



D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQ.

This transcript constitutes the minutes from the Public Meeting held on September 9, 2008.

TABLE OF CONTENTS

WELCOME:

Ruthanne Miller . . . . . 4

WISCONSIN AVENUE BAPTIST CHURCH

APPLICATION NO. 17726: . . . . . 6

Reschedule Decision to September 23, 2008: 8

DISTRICT-PROPERTIES.COM, LLC:

APPLICATION NO. 17774: . . . . . 9

Reschedule Deliberation to October 7, 2008: 12

PRIMAL FITNESS, INC.

APPLICATION NO. 17798: . . . . . 12

Exhibit 30 - Applicant Filing (accepted) 13

Exhibit 31 - Signed Petition (not accepted) 13

Exhibit 32 - Photographs (not accepted) . 13

Exhibit 33 - Response Statement (accepted) 13

Exhibit 34 - Affidavit (not accepted) . . 13

Exhibit 35 - Correction Letter . . . . . 13

Exhibit 29 - 8/22/08 Letter (not accepted) 14

MOTION TO GRANT WITH CONDITIONS: . . . . . 63

VOTE TO APPROVE WITH CONDITIONS: . . . . . 63

ADJOURN:

Ruthanne Miller . . . . . 64

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

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

11:04 a.m.

CHAIRPERSON MILLER: This meeting will, please, come to order. This is the September 9, 2008 Public Meeting of the Board of Zoning Adjustment of the District of Columbia. My name is Ruthanne Miller. I'm the Chair. Joining me today is the Vice Chair, Mr. Marc Loud, to my right. We have two Zoning Commissioners with us at this time. They are sitting on different decisions. Next to Mr. Marc Loud is Mr. Michael Turnbull and then Mr. Greg Jeffries.

To my left is Board Member Mary Oates Walker and then Shane Dettman, both Board Members. And next to Mr. Dettman is Cliff Moy from the Office of Zoning, Sherry Glazer 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. We do not

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

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

9 Please, turn off all beepers and  
10 cell phones.

11 I just want to say that we will  
12 proceed with our Special Meeting first and  
13 then we will have our hearing.

14 Does the staff have any  
15 preliminary matters?

16 MR. MOY: Yes, Madam Chair, but  
17 staff would suggest that we take those up  
18 case-by-case basis.

19 CHAIRPERSON MILLER: Thank you.  
20 Then let's proceed with the agenda.

21 MR. MOY: Madam Chair, I believe  
22 the first case for decision by the Board is

1 the Wisconsin Avenue Baptist Church case and  
2 that is Application No. 17726 of Wisconsin  
3 Avenue Baptist Church, pursuant to 11 DCMR  
4 3104.1, for a special exception to construct  
5 an addition to an existing building to allow  
6 both a child development center under section  
7 205 and a special exception to allow a private  
8 school under section 206 in the R-1-B  
9 District. This is at premises 3920 Alton  
10 Place, N.W., Square 1779, Lot 824.

11 As the Board will recall, on July  
12 29, 2008, the Board convened this application  
13 at Public Meeting session. After discussion  
14 of the motion, followed by the party  
15 opposition to reopen the record, the Board  
16 deliberated and rescheduled its decision to  
17 September 9<sup>th</sup>.

18 In the interim, Madam Chair, staff  
19 would also like to say that the -- on August  
20 8, 2008, the Office received a filing from the  
21 Wisconsin Avenue Baptist Church, which is your  
22 Exhibit 80, as a preliminary matter, because

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 the record had been closed.

2 So with that, apart from the Board  
3 acting on the merits of the application, the  
4 staff will conclude its briefing.

5 CHAIRPERSON MILLER: Thank you,  
6 Mr. Moy. Well, what I want to say is first of  
7 all, I want to thank everyone for their  
8 patience. The Board has been in recess all of  
9 August and has just come back and needed some  
10 time to go over some of these cases. And the  
11 Wisconsin Avenue case is a particularly  
12 complex case with a lot of evidence that was  
13 submitted by all of the parties. And it is a  
14 lot to address.

15 And we spent time back there  
16 trying to sort everything out in order to come  
17 out here and thoroughly deliberate the case.  
18 And what we decided was that we are not quite  
19 ready to proceed on this case, that there is  
20 a lot of very important evidence in the record  
21 and we would like to take a little bit more  
22 time to contemplate the evidence and analyze

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 it in the context of the legal issues in this  
2 case.

3 So while on the one hand I don't  
4 like to delay cases and have you all come down  
5 here and then not hear a deliberation on them,  
6 I think the more important point is that the  
7 deliberation of the case gets is the best that  
8 the Board can give it. And with all the hard  
9 work and analysis and evidence that has been  
10 presented in this case, we have decided that  
11 we want to take a little bit more time on  
12 this.

13 So what we will be doing is  
14 rescheduling this case for September 23<sup>rd</sup>  
15 deliberation, Special Public Meeting, the  
16 first thing in the morning session.

17 If any other Board Members want to  
18 make any comments, feel free, but basically,  
19 we are saving our comments for that occasion.  
20 Okay. Then I think we can proceed to the next  
21 case, Mr. Moy.

22 MS. GLAZER: Madam Chair?

1 CHAIRPERSON MILLER: Yes, Ms.  
2 Glazer?

3 MS. GLAZER: I can't get my  
4 microphone to work, but the question is is the  
5 Board going to accept Exhibit 80 or deal with  
6 that at the next session?

7 CHAIRPERSON MILLER: We have new  
8 microphones. I would suggest we just deal  
9 with that at the next session. Any objections  
10 to that? Okay.

11 MR. MOY: Okay. Very good. The  
12 next case on the agenda, Madam Chair, is  
13 Application 17774 of District-Properties.Com,  
14 LLC, pursuant to 11 DCMR 3104.1, for a special  
15 exception to construct an eight unit multi-  
16 family condominium building under section 353,  
17 in the R-5-A District at premises 930 Bellevue  
18 Street, S.E., Square 5924, Lots 141, 142 and  
19 143.

20 Also, the Board will recall on  
21 July 29, 2008 the Board convened the  
22 application also in Public Meeting session.

1 After discussion, the Board requested the  
2 applicant refile to address the previous  
3 issue. It was given a deadline of submission  
4 of September 2, 2008.

5 As of today, there has been no  
6 filing to the record. That completes the  
7 staff's briefing, Madam Chair.

8 CHAIRPERSON MILLER: Thank you,  
9 Mr. Moy. And as I understand it, the  
10 applicant hasn't contacted the Office of  
11 Zoning in any manner. Is that correct?

12 MR. MOY: That's correct, Madam  
13 Chair.

14 CHAIRPERSON MILLER: Okay. I  
15 think we should discuss how to proceed, at  
16 this point. My inclination is to give the  
17 applicant one more chance to respond to our  
18 request for information last time until our  
19 next scheduled Public Meeting. There is a  
20 chance that he is unaware of what we decided.

