

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC MEETING

+ + + + +

TUESDAY

JANUARY 26, 2010

+ + + + +

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

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

MARC D. LOUD, Chairperson  
SHANE L. DETTMAN, Vice Chairman (NCPC)  
MEREDITH MOLDENHAUER, Board Member  
NICOLE SORG, Board Member

ZONING COMMISSION MEMBER PRESENT:

KONRAD SCHLATER, Commissioner

OFFICE OF ZONING STAFF PRESENT:

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

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D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQ.

The transcript constitutes the minutes from the Public Meeting held on January 26, 2010.

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

2 1:43 p.m.

3 CHAIRPERSON LOUD: This meeting  
4 will please come to order. Good afternoon,  
5 ladies and gentlemen.

6 This is the January 26th, 2010  
7 meeting of the Board of Zoning Adjustment of  
8 the District of Columbia.

9 My name is Marc Loud, Chairperson  
10 and joining me today are Vice Chairman Shane  
11 Dettman to my right representing the National  
12 Capital Planning Commission and to his right,  
13 Mr. Konrad Schlater representing the Zoning  
14 Commission. To my left, Ms. Meredith  
15 Moldenhauer, Mayoral Appointee and I think  
16 we're all pleased to welcome this afternoon to  
17 the Board of Zoning Adjustment Ms. Nikki Sorg.

18 This is her first opportunity to participate  
19 in a hearing. Welcome and to her left, of  
20 course, Mr. Clifford Moy, Secretary of BZA,  
21 Ms. Sherry Glazer, Office of the Attorney  
22 General and Ms. Beverley Bailey, Zoning

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1 Specialist in the Office of Zoning.

2 Copies of today's meeting agenda  
3 are available to you and are located to my  
4 left in the wall bin near the door. We do not  
5 take any public testimony at our meetings  
6 unless the Board asks someone to come forward.

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

14 Does the staff have any preliminary  
15 matters?

16 MR. MOY: Good afternoon, Mr.  
17 Chairman. Yes, we do and I would suggest that  
18 we take those preliminary matters up case-by-  
19 case basis.

20 CHAIRPERSON LOUD: Yes, sir. Then  
21 why don't we call -- and I believe we're going  
22 to do it slightly out of the published order.

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1       Why don't we call the Koo Yuen case first.

2                   MR. MOY:   Yes, sir, that would be  
3       the Appeal Number 17988 of Koo Yuen.   This is  
4       the -- what's before the Board is the motion  
5       for summary judgment.       This is to the  
6       application pursuant to 11 DCMR 3100 and 3101  
7       from an April 30, 2009 Notice to Intent to  
8       Revoke Building Permit Number B as in bravo  
9       85608 by the Zoning Administrator, Department  
10      of Consumer and Regulatory Affairs for a  
11      gasoline service station in the C-1 District  
12      of premises 5010 Benning Road, S.E.   The  
13      property is in square 5340, lot 68.

14                   As the Board will recall, on  
15      December 15, 2009, the Board convened this  
16      application.       It was postponed, but the  
17      decision -- this was at a special public  
18      meeting, the Board's decision was postponed to  
19      January 26 because of the lack of the majority  
20      for a concurring vote pursuant to Section  
21      3125.5.

22                   So, what's before the Board is to

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1 act on the merits of the summary judgment and  
2 staff will conclude at this point, Mr.  
3 Chairman.

4 CHAIRPERSON LOUD: Thank you, Mr.  
5 Moy. This is the decision --

6 MR. MOY: Oh, there's one other  
7 thing I forgot to mention, Mr. Chairman.

8 CHAIRPERSON LOUD: Yes, sir.

9 MR. MOY: There was a filing last  
10 night and noted in the official record today's  
11 date January 26 a consent motion from the  
12 Department of Consumer and Regulatory Affairs  
13 which is your Exhibit 27.

