 preliminary matter, a filing from the D.C.
3 Housing Finance Agency, requesting the Board
4 to delay its decision, and that letter is
5 dated January 31, 2008, and is identified as
6 Exhibit 33 in your case folders.

7 With that, the staff is going to
8 conclude its briefing, Madam Chair.

9 CHAIRPERSON MILLER: Thank you,
10 Mr. Moy.

11 I think we need to deal with the
12 preliminary matter first, as always. We have
13 a letter from the District of Columbia Housing
14 Finance Agency, dated January 31, 2008, in
15 which they ask us to postpone our decision on
16 this case.

17 They say that they are not in
18 opposition to the request that's before us,
19 but they are concerned about the unknown
20 impact that the proposed development will have
21 on what has been a lengthy relocation,
22 acquisition, disposition, and redevelopment

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1 process for Parkway Overlook Apartments, which
2 I believe is an affordable housing project.

3 It's not clear what the connection
4 is here, but this agency seems to think there
5 might be one, and has also cc'd the Office of
6 Planning. We haven't gotten a response from
7 the Applicant to this letter, so we don't know
8 his position, nor has OP responded.

9 So, it's kind of put this question
10 mark on this case, and on the other hand I
11 don't want to delay our decision on this case
12 very long, without really appreciating what
13 connection there might be here.

14 On the other hand, it is a
15 District agency that's expressing some
16 concern, and has properties that surround the
17 property at issue here.

18 So, I would suggest that we just
19 put this off to our next regular decision
20 meeting in March, and in the meantime this can
21 sort itself out. We could hear from Office of
22 Planning, or they could talk to Office of

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1 Planning and the Applicant, just so that
2 there's not a question in this case.

3 Do others have a different view?

4 COMMISSIONER JEFFRIES: We've got
5 to have a date certain, you said the next --
6 okay, so we are going to make certain that
7 there's a date certain, because if it's open
8 ended, you know, I don't think it would be
9 fair to the Applicant, given the
10 circumstances. It doesn't seem as if the
11 Applicant's plans to develop, you know, that
12 really has not much to do at all with the
13 request or needs from the Housing Finance
14 Agency.

15 But, as a courtesy, I think you
16 are absolutely right, that we should allow a
17 little time to sort through these issues and
18 so forth, to determine if there is a nexus.

19 And so, I just think we should
20 have a date certain, it shouldn't be open
21 ended, so that's good.

22 CHAIRPERSON MILLER: I agree. I

1 was thinking that it would be our next regular
2 decision meeting, which would be March 4th.
3 One month should be a good amount of time.

4 Any other opinions on this?

5 VICE CHAIRMAN LOUD: Not on this,
6 but a related issue. I didn't have in my
7 package the revised floor plan, I had the site
8 plan, and I know that they've reduced the
9 number of units, I think, from 20 to 17.

10 And so, under Section 353 they
11 would, I think, need to submit a revised floor
12 plan. So, if we extend it out 30 days, I'm
13 just suggesting that that would give them time
14 to submit that as well.

15 CHAIRPERSON MILLER: That's a good
16 point. So, we will do that, we will leave the
17 record open for that revised floor plan.

18 COMMISSIONER JEFFRIES: We're just
19 looking at 17701?

20 CHAIRPERSON MILLER: Right. I
21 think when we are finished with this, which I
22 think we pretty much are, I guess by consensus

1 then this is going to be continued for
2 decision-making until March 4th, and we'll
3 leave the record open for correspondence
4 relating to the District of Columbia Housing
5 Finance Agency, or we'll reopen the record for
6 that, and leave the record open for the
7 revised floor plan, which may not have come in
8 yet. Okay.

9 MR. MOY: That's correct, Madam
10 Chair.

11 Would the Board wish to set a
12 deadline for these filings? If you do, I
13 would suggest a date of Tuesday, February the
14 26th. That's one week before March the 4th.

15 CHAIRPERSON MILLER: I think that
16 would be a good idea to set that deadline as
17 well. Thank you.

18 MR. MOY: And also, this would
19 apply to the next application, too, which is
20 17702, correct?

21 CHAIRPERSON MILLER: And, I don't
22 think we need to go through the whole history

1 of this one, since we have the same issue with
2 respect to the letter. Are we on it now,
3 17702, okay, we have the same letter that
4 applies to this application as well, so I
5 would suggest that we do the same thing, put
6 in the same deadlines, and leave the record
7 open for the same thing, correspondence
8 related to this letter from the District of
9 Columbia Housing Finance Agency, and then any
10 revised plans. Okay.

11 So, I think that's by consensus on
12 both those cases, and do we have anything else
13 on the agenda for today's public meeting?

14 MR. MOY: No, that completes the
15 public meeting for February the 5th, Madam
16 Chair.

17 CHAIRPERSON MILLER: Okay, then
18 this meeting is adjourned, and we will shortly
19 go into the cases that are here for hearing
20 today, but we are going to take a short break
21 first. That would be at least ten minutes.
22 Okay.

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(Whereupon, the above-entitled
matter was concluded at 3:16 p.m.)