21 It's my understanding that we were  
22 pretty much comfortable with the application,

1 satisfied with the application, except for  
2 this one point. And that we ought to give him  
3 one more opportunity to respond to that.

4 How do others feel?

5 VICE CHAIRMAN LOUD: I agree,  
6 Madam Chair. We have worked with this  
7 applicant before and have had follow-up  
8 requests and normally the applicant does  
9 respond. So I would be in favor of giving the  
10 applicant an additional shot at it.

11 CHAIRPERSON MILLER: Okay. And I  
12 don't believe we have any party in opposition,  
13 so that no one is prejudiced by this delay.  
14 So why don't we reschedule deliberation on  
15 this case to our next regular scheduled Public  
16 Meeting?

17 MR. MOY: That would be the 16<sup>th</sup> of  
18 September, Madam Chair, next week.

19 CHAIRPERSON MILLER: No.

20 MR. MOY: Oh, in October?

21 CHAIRPERSON MILLER: Yeah, the  
22 next, the regular meeting. That would be

1 October 7<sup>th</sup>?

2 MR. MOY: That's correct.

3 CHAIRPERSON MILLER: Okay. And is  
4 it possible for the Office of Zoning to just  
5 try to contact him again and alert him to our  
6 deliberations on this?

7 MR. MOY: Yes, absolutely.

8 CHAIRPERSON MILLER: Okay. Then  
9 that concludes Application No. 17774. So we  
10 are ready for the next decision.

11 MR. MOY: The next and last case  
12 for decision, Madam Chair, is Application No.  
13 17798 of Primal Fitness, Inc., pursuant to 11  
14 DCMR 3103.2, for a variance from the use  
15 provisions to operate a fitness center under  
16 subsection 330.5, in the R-4 District. This  
17 is at premises 219 M Street, N.W., Square 555,  
18 Lot 805.

19 On August 1, 2008, the Board  
20 convened with this application in a Public  
21 Meeting session. After Board discussion, the  
22 Board requested that the applicant submit

1 additional information to supplement the  
2 record.

3 At this point, Madam Chair, in  
4 your case folders, all the filings are  
5 untimely beginning with the filing from the  
6 applicant, which was filed on September 3,  
7 2008. The deadline was July 22<sup>nd</sup>. This is  
8 Exhibit 30. The applicant has also followed  
9 up with a correction letter, which was  
10 submitted early this morning, which would be  
11 your Exhibit 35.

12 Finally, there have been filings  
13 from the party opposition, a series of four  
14 filings. One is the -- is Exhibit 34, an  
15 affidavit, a copy of an affidavit to the  
16 Superior Court. The second filing is a  
17 petition, signed petition in opposition,  
18 Exhibit 31. There is also a statement in  
19 response to the applicant's filing, identified  
20 as Exhibit 33. And finally, there is a  
21 filing, which is a collection of photographs,  
22 identified as Exhibit 32.

1           And I'll conclude by saying that  
2           the staff since the last hearing received a  
3           document from the president of the Mount  
4           Vernon Square Neighborhood Association, dated  
5           August 22, 2008, identified as Exhibit 29.  
6           That also was a filing that -- where the  
7           record had been closed.

8           So with that, the Board is to act  
9           on the merits of the requested variance  
10          relief, based on the supplemental filings and  
11          that concludes the staff's briefing, Madam  
12          Chair.

13                   CHAIRPERSON MILLER: Thank you,  
14          Mr. Moy. Okay. Before we get into the merits  
15          of this decision, we need to address what  
16          documents we will be accepting into the  
17          record. As Mr. Moy stated, all the documents  
18          are untimely, but we do have the authority to  
19          waive our rules to accept a document that is  
20          untimely, if it doesn't prejudice another  
21          party and for good cause.

22                   So starting with the applicant's

1 submission. Well, let me just start with, I  
2 guess, reviewing in August what we did. We  
3 did leave open the record for just some very  
4 specific documents. One was for the applicant  
5 to identify, you know, measures that might be  
6 implemented to mitigate identified noise and  
7 vibration impacts on the adjacent property.

8 And including identifying, you  
9 know, what these impacts might be if there  
10 were some, since we had heard that on August  
11 15<sup>th</sup>, they were going to be having a new room  
12 for the weights. And we were interested in  
13 how that was all working out, before we were  
14 going to make a decision.

15 And then we also asked him to  
16 revisit the variance analysis. So basically,  
17 we were looking at the variance analysis and  
18 impacts on Ms. Keys' property and measures,  
19 which might be taken to mitigate adverse  
20 impacts.

21 And then we allowed a response  
22 from her to whatever filing he would submit.

1 So his filing was late. He said he wasn't  
2 aware that he had this invitation to file it.  
3 I think that we should admit it as it is  
4 pertinent to our deliberation and we have  
5 allowed Ms. Keys to respond.

6 Is there objection to that?  
7 Discussion on that? Okay. Not hearing any,  
8 then I'll proceed under the assumption that  
9 there is consensus that that document is in.  
10 Okay. So then we need to look at next, I  
11 think, Exhibit 33, Ms. Keys' response, which  
12 is also late, but the only reason it is late  
13 was because the applicant's was late. So it  
14 couldn't have been earlier, so I would  
15 certainly suggest that timeliness be waived.

16 And does anyone have an issue with  
17 the responsiveness of -- to the point that we  
18 are looking at of this letter? Any  
19 objections? Okay. I think that concerns come  
20 into play with respect to her attachments or  
21 they are either attachments to this letter or  
22 they are separate exhibits, but why don't we

1 start with an affidavit that she submitted?

2 And I believe that affidavit was  
3 dated in February, February 20, 2008, and it  
4 was an affidavit that was filed in Superior  
5 Court. I don't believe that this should be  
6 admitted as responsive to what we left the  
7 record open for, because it is an affidavit  
8 that was written in February and we were  
9 seeking filings with respect to how are things  
10 working out in August and, you know, what  
11 adverse impacts are continuing and what was  
12 her position on the applicant's mitigation  
13 measures, if any.

14 Is there a consensus on that? Is  
15 there discussion on that? Okay. Not hearing  
16 any, then I assume you are in agreement with  
17 my assessment and that won't be included in  
18 the record.

19 Because I just want to say when we  
20 leave the record open for a specific purpose,  
21 it has to be just for that purpose, otherwise,  
22 we are opening the doors again and then new

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 information can come in that other parties  
2 don't have a chance to respond to and that's  
3 not fair and that's what this is based on.

4 The other document, one other  
5 document she submitted was a petition. And I  
6 believe that petition was filed, is signed by  
7 neighbors opposing the applicant's project.  
8 I don't think that is also responsive to what  
9 we left the record open for. It goes to, you  
10 know, what people in the area feel about this  
11 application and the record was only left open  
12 for impacts on her property, specifically with  
13 respect to vibrations.

14 Do others have a different point  
15 of view? Okay. Not hearing anyone or any  
16 others, this will also not be included or  
17 accepted in the record.