14 CHAIRPERSON LOUD: Okay. Thank  
15 you, Mr. Moy.

16 As indicated, this is a public  
17 decision meeting of the BZA on the Koo Yuen  
18 appeal, motion for summary judgment.

19 I notice that the parties have  
20 stepped forward to the table and good  
21 afternoon, but as a decision meeting, we don't  
22 take testimony at our decision meetings. You

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1 can remain there and if -- or some reason we  
2 decide to go outside, you'll be available.  
3 But, in the meeting, we don't allow testimony  
4 at public decision meetings.

5 So, we'll move forward in the  
6 context of the decision meeting and as part of  
7 our deliberation, Mr. Moy, we'll take into  
8 consideration the late filing that you  
9 reference.

10 As you indicated, this is the Koo  
11 Yuen appeal from a DCRA Notice of Revocation  
12 and I believe the Board is ready to deliberate  
13 and I'll be happy to set it up and start us  
14 off and share my observations and then open it  
15 up for Board Members to do that same.

16 Just by way of brief background  
17 factually, the Appellant in this case obtained  
18 a building permit from DCRA in March of 2008  
19 for a gas station in the C-1. The site had  
20 been granted a special exception as a gas  
21 station by the BZA in 1965. That was BZA  
22 Order Number 8427. The order referenced three

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1 bays and two service islands and DCRA  
2 thereafter issued C of Os for gas stations at  
3 that site for the next 11 years, roughly from  
4 1967 to 1979.

5 There was an intervening period  
6 where C of Os were issued for different uses  
7 including from about 1986 to '93. The DCRA  
8 issued C of Os for a coin-operated laundry at  
9 that site in the C-1. Which is also a matter-  
10 of-right use in the C-1, the coin-operated  
11 laundry.

12 On April 30th, 2009, that is about  
13 a year after the building permit had been  
14 issued, the ZA revoked the building permit  
15 stating that the permit was issued erroneously  
16 because, one, the Appellant submitted  
17 misleading information suggesting the current  
18 use of the site was a gas station and that it  
19 -- DCRA discovered that the most recent use  
20 was actually a coin-operated laundromat.

21 Secondly, the ZA concluded that  
22 since -- not secondly, but rather since the ZA

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1 concluded that the most recent C of O was for  
2 a laundry, the ZA reasoned that the Appellant  
3 could only operate a gas station at the site  
4 with a BZA special exception as required by  
5 Section 706.1.

6 On appeal, the Appellant argues as  
7 follows and I'm not going to read literally  
8 everything that's in the appeal paper. So,  
9 I'm going to capture the essence of what's  
10 been argued.

11 First, that BZA Order Number 8427  
12 authorized the gas station use at the site.  
13 Secondly, that the MLW case, one of our cases,  
14 I don't have the cite handy in front of me,  
15 17591. That's a BZA case from I believe May  
16 2007. That that case and the analysis in that  
17 case would render the approved use as  
18 conforming or at least not nonconforming and  
19 that under such an analysis, the use of the  
20 site could lapse for 23 years without  
21 impacting its ability to use the site as a gas  
22 station. Fourthly, that there are no material

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1 facts in dispute and that summary judgment is  
2 appropriate as a matter of law and I believe a  
3 fifth argument has since been withdrawn and  
4 that was an equitable argument raised by the  
5 Appellant regarding the significant lapse  
6 between the issuance of the building permit in  
7 March 2008 and its revocation about a year  
8 later, April 2009.

9 The Appellee on the other hand  
10 argues on appeal that the Appellant's right to  
11 the gas station use terminated once the deli  
12 and carry-out use briefly mentioned by me at  
13 the outset and the coin-laundry use  
14 specifically commenced. In other words, that  
15 those two intervening uses precluded the site  
16 from returning back to a gas station use.  
17 Secondly, the Appellee argues that there are  
18 material facts in dispute regarding whether  
19 enlargement from an approved -- what the  
20 Appellee characterizes as an approved two  
21 islands in the original 1965 BZA Order 8427 to  
22 six pumps that became the subject of one of

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1 the several C of Os that was issued on the  
2 site between '67 and '79 would, in fact,  
3 exceed BZA Order 8427 and thirdly, whether or  
4 not the Appellant submitted misleading plans  
5 by representing that it was a gas station.