18 And then finally, we have some  
19 photographs that were submitted by Ms. Keys.  
20 And I would suggest that these also not be  
21 included in the record, because there just is  
22 no -- it's an unfairness issue. I can't see

1 when they were taken, who took them, how they  
2 relate to the issue of vibrations on her  
3 property.

4 So any other concerns with  
5 excluding those from the record? Okay. So  
6 those will not be included in the record.  
7 Just Ms. Keys' two page response, Exhibit 33,  
8 just the first two pages. Okay.

9 We have another document that was  
10 submitted that Mr. Moy mentioned and that was  
11 Exhibit 29 from Mount Vernon Square  
12 Neighborhood Association indicating their  
13 support for the project. This is untimely and  
14 this was not relevant to the vibrations issue,  
15 but in general, the record was not left open  
16 for anyone to file a submission. It was just  
17 left open for the parties. And Mount Vernon  
18 Square Neighborhood Association is not a  
19 party. So I believe this is also too late.

20 Does anyone have a different  
21 position on that? All right. I think that  
22 covers all the questions of documents that

1 came in late.

2 Okay. So we can move now into the  
3 merits of this case. This is an application  
4 for a use variance for a commercial fitness  
5 center in a Residential District, in an R-4  
6 District. And in order to be granted a use  
7 variance, the applicant had to show that the  
8 property is unique or has an exceptional  
9 condition that leads to an undue hardship for  
10 it to be used as permitted under the Zoning  
11 Regulations.

12 And then that the particular use  
13 would not result in any substantial detriment  
14 to the public good and without substantially  
15 impairing the Zone Plan. The property in this  
16 case, I think, is an unusual and exceptional  
17 case. It's a fire house and it's only been  
18 used commercially. It has never been used as  
19 a residence. And it is actually on a  
20 commercial strip, even though it's in the R-4  
21 District. And it is also a contributing  
22 building.

1           So it has great hardships with  
2           respect to using it for residential purposes.  
3           It never has been and it would be very  
4           expensive as shown in the record to make  
5           improvements to adapt it to residential use  
6           with respect to putting in a kitchen and  
7           bathrooms and things like that.

8           Office of Planning also, they have  
9           submitted a report in support. They also  
10          indicated that its use as a fitness center  
11          also would not preclude it from being used in  
12          the future as another use that is permitted in  
13          this district, such as a private club or child  
14          development center.

15          And they did find that there was  
16          no substantial detriment to the public, at  
17          least from this creative adaptive reuse of the  
18          building, actually that it is on a commercial  
19          strip, that it adds vibrancy and security of  
20          the neighborhood. It doesn't generate much  
21          traffic.

22          In essence, what this case came

1 down to was whether it would cause adverse  
2 impacts on neighboring properties because of  
3 what's involved here is a lot of -- well, some  
4 weight dropping and things like that. And  
5 that's why we kept the record open a little  
6 longer to find out whether certain mitigating  
7 measures were working, because one of the  
8 neighboring properties, Ms. Keys, runs a store  
9 next door. She was complaining about  
10 headaches from vibrations and things like  
11 that.

12 She also had some other concerns,  
13 which we can get into. The applicant also had  
14 a report done by Mr. Vincent Ford, who  
15 represents himself as, you know, a  
16 professional in Building Code and use  
17 analysis. And the report does indicate that  
18 there had been vibrations and they were taking  
19 measures to reduce that and monitor that.

20 I think they found that any  
21 weights greater than 95 pounds should be  
22 dropped in the back room and they built a

1 whole back room -- prepared a whole back room  
2 just for the heavier weight dropping.

3 I think that also in addition to  
4 the questions about vibrations whether they  
5 have been mitigated, we need to also consider  
6 Ms. Keys had some other concerns about adverse  
7 impacts on the neighborhood, such as she  
8 didn't like the way that the men ran around  
9 the neighborhood without any shirts.

10 I think in her last filing, she  
11 talked about dog barking in the gym and there  
12 were a lot of other, it seems to be, little  
13 problems between neighbors. But to me, it  
14 comes down to, you know, the adverse impacts  
15 question. But I think, you know, everyone  
16 should weigh in, first of all, whether, you  
17 know, this is -- we agree that this is an  
18 exceptional condition here that gives rise to  
19 an undue hardship in using it as permitted  
20 under the Zoning Regs.

21 So I think I want to let others  
22 weigh in here and then we can discuss if we

1 were to grant the variance, whether we should  
2 condition it. Yes?

3 COMMISSIONER TURNBULL: Madam  
4 Chair, after review, I don't see any reason  
5 not to grant a variance for the use. I think  
6 that it's clear to make this that there is an  
7 undue hardship to make this work as a  
8 residence. And that as a commercial facility  
9 of some sort, I think it has proven that over  
10 the years that it has been there, it has  
11 existed in a form different than a residence.

12 So I think there is a hardship of  
13 doing it. And I would have no problem with  
14 granting a variance.

15 I guess my problem is still trying  
16 to understand the good faith effort upon the  
17 applicant to mitigate the noise and vibrations  
18 on the neighbor next door. And I haven't seen  
19 anything yet that sort of shows that the two  
20 of them have got -- I mean, if I look in  
21 Exhibit No. 33, it sounds like there has  
22 nothing been done on any of the repairs, if

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 they have come to an agreement on repairs  
2 inside the house.

3 We get there is a lot of  
4 information about Mr. Toorock, but I don't see  
5 anything about Mr. Valentine, who is the owner  
6 of the property. And I guess I would like to  
7 see some meeting of the minds or something  
8 that comes together that shows that there has  
9 been something done and that everyone walks  
10 away from this feeling that they are  
11 satisfied.

12 And I don't see that. That's the  
13 only thing that troubles me is that we have  
14 got, obviously, the store owner very much  
15 concerned that things have not been done. She  
16 still feels that there are still things going  
17 on that don't meet her needs. I don't see  
18 anything from Mr. Valentine, per se, that says  
19 he has met with her.

20 I mean, if you remember at our  
21 last hearing, Mr. Valentine was very broken up  
22 about the fact that his long-term relationship

1 with his neighbor was in jeopardy. And he was  
2 very heartfelt here about trying to promise  
3 that he was going to mend this. And yet, we  
4 still have in Exhibit 33 this feeling that  
5 things have not been done.

6 So I guess I'm confused. I'm a  
7 little bit uneasy. Again, the variance issue,  
8 the use factor is not a problem with me. I'm  
9 just concerned about that there has been a  
10 good faith effort that the parties have gotten  
11 together to work these things out and that we  
12 can walk away from this feeling that we have  
13 done our due diligence from a zoning issue and  
14 can feel secure that there is not this  
15 hardship to the other property.

16 And I guess I feel still a little  
17 bit uneasy about that.

18 CHAIRPERSON MILLER: You know, I  
19 mean, I agree with you with respect to  
20 concerns. And I think that that was one of  
21 the big reasons we continued this, hoping  
22 that, you know, they would add this room and

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 that they would work it out and then they  
2 would come back and tell us, okay, we have  
3 worked it out and these are the conditions we  
4 agree to or whatever.

5 And it didn't happen. So the fact  
6 that it didn't happen, I think, that, at this  
7 point, we just have to decide, you know, what  
8 do we think about it? Are we convinced that  
9 there is not a significant adverse impact here  
10 that would cause us to deny the variance? And  
11 if we don't think so, but we think that there  
12 should be certain measures taken or  
13 conditions, what would they be?

14 And I think that an interesting  
15 point that the owner hasn't weighed in on this  
16 again. He did seem to be so upset that there  
17 not be, you know, bad relations between them.  
18 Now, the applicant did indicate in his -- at  
19 Exhibit 30 that, you know, they have taken  
20 certain measures that they think address the  
21 problems, you know, with respect to, you know,  
22 only up to 95 pounds being dropped in the

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 front room, that they built out a new room for  
2 the heavier weight lifting, that they are  
3 going to be plastering the walls.

4 They are going to be, they haven't  
5 yet. He says they are going to be in Ms.  
6 Keys' store. And that they will be  
7 monitoring. So I guess we have to decide. We  
8 have to kind of bite the bullet I think and  
9 just decide, okay, can we grant the variance,  
10 you know, with conditions and will that do it  
11 for us?

12 And then there is also the issue  
13 of a term as a condition to make sure that it  
14 is working out. Are there other comments, at  
15 this point?

16 VICE CHAIRMAN LOUD: Madam Chair?

17 CHAIRPERSON MILLER: Yes?

18 VICE CHAIRMAN LOUD: I think bite  
19 the bullet is a good way to put it. This is  
20 a very difficult case, I think, for me to come  
21 down one way or the other on. I think it's a  
22 good project and I think that it's being run

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 professionally by the applicant.

2 On the other hand, I'm deeply  
3 concerned about the times of the day during  
4 which the weights drop specifically. As I  
5 understand it, the 11:00 a.m. to 2:00 p.m.  
6 time slot where, as I understood, for 15  
7 minutes at 11:00, 15 minutes at 12:00, 15  
8 minutes at 1:00 and 15 minutes at 2:00 the  
9 weights are being dropped.

10 I'm not as concerned about the  
11 6:00 a.m. period of time that the weights are  
12 dropped or the 8:00 a.m. period of time that  
13 the weights are dropped. But given Mrs. Keys'  
14 testimony about the thumping noise in her head  
15 and just trying to put myself in that  
16 situation of hearing that go on and on from  
17 11:00 a.m. to 2:00 p.m. gives me tremendous  
18 cause to not support the application or to  
19 only support it with conditions regarding  
20 eliminating the dropping of the weights during  
21 a part of that 11:00 a.m. to 2:00 p.m. time  
22 slot.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1                   So I would be in favor of  
2                   supporting the application with conditions  
3                   that a period of time between 11:00 a.m. and  
4                   2:00 p.m. be removed and we could talk further  
5                   about what that time is. It's nothing  
6                   personal against the proposal and good work  
7                   that they are doing there. I just think it's  
8                   a bit much to expect next door neighbor to  
9                   endure that three times a week.

10                   CHAIRPERSON MILLER: You know,  
11                   what gives me pause on that is Exhibit 33,  
12                   which is her latest filing, I mean, it's not  
13                   to take away from her previous filings, but,  
14                   you know, we had asked for, you know, how are  
15                   things going now and I don't see a lot of  
16                   complaint in that submission about, you know,  
17                   the weights dropping or, you know, headaches  
18                   or something, which she had complained of  
19                   before they made their changes.

20                   If you look at the front page, a  
21                   lot of the complaints are about other issues  
22                   running and crawling through the neighborhood

1 and men without shirts and any of the dog in  
2 the gym as well as motorcycles and made calls  
3 to 911 about injuries.

4 And so when I went all through  
5 this and finally at the end I saw something  
6 about vibrations from noon to 6:00, I guess,  
7 I'm left with the impression that, you know,  
8 maybe this isn't a big issue right now. It  
9 was. I don't know if it still is. Maybe the  
10 corrective measures that they took with  
11 respect to moving heavier weights to the back  
12 have alleviated that one.

13 So I just think when we are  
14 considering conditions, you know, we should  
15 look and see, you know, are they -- is there  
16 enough evidence that supports them or not? I  
17 know that that was our biggest concern about  
18 her and her headaches. I just can't tell any  
19 more now from the latest submission that this  
20 is a real problem.

21 VICE CHAIRMAN LOUD: And again to  
22 respond, but also to preface it by saying I

1 think it's a difficult case for me. But if  
2 you look at Exhibit 33, and I think she was  
3 very clear at the hearing regarding the noise  
4 impact and the thumping on her head and, of  
5 course, she talked about mirrors cracking and  
6 all that. But just the personal impact to her  
7 and her body, I think, is what resonated with  
8 me.

9 Here at Exhibit 33 on page 2, and  
10 I think it's the final sentence.

11 CHAIRPERSON MILLER: Yeah.

12 VICE CHAIRMAN LOUD: She does sort  
13 of -- to me it's a reinforcement of what she  
14 had testified to at the hearing. They were  
15 supposed to relocate the area in which they  
16 drop weights. But yesterday on September 2<sup>nd</sup>,  
17 the entire building vibrated from noon to 6:00  
18 p.m., and again, her testimony.

19 The testimony of the applicant was  
20 that they had these sessions at 11:00, 12:00,  
21 1:00, 2:00 and then again from 5:00 -- I guess  
22 again at 5:00 and again at 6:00 or just again

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 at 5:00 for 15 minutes.

2 So I don't think that she is  
3 necessarily saying that that's not -- the  
4 thumping and the head concerns are no longer  
5 an issue at all. I think she was introducing  
6 some other newer concerns perhaps from when  
7 the hearing was held.

8 CHAIRPERSON MILLER: Yeah. I  
9 think that one sentence is -- you know,  
10 deserves looking at, but I don't fully  
11 understand it. She goes "They were supposed  
12 to relocate the area in which they drop  
13 weights, but yesterday on September 2<sup>nd</sup>, the  
14 entire building vibrated from noon to 6:00."

15 First of all, I don't know which  
16 building she is referring to. I mean, is she  
17 referring to her building vibrating or is she  
18 referring to, you know, the fitness center  
19 building? You think she is referring to her  
20 building?

21 VICE CHAIRMAN LOUD: I think it's  
22 a fair inference. One would simply have to

1 infer that it would be consistent with what  
2 she said throughout the proceeding. But I  
3 think it would be a fair inference that that  
4 is what she is talking about.

5 CHAIRPERSON MILLER: Well, then we  
6 need to weigh that against, was it Mr. Ford's  
7 findings, weights, I guess, 95 pounds and  
8 below wouldn't cause that kind of vibrations  
9 on her building if they were dropped in the  
10 front and only heavier weights would, but if  
11 heavier weights were dropped in the back, they  
12 wouldn't. I think if I'm understanding it  
13 correctly.