6 I think that's the factual context  
7 for our deliberations and I'm going to start  
8 us off by going through my analysis of what  
9 the evidence is, what the legal argumentation  
10 has been and where I'm leaning toward coming  
11 out on this certainly subject to being  
12 persuaded by Board Members.

13 First of all, I think that the  
14 Appellant has made a case partially for the  
15 summary judgment and partially has not and  
16 I'll explain what that means and hopefully  
17 suggest some way to bring a clear resolution  
18 to what we're talking about.

19 With respect to the issue of  
20 whether there are any material facts in  
21 dispute that would preclude us from granting  
22 summary judgment, I think the key word is on

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1 material. There are facts in dispute clearly  
2 whether the building permit application  
3 contained misleading information or did not  
4 contain misleading information for example.

5 But, none of the facts that are  
6 proffered as being in dispute are material to  
7 the ultimate outcome of the case and the  
8 question before us which is really whether the  
9 special exception use that was granted in 1965  
10 by the BZA Order 8427 in affect carried with  
11 it a vesting of the rights of the Appellant to  
12 operate a gas station on that site independent  
13 of any subsequent lapses of a gas station use  
14 on that site.

15 If you accept as materially true  
16 that there were intervening uses for a deli  
17 and a carry out and a coin-operated laundry,  
18 that does not -- under the analysis that we  
19 adopted in the MLW case, that does not defeat  
20 the holder of that special exceptions  
21 continuing privilege to operate that special  
22 exception use on that site.

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1           We have said in some of our cases  
2           that deal with abandonment issues and whether  
3           under Section I think it's 2005 a lapse of  
4           three years creates a presumption of  
5           abandonment, that only applies where we have  
6           found that the property is nonconforming and  
7           in this case, I think the fact that the  
8           special exception was granted in 1965 and that  
9           the special exception authorized this gas  
10          station use convinces me that the property is  
11          not nonconforming. In fact, special exception  
12          use is presumed to be compatible in the zone  
13          in which it's found assuming that the  
14          applicant for the special exception can make  
15          the criteria of the special exception. I  
16          think in this case perhaps having to do with  
17          adverse traffic impacts and the like.

18                 So, in this case, clearly, the case  
19                 was made for a special exception in 1965. The  
20                 Applicant was successful in that and so, there  
21                 is no presumption or finding that this  
22                 property is nonconforming and there would, as

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1 a result, not be any reference to abandonment.

2 I think also that the specific  
3 definition of nonconforming does not apply in  
4 this case under our Section 199 because this  
5 was not a property that exists as I understand  
6 it -- property that existed in 1958 as a gas  
7 station. I think at some of the earlier  
8 pleadings that may have been represented by  
9 the -- I do remember that being represented by  
10 the Appellant, but that argument was quickly  
11 abandoned I think both at the hearing and then  
12 subsequent filings.

13 So, for me, I don't think that  
14 there are any material facts in dispute and  
15 that I can draw the conclusion from this  
16 Board's decision in the MLW case as applied to  
17 these specific allegations and facts that are  
18 before us now that the admitted lapse of use  
19 is immaterial in terms of whether or not this  
20 use is authorized by the special exception.

21 And I think with that I'll pause  
22 and see if Board Members want to weigh in and

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1 when I resume my next set of comments, I'll  
2 talk about the expansion from two bays that  
3 was in -- two service islands in the plan.  
4 I'm sorry. In the BZA order to what I  
5 perceive to be four service islands in the  
6 plans that were submitted to the DCRA in March  
7 2008.

8 And with that, let me open it up to  
9 Board Members. If there are any comments from  
10 Board Members.

11 MEMBER MOLDENHAUER: Chairman Loud,  
12 I think that you have provided a very in-depth  
13 summary and I agree with your analysis.

14 I think that the special exception  
15 in 1965 created a vested right that would run  
16 with the land because that special exception  
17 did not have a time restriction on it and  
18 thus, we do not look at the issue of  
19 abandonment for a nonconformity.

20 I think that we should apply MLW to  
21 the facts at hand in this case and by doing  
22 that, the lapse of use is not a relevant issue

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1 to review and then we look at the issues as --  
2 in the facts most favorable to the non-moving  
3 party which is DCRA and in looking at those,  
4 just as to the matter of law as to whether or  
5 not the special exception was granted with any  
6 sort of time restrictions and if it was which  
7 I think is a matter of fact which both parties  
8 agree to, it is not disputed, then I think  
9 that we have to grant the summary judgment in  
10 this matter based on the fact that the  
11 statutory rights of the special exception  
12 would run with the land and would not be  
13 affected by any lapse of use.

14 CHAIRPERSON LOUD: Thank you, Ms.  
15 Moldenhauer.

16 Are there others wishing to weigh  
17 in? All right.

18 There not appearing to be any, let  
19 me just go on further with respect to a  
20 resolution in this case and being real clear  
21 about moving forward in this case.

22 Initially, I was a little concerned

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1 about the fact that the 1965 BZA order  
2 referenced two service islands I think, Three  
3 bays, two service islands and that the  
4 building permit application and more  
5 importantly, the plan submitted with that  
6 application identified four service islands on  
7 the plan. That was Exhibit 5 in our file.

8           However, after reviewing the matter  
9 several times and thinking through how we  
10 typically handle these types of applications  
11 including frankly some from Mr. Koo Yuen who  
12 has operated a number of gasoline stations in  
13 the city, that if there are plans that are  
14 approved by the BZA and then subsequent to  
15 that approval there's a minor modification of  
16 those plans, then what happens is the Board  
17 will entertain a request from such an  
18 applicant who's in that situation to get our  
19 approval for the minor modification and I  
20 think that that would be an appropriate way to  
21 handle this case. That is that the increase  
22 from the two service islands approved in 1965

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1 to if these are the plans that are going to  
2 move forward, the ones that were submitted  
3 March '08 to four service islands and whatever  
4 additional changes, the canopy and the light,  
5 that that would come before the BZA as a  
6 request for a minor modification and the BZA  
7 would review our criteria for that and render  
8 a decision on that.

9 So, it's a long winded way I think  
10 of saying that I believe the Appellant has met  
11 its responsibility and burden with respect to  
12 the summary judgment. I'm in favor of  
13 granting the summary judgment and as a part of  
14 that grant, making clear to the Appellant that  
15 the appropriate way to bring this to a  
16 resolution would be to seek BZA approval for  
17 minor modification.

18 If there's nothing further from  
19 Board Members, then what I'd like to do is  
20 introduce a motion and I would like to move  
21 approval of Appeal Number 17988 Appellant's  
22 contesting of the DCRA's Notice to Revoke the

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1 building permit and more specifically,  
2 approval of the motion for summary judgment as  
3 disposing of the case.

4 MEMBER MOLDENHAUER: I second.

5 CHAIRPERSON LOUD: A motion has  
6 been made and seconded. Is there further  
7 deliberation?

8 COMMISSIONER SCHLATER: I guess  
9 it's being understood that that motion for  
10 summary judgment is subject to the condition  
11 that the Appellant has to come back for a  
12 modification of their plan.

13 CHAIRPERSON LOUD: Yes, I want to  
14 be real clear because it's a case of first  
15 impression for me, too, Mr. Schlater. So, I'm  
16 not -- I want to be real clear from the Office  
17 of OAG that as we vote on this motion we're  
18 also tying our approval to the need for the  
19 Appellant to seek further relief from the BZA  
20 as a minor modification.