14 Okay. So we have to weigh. Okay.  
15 So let's just weigh those. We have to weigh  
16 those two pieces of evidence, I think that's  
17 the key, and then decide if we can assess, you  
18 know, the adverse impact.

19 VICE CHAIRMAN LOUD: I'm not  
20 unmindful of it. I think when you weigh an  
21 expert's testimony against a layperson's  
22 testimony in an area that is beyond the

1 average Ken of a layperson, then your marching  
2 orders are to follow the testimony of the  
3 expert.

4 But I think in this case, it's  
5 more a question of credibility. She ought to  
6 know if, when those weights are dropped, it  
7 creates a thumping in her head or not. That's  
8 -- she doesn't need to be an expert to know  
9 that one way or the other.

10 And so it boils down to is she a  
11 credible witness or is she making this up or  
12 is she exaggerating? And I found on that  
13 point a consistency throughout the testimony  
14 about this thumping being a real problem for  
15 her in the store during those periods of time.  
16 So I credit the witness' testimony in that  
17 regard.

18 CHAIRPERSON MILLER: Okay. So  
19 basically, are we of the position that we're  
20 inclined to grant the variance, but with  
21 conditions?

22 VICE CHAIRMAN LOUD: That's what i

1 would like to see govern here, Chair.

2 MEMBER WALKER: Madam Chair, I  
3 agree. I am inclined to grant the variance.  
4 The applicant has indicated that he has put  
5 into place some monitoring of the property  
6 next door. And since it is the case that he  
7 is going to be keeping tabs on what is  
8 happening and has agreed to correct any  
9 problems that arise, that we should consider  
10 a short-term in this case.

11 CHAIRPERSON MILLER: Okay. Yeah.  
12 We can start off with that. I think it is  
13 appropriate to consider a short-term as this  
14 is a new use and there is still some question  
15 as to the impacts of the weights on the  
16 vibration issue.

17 So I mean, I would suggest that  
18 maybe we put a term of a year on it, that  
19 that's a short-term, but it's long enough to  
20 see how the business is working and make sure  
21 there are no big problems associated with it.  
22 Not that we anticipate any, but we do see --

1 we have this question that's not totally  
2 resolved. We don't know for sure whether Ms.  
3 Keys feels vibrations or not.

4 COMMISSIONER TURNBULL: Well,  
5 Madam Chair, what about in Exhibit 30 the  
6 applicant talked about making -- wanted to say  
7 -- I'm looking toward the bottom there in the  
8 last paragraph on page -- the first page. It  
9 says "Further, there is no ambiguity about the  
10 monitoring. Ray Valentine will be  
11 plastering." Then he talks about Vince Ford  
12 with strong monitoring devices. He says "At  
13 the end of the monitoring period of six  
14 months, we will ask Vince Ford to make a new  
15 report to update the situation."

16 Is that something that we need to  
17 clarify in the order?

18 CHAIRPERSON MILLER: I would be in  
19 favor of having a condition that encompasses  
20 that representation, that it would be the  
21 applicant will install monitoring devices to  
22 insure no adverse impact on Ms. Keys.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 COMMISSIONER TURNBULL: Okay.

2 CHAIRPERSON MILLER: I think  
3 that's good. Now, when we get to the question  
4 about reports, I think that they made an offer  
5 to, you know, submit a report to the BZA and  
6 the ANC, if I'm correct?

7 COMMISSIONER TURNBULL: Yes.

8 CHAIRPERSON MILLER: Yes.

9 COMMISSIONER TURNBULL: You're  
10 absolutely correct.

11 CHAIRPERSON MILLER: Okay. We  
12 don't -- we can't really deal with that in  
13 these proceedings and that's why we talk about  
14 having a term, because then the applicant  
15 comes back to us and there is notice to the  
16 community and we will see how things are  
17 going.

18 If someone were to file a report,  
19 there is no case pending that it would be  
20 attached to. You know, once we decide this  
21 case, it's over. So I think it's a good idea  
22 to submit the report to the ANC in six months.

1 I think it's good for the community to be  
2 somewhat of a watchdog on this. I think  
3 that's fine. And then maybe after a year, but  
4 not to submit to the BZA.

5 COMMISSIONER TURNBULL: No.

6 CHAIRPERSON MILLER: Yeah.

7 COMMISSIONER TURNBULL: I think  
8 the ANC has agreed and the third party --

9 CHAIRPERSON MILLER: I agree.

10 COMMISSIONER TURNBULL: -- too.

11 I'm just concerned of her last exhibit to us  
12 in the 33 that seems to me that she has a fear  
13 of the tenant, which has come out. And she  
14 talks about police reports. So I'm a little  
15 uncertain as to how that relationship -- I  
16 mean, actually, the owner is the one we really  
17 should be dealing with the store owner, not  
18 the tenant.

19 So I think I'm just a little bit  
20 concerned on how the relationship is going on  
21 that. That's my own concern. I'm just -- I  
22 know it's not a zoning issue, but it is an

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 impact on the neighbor and I'm just trying to  
2 address that somehow for us that there is a  
3 comfort level of some sort.

4 VICE CHAIRMAN LOUD: Just a point  
5 of clarification on Mr. Turnbull's last  
6 contribution. Would this six month interim  
7 monitoring report, and I just don't know the  
8 answer, also be provided to Mrs. Keys? Is  
9 that the understanding?

10 CHAIRPERSON MILLER: I don't know  
11 that that's what the applicant --

12 VICE CHAIRMAN LOUD: Okay.

13 CHAIRPERSON MILLER: -- suggested,  
14 but I think it's a good idea.

15 VICE CHAIRMAN LOUD: Yeah, I was  
16 just going to --

17 CHAIRPERSON MILLER: I mean, we  
18 can put that in our conditions.

19 VICE CHAIRMAN LOUD: I would  
20 recommend that as part of the conditions and  
21 then I think I could support Commissioner  
22 Walker's direction on this case in terms of a

1 year. Yeah, for one year with the condition  
2 that during that year period at the six month  
3 interval, Mrs. Keys is given a copy of the  
4 monitoring report as well.

5 CHAIRPERSON MILLER: All right.  
6 Here are three conditions that I think that we  
7 have so far. Applicant will install  
8 monitoring devices to insure no adverse impact  
9 on Ms. Keys' property or whatever. Applicant  
10 will submit monitoring report to the ANC and  
11 Ms. Keys within six months of the date of this  
12 order. And then again, I think after one  
13 year, I think every six months would be good.

14 And in particular, that this  
15 variance would be for a term of one year from  
16 the date of this order. I think we may also  
17 want to visit some other conditions. I know  
18 Mr. Loud had one which we need to get back to.

19 MEMBER WALKER: Madam Chair?

20 CHAIRPERSON MILLER: Yes?

21 MEMBER WALKER: On your first  
22 condition, I would just change the wording to

1 detect adverse impact.

2 CHAIRPERSON MILLER: Thank you.

3 MEMBER WALKER: Rather than --  
4 okay.

5 CHAIRPERSON MILLER: Can not,  
6 right. We can't enforce ensuring. I also had  
7 in my mind that we put as a condition that  
8 weights heavier than 95 pounds may only be  
9 dropped in the back room. It's something that  
10 they said they are doing, but we might as well  
11 include it.

12 Mr. Loud has -- we may want to  
13 come back to your proposed condition, which  
14 would be limiting activities during certain  
15 hours. We haven't really fully discussed  
16 that. I think we all have agreed to the  
17 length with the term and the monitoring and  
18 reporting and the weights heavier than 95  
19 pounds being dropped only in the back room.

20 VICE CHAIRMAN LOUD: So we're back  
21 to the, as I understand it, at 11:00, at 12:00  
22 noon, at 1:00 p.m. and again at 2:00, and I'm

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 not quite sure, Madam Chair, how to respond to  
2 the head shaking that I see going on, but  
3 perhaps my facts are a bit wrong, I want to  
4 make sure that I'm correct before offering any  
5 additional conditions on this issue. Madam  
6 Chair?

7 CHAIRPERSON MILLER: Yes, I'm  
8 trying to see where you are pulling them from.

9 VICE CHAIRMAN LOUD: I know it's a  
10 bit extraordinary, but the --

11 CHAIRPERSON MILLER: Is it from  
12 the schedule of their classes or what?

13 VICE CHAIRMAN LOUD: These are  
14 from my notes of the testimony that Mr.  
15 Toorock provided at the hearing.

16 CHAIRPERSON MILLER: Okay.

17 VICE CHAIRMAN LOUD: Mr. Toorock  
18 is here. I know it's extraordinary actually  
19 to ask for that kind of clarification at a  
20 decision meeting.

21 CHAIRPERSON MILLER: Well, I would  
22 say this, I mean, it's something to weigh

1 because if it's very important to ask Mr.  
2 Toorock to get the facts right, we can call  
3 him up. We just have to be careful that, you  
4 know, we don't open the door with respect to  
5 somebody else then having an opportunity to,  
6 you know, participate.

7 VICE CHAIRMAN LOUD: Right.

8 CHAIRPERSON MILLER: You know,  
9 respond. If it's just a factual question that  
10 is important if you are considering putting a  
11 limitation on his schedule, I don't object to  
12 that.

13 VICE CHAIRMAN LOUD: Okay.

14 CHAIRPERSON MILLER: Is that  
15 something that you would like to do?

16 VICE CHAIRMAN LOUD: I would like  
17 to be clear that I'm interpreting the  
18 testimony correctly that at 11:00 a.m., at  
19 12:00 noon, at 1:00 p.m. and at 2:00 p.m.  
20 there are 15 minute durations where these  
21 weights in excess of 95 pounds will be  
22 dropped.

1 CHAIRPERSON MILLER: Yes. You  
2 should come to the table, sure. Identify  
3 yourself for the record and then you can  
4 respond to Mr. Loud. Okay. Use the  
5 microphone. Um-hum.

6 MR. TOOROCK: Hello. My name is  
7 Mark Toorock. Thank you for allowing me to  
8 offer clarification on this issue.

9 Sir, Mr. Loud, I could see where  
10 my testimony previously would lead you to  
11 believe that. I would like to add  
12 clarification that what we actually have  
13 between 11:00 and 2:00 is an open gym time  
14 where clients can come in and run their  
15 workout at any time during that time.

16 I'm not asking that weights over  
17 95 pounds be dropped in the front room during  
18 that time. And I also need to say that during  
19 the lunchtime, we have an average of four  
20 clients a day. So it's a greatly diminished  
21 segment of business compared to say 20 clients  
22 at our 6:00 a.m. or 6:00 p.m. class. So it's

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 actually a very small amount of activity that  
2 happens during that time.

3 And I also wouldn't want any,  
4 during that period, no weight over 95 pounds  
5 should drop either. It's not -- there is no  
6 consistent methodical time that we drop  
7 weights. That would drive anybody crazy. So  
8 again, on days when there are weight dropping,  
9 which may be two or three days a week on  
10 average, someone may come in and drop a weight  
11 during that time frame of 11:00 to 2:00.

12 But it's not per se from the way  
13 you said, it sounded like someone comes in at  
14 11:00 and starts dropping weights. 12:00  
15 starts dropping weights. So I feel that is a  
16 clarification and, please, forgive the head  
17 shaking but I just wanted you to have an  
18 accurate picture.

19 That again, on average, anywhere  
20 from three to five people come in any time  
21 between 11:00 and 2:00, and I'm talking about  
22 in total, there are three to five people that

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 workout during that time frame. So it's not  
2 a very busy time frame at all.

3 VICE CHAIRMAN LOUD: Thank you,  
4 Mr. Toorock, for clarifying that. I was  
5 struggling with the mike a little bit. Am I  
6 correct in understanding that once it starts  
7 and whenever it starts, the duration is for 15  
8 minutes for that particular person who is  
9 dropping weights?

10 MR. TOOROCK: There is never a  
11 time in the gym where somebody actually drops  
12 weights for 15 minutes straight. Again, that  
13 would be unreasonable to ask of anybody to  
14 endure either. If a person were to drop a  
15 weight, if it's the 95 pound weight, they may  
16 drop it five or six times throughout the  
17 course of their workout, which could last  
18 anywhere from 15 to 25 minutes.

19 And if it were a heavier weight  
20 which are now used in the back room, they may  
21 drop it up to 9, 10, 11, 12 times, because we  
22 do things like dead lifts. We go from the

1 floor and they are dropped, but they are much  
2 heavier weights. Those would be in the back  
3 room.

4 And again, it would never be that  
5 -- there is no exercise where someone picks up  
6 the weight and drops it consistently for any  
7 set amount of time. That's just not an  
8 exercise we do. There is one exercise which  
9 was similar to that, which was tire --

10 VICE CHAIRMAN LOUD: I think you  
11 have answered my question. And the reason I'm  
12 cutting you off is I don't want to invite  
13 rejoinders and rebuttals and counters, so I  
14 think the specific sort of confusion I was  
15 dealing with you have addressed and I  
16 appreciate that.

17 MR. TOOROCK: Thank you.

18 CHAIRPERSON MILLER: Okay. I  
19 guess the door has been opened.

20 MS. KEYS: My name is Brenda Keys.  
21 I am the owner of the food store which is next  
22 door. They have moved their weights to the

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 back of the building, but I'm still feeling  
2 the same impact. No longer than yesterday, I  
3 noticed a new crack on the side of my wall.

4 So I'm saying dropping those  
5 weights in that building still has an impact  
6 on my building.

7 VICE CHAIRMAN LOUD: Madam Chair,  
8 just to sort of wrap up where I was going with  
9 the conditions. I am very comfortable with  
10 Commissioner Walker's term of one year for  
11 this to come back to us for review with there  
12 being this requirement that after six months,  
13 this monitoring and detection report be  
14 provided to Ms. Keys, so that she can evaluate  
15 and take appropriate steps to get ready for  
16 the one year evaluation and that those be the  
17 primary conditions that I'm interested in  
18 seeing in terms of granting approval of the  
19 application.