21 MS. GLAZER: I think it's up to the  
22 Board. However, as a practical matter, you

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1 might want to call the Appellant up and see if  
2 the Appellant wants to make that request as  
3 part of this proceeding. Even though this is  
4 a decision meeting --

5 CHAIRPERSON LOUD: Um-hum.

6 MS. GLAZER: -- I think you can ask  
7 that question.

8 CHAIRPERSON LOUD: And if we were  
9 to do that and this Appellant were to make  
10 that request of us right now, your  
11 understanding of the advantage of that is that  
12 it would remain a part of this 17988 case and  
13 that there could be a supplemental pleading  
14 relative to the minor modification that we  
15 could decide at a subsequent decision meeting.

16 MS. GLAZER: Yes, Mr. Chair, there  
17 could be a filing -- a written filing and we  
18 could put this matter over and decide it  
19 altogether.

20 CHAIRPERSON LOUD: Okay. That  
21 makes sense to me. I don't see any reason to  
22 not entertain that process -- that approach

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1 particularly since it's being advised by  
2 counsel.

3 COMMISSIONER SCHLATER: Mr.  
4 Chairman.

5 CHAIRPERSON LOUD: Yes.

6 COMMISSIONER SCHLATER: I just want  
7 to make clear if there are modifications to  
8 the plan that the community would get due  
9 notice of them. So, I don't know what the  
10 plan is since I haven't seen the plan, but if  
11 it's got a big canopy, bright lights, a lot  
12 more pumps, that might be something that may  
13 be of interest to the community in terms of  
14 the expansion of the gas station use on the  
15 site and I just wanted to make sure that that  
16 notification would be properly made.

17 CHAIRPERSON LOUD: I think that's a  
18 good point, but when we do these minor mods,  
19 again, this is sort of a first impression for  
20 me, do we send that kind of notice out to the  
21 community or --

22 MS. GLAZER: The typical procedure

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1 would be for the applicant to make a request  
2 for a minor modification and if it -- the  
3 Board believes it's minor, no hearing would be  
4 required. However, the applicant would have  
5 to serve the parties in the previous case, the  
6 original special exception case and I don't  
7 know who those parties are.

8 CHAIRPERSON LOUD: And are we --  
9 we're not talking about the 1965 case. Are  
10 we?

11 MS. GLAZER: I guess we are.

12 CHAIRPERSON LOUD: Well, to me,  
13 that wouldn't make a lot of sense to do that.  
14 I mean they're contemporary. Well, we know  
15 that this civic association was a part of it,  
16 but we don't know from the decision whether  
17 the ANC was a part of it.

18 There's certainly more contemporary  
19 parties that would, I think to Mr. Schlater's  
20 point, would be the parties that we'd want to  
21 get notice.

22 I'm concerned about making sure

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1 that we do this according to a framework of  
2 rules that exists in our zoning regulations.

3 So, I don't know if that answers  
4 your question, Mr. Schlater, but if we can  
5 send notice to an appropriate set of parties,  
6 stakeholders under our rules, I think that we  
7 should do that and I'm looking to you, Ms.  
8 Glazer, for some guidance on how we accomplish  
9 that.

10 MS. GLAZER: Well, I'm assuming  
11 that the applicant would send notice to the  
12 ANC in the District and also DCRA would not  
13 typically get notice, but here the plans I  
14 think would be the same plans that were  
15 submitted for the building permit and I think  
16 that's part of the Board's record if I'm not  
17 mistaken.

18 But, I think the Applicant would be  
19 -- perhaps we could ask the Applicant. He's  
20 here, I see, with counsel.

21 CHAIRPERSON LOUD: Well, before we  
22 call him up, I think Mr. Moy's indicating that

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1 our rules under Section 3129 allow for the  
2 serving of notice I think to the ANC and I  
3 think the ANC and DCRA is already a party in  
4 this. So, I think if we include the ANCs, if  
5 we include DCRA, would that meet your -- okay.

6 I think that would meet the concerns of Mr.  
7 Schlater. So, I'd be very supportive of that.

8 Let me see if other Board Members  
9 want to weigh in on just this particular issue  
10 of the notice. Okay. It doesn't appear that  
11 any do.

12 So, there's motion on the table.  
13 The motion is to grant the summary judgment  
14 with the proviso that the Appellant come back  
15 to the BZA, seek a minor modification under  
16 Rule 3129 and as a part of that process, to  
17 also notify the ANC and any parties that are  
18 part of this proceeding of the modification  
19 motion.

20 And I think with that understanding  
21 why don't we now have the Appellant just  
22 indicate on the record if that is something

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1 that the Appellant is interested in doing.

2 I don't think your microphone is on  
3 yet.

4 MR. DECARO: I'm sorry. I'm sorry.  
5 I guess I have to push the button.

6 At any rate, yes, you know,  
7 generally speaking, first of all, I'd like to  
8 thank you very much for carefully considering  
9 our position.

10 Second of all, I would wonder if it  
11 would be possible for the Appellant to go  
12 forward with a two pump island construction  
13 and then request a modification at the same  
14 time with notice for the additional two pumps  
15 and any other things that may have not have  
16 been included in the first special exception  
17 use. Do you think that would be appropriate?

18 CHAIRPERSON LOUD: Well, I know  
19 there's a rule that discourages us from giving  
20 legal advice, but just to respond to what I  
21 think I'm hearing, the existing 1965 BZA order  
22 unambiguously authorized a special exception

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1 use for three bays and two service islands and  
2 that's not something that you would need  
3 additional approvals from either the Zoning  
4 Administrator or the BZA for.

5 So, if the question is can you go  
6 forward with the two service islands, I think  
7 that's a part of the underlying relief that's  
8 already been granted.

9 MR. DECARO: Okay. I just wanted  
10 to clarify that that was the Board's  
11 understanding and then we will -- I don't have  
12 any objection.

13 My client asked me to bring to the  
14 Board's attention that there had been a  
15 previous occupancy permit issued for a six-  
16 island station. Of course, you eluded to that  
17 in your opening comments and that was a six-  
18 island station for a number of years, over a  
19 decade and then so, I --

20 CHAIRPERSON LOUD: I don't see why  
21 we would entertain -- if we're having a  
22 discussion about you having to come back to

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1 the BZA just to go from two to four --

2 MR. DECARO: Um-hum.

3 CHAIRPERSON LOUD: -- why we would  
4 even entertain going from two to six without  
5 following the same procedure.

6 MR. DECARO: I'm talking about four  
7 to six. You know, in other words --

8 CHAIRPERSON LOUD: You don't have  
9 four. I mean --

10 MR. DECARO: -- six to four. No,  
11 six to four because there were six -- six were  
12 approved under that occupancy permit. We're  
13 going back to four now. So, at one time for  
14 about 11 or 12 years, it was a six-island  
15 station and now, we're asking for a four-  
16 island station.

17 I don't know if that has any  
18 precedential affect. You know, pardon my  
19 unfamiliarity with the rules here, but, you  
20 know, I guess that person just got an  
21 occupancy permit by, you know -- it was just  
22 granted and it just, you know, is an

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1 historical fact. I don't know if it has any  
2 precedential affect on our application.