20 And while I don't want to go to  
21 the extent of making it a condition, I do  
22 think certain representations were made about

1 repairing the next door property and I would  
2 hope, and I'm wording this as a hope and not  
3 a condition, that the parties would work in  
4 good faith to resolve that promptly.

5 MEMBER DETTMAN: Madam Chair, I'm  
6 in general agreement with the direction that  
7 the Board is going and with the conditions  
8 that have been put forth thus far. Except for  
9 the one year. I could see -- maybe I'll just  
10 suggest that we re-evaluate the one year and  
11 maybe make it a little bit shorter for a few  
12 reasons.

13 One is that we never really heard  
14 from the ANC on this one. We got a letter  
15 saying that it was presented. The SMD said  
16 that the constituents were opposed. However,  
17 the unanimous vote was actually just a delay  
18 of an actual vote on it, so that it could be  
19 taken up in September.

20 The working relationship between  
21 Mr. Toorock and Mrs. Keys troubles me. To  
22 look at Exhibit 33 and see things that are

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 screaming I'm sick of you and seeing a photo  
2 of Mr. Toorock sitting in the driveway filming  
3 Mrs. Keys trying to park. That's a  
4 relationship that is not working. I think  
5 it's a relationship that if we are to grant  
6 this variance, it's going to be having to  
7 continue to be nurtured.

8 But seeing that police officers  
9 are being taken off the street in order to  
10 mediate this kind of childish argument, is  
11 taking an officer away from maybe more  
12 troublesome crimes. So there are a couple of  
13 other reasons I could see having maybe a  
14 shorter time period on this.

15 I know it is a little bit more  
16 burdensome for the applicant, but in a case  
17 like this, I think the burden falls on both  
18 parties and maybe we could share the burden a  
19 little bit.

20 MEMBER WALKER: Madam Chair, just  
21 let me point out that the photograph in  
22 Exhibit 34 that Mr. Dettman referred to is not

1 part of the record. We made the decision not  
2 to accept. Okay. If it's some place else,  
3 that's fine.

4 CHAIRPERSON MILLER: Yeah, I  
5 agree. I agree. If you are referring to a  
6 document that we decided not to include in the  
7 record, then you shouldn't be relying on it.

8 MEMBER DETTMAN: That's true.

9 CHAIRPERSON MILLER: You're  
10 thinking of --

11 MEMBER DETTMAN: I'm -- my  
12 reference to that picture if it only resides  
13 in Exhibit 34, I'll recant that comment. But  
14 still, I think there is enough in the record  
15 that speaks to their working relationship or  
16 lack thereof.

17 CHAIRPERSON MILLER: You know,  
18 that bothers me as well, but I don't think  
19 that's a zoning issue per se.

20 MEMBER DETTMAN: It's not a zoning  
21 issue, unless you look at it sort of in a  
22 broader context that if it is taking people

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 from MPD away and off the streets, to me,  
2 that's an impact on the public good  
3 potentially, for a working relationship that  
4 should not be that difficult.

5 I think that after six months if  
6 we find out that this vibration is causing  
7 cracks and that we are fixing them, if we are  
8 fixing cracks every six months, that's nice  
9 that they are continually being fixed, but  
10 there is obviously a problem there that is a  
11 recurring problem that could be potentially  
12 Mrs. Keys, being a part of the public good, is  
13 an impact on public good.

14 And again, going back to the ANC,  
15 we really never heard from them. They  
16 represent the larger body. And if the  
17 participants or the members of this gym are  
18 filtering out through the neighborhood and  
19 having some sort of impact on the  
20 neighborhood, I know that everyone is allowed  
21 to go in and around the neighborhood.

22 But the fact that they are

1 associated with this gym and if they are  
2 having some sort of impact and the ANC comes  
3 back and says we have heard from the larger  
4 body, the larger public good, and it's an  
5 impact that we don't like, it's going to allow  
6 us to re-evaluate that in say nine months  
7 instead of a year.

8 CHAIRPERSON MILLER: Well --

9 MEMBER DETTMAN: It's just a  
10 suggestion. I'm fine with the one year. It's  
11 not going to hold up my vote.

12 CHAIRPERSON MILLER: Yeah.

13 MEMBER DETTMAN: But I think it's  
14 a little bit long.

15 CHAIRPERSON MILLER: See, what  
16 concerns me is, you know, that Ms. Keys still  
17 says that she, you know, has -- feels  
18 vibrations or whatever, which is what  
19 concerned us all along. And then I just think  
20 we are at the point where we have to decide,  
21 you know, whether Mr. Ford and Ms. Keys and we  
22 have common sense and I don't know. I mean,

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 in favor of a shorter term would be that  
2 reason that, you know, is that really a  
3 concern?

4 I think she has a lot of other  
5 concerns as well, which we can discuss, you  
6 know, whether we have any authority over or  
7 concern about the men running around the  
8 neighborhood or something.

9 And a one year is about the  
10 shortest we have ever done, but there is no  
11 reason that we, you know, can't so shorter if  
12 we are concerned. As far as the ANC goes,  
13 they have been on notice. They didn't want to  
14 participate. I can only read that as they  
15 don't have any concerns.

16 Anyway, we had record that is  
17 before us. And but anyway, if Board Members  
18 want a shorter period of a term, we can do  
19 that. You know, it's just I thought one was  
20 short. And so, you know, sometimes it's a big  
21 burden on certain types of applicants to have  
22 a very short term. It may not be the case

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 here. I don't know. We have to balance.

2 So what do others think?

3 VICE CHAIRMAN LOUD: I very much  
4 support Commissioner Dettman's recommendation  
5 and the spirit of it and I think that there is  
6 enough in the record to support the nine month  
7 term without reference to the exhibits that  
8 has not been officially admitted. And  
9 specifically, you talked about it, Madam  
10 Chair. It's the noise. It's the thumping.  
11 It's the testimony, if it's credible, of this  
12 constant noise, vibration, which would be  
13 annoying to anyone if it's true.

14 So I would be in support of the  
15 nine months, if my colleagues are. It's not  
16 a game changing format. I think we ought to  
17 go ahead and make a decision on it. But I  
18 think where Commissioner Dettman is going is  
19 a good place and it's based on the record.  
20 And I would support it.

21 COMMISSIONER TURNBULL: Madam  
22 Chair, I agree. I think that normally we have

1 had only a year has been a fairly standard as  
2 a minimum. But in light of what Mr. Dettman  
3 has said and Mr. Loud and I think I expressed  
4 some concerns earlier, too, that I'm a little  
5 troubled by the relationship, I would be  
6 amenable to a shorter term.

7 MEMBER WALKER: And I only pause,  
8 Madam Chair, because I think nine months could  
9 be viewed as particularly onerous or  
10 burdensome for the applicant. But I am  
11 willing to go along with the consensus, with  
12 the other Members of the Board.