3 CHAIRPERSON LOUD: Let me cut you  
4 off because I don't think we want to hear a  
5 lot of testimony on this particular issue --

6 MR. DECARO: Okay.

7 CHAIRPERSON LOUD: -- of the six  
8 versus the four.

9 MR. DECARO: Okay.

10 CHAIRPERSON LOUD: I think that  
11 whatever framework we're setting up that would  
12 allow the Appellant to go from two to four,  
13 when the Appellant submits that additional  
14 paperwork, if there's six contained in there  
15 instead of the four, I think we'll review the  
16 minor mod at that time. Then --

17 MR. DECARO: Thank you very much.

18 CHAIRPERSON LOUD: -- go through  
19 the criteria and see if it meets the criteria.

20 MR. DECARO: I'm sorry. They're  
21 not proposing we go to six. I was just saying  
22 that it had been six at one point, but I

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1 understand what you're saying and I understand  
2 about 3129 and so forth and --

3 CHAIRPERSON LOUD: Okay.

4 MR. DECARO: -- Mr. Yuen, do you  
5 wish to address the Board?

6 MR. YUEN: May I just speak  
7 regarding the six pump?

8 CHAIRPERSON LOUD: I think we don't  
9 want to. We're in the decision meeting and  
10 there's a motion that's been made, seconded  
11 and we're deliberating on the motion that's  
12 been made and seconded.

13 I think we'd opened this up.  
14 Against my better judgment, we opened this up  
15 for your counsel to just advise us as to  
16 whether or not he wanted to take advantage of  
17 the opportunity to submit a minor  
18 modification. He's answered that question.  
19 I'm assuming you agree with him on that.

20 MR. YUEN: Yes, absolutely.

21 CHAIRPERSON LOUD: And I think any  
22 further refinement can probably best be

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1 submitted as a part of whatever minor  
2 modification submission that you make to the  
3 BZA.

4 MR. YUEN: Mr. Loud, if you indulge  
5 me, I just want to speak for about 15 seconds.

6 We actually have a four-pump  
7 situation versus six pump that was granted on  
8 the occupancy permit, but however that may be,  
9 I like the opportunity to reduce to the two  
10 pump so that we'll comply with the 1966  
11 approval without any change so that we can  
12 proceed with the construction and then if  
13 there's a time later that we'd like to  
14 increase the use to four -- four island, then  
15 I will use that discretion by mean of the  
16 minor modification at that moment, sir.

17 So, and I -- my situation at this  
18 moment is to be able to make a statement to  
19 the Board to rule that I can go ahead and  
20 proceed with two island.

21 CHAIRPERSON LOUD: Okay. Let's  
22 move on because your counsel has raised that

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1 previously. I think I've responded to it  
2 previously regarding the MLW analysis and I  
3 think what the Board will vote on in a moment  
4 I think there's support for the idea that the  
5 special exception granted in 1965 vested a  
6 right for a continuous gas station at that  
7 location for two. Clearly for two.

8 So, I think we can reengage back  
9 into deliberation and see if there --

10 MR. DECARO: Mr. Chairman, I just  
11 have one. I'm sorry. I hate to interrupt  
12 you.

13 I just have one more point for the  
14 record and that is we did not waive our  
15 latches argument. If there's an appeal, I  
16 just want to put that on the record.

17 We did waive our service of process  
18 argument.

19 Thank you.

20 CHAIRPERSON LOUD: Thank you. Back  
21 in deliberation, is there further deliberation  
22 from the Board on the motion as seconded?

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1                   MEMBER MOLDENHAUER:       There's no  
2 further deliberation, but for the record, I  
3 believe that we have to state that certain  
4 parties have read the record. I've read the  
5 record to date and I believe -- and that's  
6 fine. I just want to make sure that's on the  
7 record.

8                   CHAIRPERSON LOUD:       Thank you, Ms.  
9 Moldenhauer.

10                  All right. So, the motion's been  
11 made. The motion's been seconded. Is there  
12 further deliberation?

13                  Hearing none, all those in favor  
14 say aye.

15                  (Ayes.)

16                  CHAIRPERSON LOUD:       All those who  
17 oppose? Are there any abstentions? And Mr.  
18 Moy, can you read back the vote please?