13 CHAIRPERSON MILLER: Okay. I  
14 think I hear a consensus for nine months, so  
15 why don't we change the term to nine months.  
16 And I would just like to comment that I think  
17 that some of our concerns that we are  
18 expressing right now were concerns that we  
19 expressed a month ago and that we were hoping  
20 that we would get more evidence in the record  
21 with respect to this impact, because we sit up  
22 here and we're trying to figure out oh, can

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 they hear vibrations or not, feel vibrations,  
2 you know, it's hard.

3 So anyway, let's leave it at nine  
4 months. Do we want to add a condition with  
5 respect to the plastering or not? The  
6 applicant made a representation in Exhibit 30  
7 that they would be plastering the cracks in  
8 Ms. Keys' walls.

9 COMMISSIONER TURNBULL: Madam  
10 Chair, I think that I would like to see it,  
11 but I don't know if could enforce that. I  
12 don't know how you can -- I don't know how  
13 that's -- who goes to see that, who checks  
14 that out, who monitors that. I am concerned  
15 about the cracks. I'm very concerned, but I  
16 don't know how -- what mechanism we have to  
17 enforce that, unless you have got some ideas  
18 on how we do that.

19 CHAIRPERSON MILLER: Well, you  
20 know, actually I mean, I feel that if this is  
21 coming back in nine months, that the applicant  
22 is going to want to present a case that is

1 favorable, in which case he would want to show  
2 that he plastered the walls and stuff. So I'm  
3 not sure that it's really necessary.

4 Others have an opinion on that?  
5 Okay. Well, let me look at the -- we had a  
6 condition about applicant will submit a  
7 monitoring report to the ANC and Ms. Keys  
8 after six months. And then I had it and then  
9 again after one year, but I think we need to  
10 change that to nine months, prior to the  
11 hearing, after nine months.

12 So we will have two reports by the  
13 time we look at this again. You don't think  
14 so? You think we just leave it at six months?

15 MEMBER WALKER: Yeah, I think, you  
16 know --

17 CHAIRPERSON MILLER: And then  
18 there will be --

19 MEMBER WALKER: -- the --

20 CHAIRPERSON MILLER: Okay. Let's  
21 do that.

22 MEMBER WALKER: -- report that you

1 would get after nine months would be  
2 duplicative, I think.

3 CHAIRPERSON MILLER: Right.

4 MEMBER WALKER: One report would  
5 suffice.

6 CHAIRPERSON MILLER: So they will  
7 be required to do a report to the ANC and Ms.  
8 Keys after six months from the date of this  
9 order. Okay. And that's it.

10 MEMBER WALKER: Right.

11 CHAIRPERSON MILLER: And then they  
12 will be filing with --

13 COMMISSIONER TURNBULL: Madam  
14 Chair, I guess the only thing which I don't  
15 know whether it is a condition, I mean, we  
16 have often asked for Construction Management  
17 Plans or -- again, it's not an enforceable  
18 thing. I don't know whether you ask for  
19 something and see if they have carried it  
20 through, I don't know, a plan of mitigation  
21 that -- again, we can't enforce it, but sent  
22 to the owner on what they plan to do.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 I don't know if that's doable or  
2 not. Probably not. I mean, we're back to the  
3 same argument that we were before.

4 CHAIRPERSON MILLER: We did. We  
5 asked for mitigation measures from them.

6 COMMISSIONER TURNBULL: And again,  
7 it's something that it's not in our purview to  
8 actually monitor. It's something that the  
9 applicant -- I mean, they made a commitment to  
10 work with the applicant to do this, but I  
11 don't know if that's something that we can put  
12 in our order.

13 CHAIRPERSON MILLER: What do you  
14 think is missing from the mitigation measures?  
15 We talked about weights heavier than 95 pounds  
16 may only be dropped in the back room.  
17 Applicant will install monitoring devices to  
18 detect adverse impacts on the neighbors.  
19 Applicant will submit monitoring report to the  
20 ANC after six months.

21 COMMISSIONER TURNBULL: I guess  
22 I'm mainly concerned about the mitigation we

1 have never seen in our report that says what  
2 the mitigation methods were. I mean, what  
3 they have talked about, what they were going  
4 to do. Did we ever see documentation that it  
5 was actually done? Photographs showing the  
6 new padding, the separation. I don't know if  
7 we have ever seen anything like that.

8 But I guess some kind of  
9 documentation that says this was done, this  
10 was done. That's my only concern.

11 CHAIRPERSON MILLER: I don't know.  
12 I mean, I guess because nine months doesn't  
13 seem that far away. It seems like good  
14 guidance to the applicant as to, you know,  
15 maybe what we will be looking for at that  
16 point to make sure it is working out.

17 COMMISSIONER TURNBULL: I would  
18 agree. We could --

19 CHAIRPERSON MILLER: Yeah.

20 COMMISSIONER TURNBULL: -- if we  
21 feel that it hasn't been done at that time, we  
22 can deal with it then.

**NEAL R. GROSS**

COURT REPORTERS AND TRANSCRIBERS  
1323 RHODE ISLAND AVE., N.W.  
WASHINGTON, D.C. 20005-3701

1 CHAIRPERSON MILLER: Any other  
2 thoughts on that? Any other thoughts in  
3 general on the application, comments that want  
4 to be made?

5 Okay. Then all those in favor of  
6 granting the variance with conditions say aye.

7 ALL: Aye.

8 CHAIRPERSON MILLER: Opposed?  
9 Abstaining? And would you call the vote,  
10 please?

11 MR. MOY: Madam Chair, I don't  
12 believe that there was a motion on the table.  
13 A maker of the motion and a second.

14 CHAIRPERSON MILLER: Oh. I would  
15 move approval of Application No. 17798 for a  
16 use variance under section 330.5, for a  
17 commercial use in a Residential Zone.

18 MEMBER WALKER: Second.

19 CHAIRPERSON MILLER: All those in  
20 favor say aye.

21 ALL: Aye.

22 CHAIRPERSON MILLER: All those

1       opposed? All those abstaining? And would you  
2       call the vote, please?

3               MR. MOY: Yes, Madam Chair. The  
4       staff would record the vote as 5-0-0 to  
5       approve the application with stated conditions  
6       as conditioned on the motion of the Chair, Ms.  
7       Miller, seconded by Ms. Walker. Also in  
8       support of the motion Mr. Loud, Mr. Dettman  
9       and Mr. Turnbull.

10              MS. BAILEY: Madam Chair, are we  
11       talking a full order here?

12              CHAIRPERSON MILLER: Yes.

13              MR. MOY: Yes, there is  
14       opposition.

15              CHAIRPERSON MILLER: Do we have  
16       anything else on the agenda for today's Public  
17       Meeting?

18              MR. MOY: No, I believe that  
19       completes the Public Meeting for today, Madam  
20       Chair.

21              CHAIRPERSON MILLER: Okay. Then  
22       this meeting is adjourned.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

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