19                  MR. MOY:       Yes, sir, staff would  
20 record the vote as 4 to 0 to 1. I'm smiling  
21 because I'm seeing a full Board for a long  
22 time. And this on the motion of the Chair Mr.

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1 Loud to grant the summary judgment under the  
2 proviso that the Applicant would be filing for  
3 further -- seeking further relief pursuant to  
4 Section 3129 for minor modification of  
5 approved plans. Seconded the motion Ms.  
6 Moldenhauer who has read the record, reviewed  
7 the record. Also in support of the motion,  
8 Mr. Schlater and Mr. Dettman. Ms. Sorg the  
9 newest member is present but not participating  
10 on this application. So, again, it's 4 to 0  
11 to 1.

12 CHAIRPERSON LOUD: Thank you, Mr.  
13 Moy. Thank you, Appellant and Appellee and we  
14 appreciate your patience. We appreciate the  
15 professional quality of the briefing and the  
16 presentation as well.

17 I think that we have another order  
18 of business to get to before we do the --  
19 before the Emory case is called and I turn it  
20 over to Vice Chair Dettman to take us through  
21 the Emory and that would be the Board  
22 regulations require us to hold our elections

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1 in January.

2 I think it's the first meeting in  
3 January and so, I'd like to see if we could do  
4 our elections for the BZA and I'm not --  
5 haven't gone through this before. So, I'm not  
6 totally familiar with the level of formality,  
7 but I know that there are some nominations  
8 that Board Members want to make and then we'll  
9 vote on each and we'll move on with the next  
10 business on our calendar.

11 So, the first office is the office  
12 of Chair and I'd like to open it up to see if  
13 there are any nominations.

14 MEMBER MOLDENHAUER: I would like  
15 to nominate Marc Loud for Chair.

16 VICE CHAIRPERSON DETTMAN: I will  
17 second that motion and commend Mr. Loud for  
18 the job that he's done over the last year as  
19 Chairman.

20 CHAIRPERSON LOUD: Motion's been  
21 made and seconded. Is there further  
22 deliberation?

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1                   Hearing none, all those in favor  
2 say aye.

3                   (Ayes.)

4                   CHAIRPERSON LOUD: All those who  
5 oppose and are there any abstentions? Mr.  
6 Moy, can you read back the vote please?

7                   MR. MOY: Yes, sir, with pleasure.

8                   The nomination is to nominate the current  
9 Chair Mr. Loud as Chair for this coming year.

10                  Motion made by Ms. Moldenhauer. Seconded by  
11 Mr. Dettman. In support of the motion, Mr.  
12 Schlater. I'm assuming Ms. Sorg and I'm  
13 assuming also Mr. Loud. So, that's 5 to 0 to  
14 0.

15                  CHAIRPERSON LOUD: Thank you, Mr.  
16 Moy. Thank you, Ms. Moldenhauer, Mr. Dettman  
17 for your very kind remarks.

18                  I've had the privilege in my life  
19 of working with very, very bright people  
20 before, but I've never worked with very, very  
21 bright people who happen to be just as nice as  
22 everybody is at BZA and OZ and it's really a

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1 pleasure to serve as your Chair.

2 I think my job is to not mess  
3 anything up and allow the creativity and the  
4 intelligence that's here to come out in every  
5 case and I think we're all doing a good job of  
6 doing that.

7 Now, for the office of Vice Chair,  
8 I would like to nominate Mr. Shane Dettman.  
9 Mr. Dettman has been Vice Chair for the last  
10 year. He's been outstanding member of the  
11 BZA. He's been an aide to me as well on many  
12 issues and many cases that have come before  
13 BZA.

14 He's also had the duty as it were  
15 to serve as Chair for about a month  
16 continuously when I was not able to come  
17 before the BZA for personal reasons I think  
18 from December 5 to January -- around January 5  
19 and did an outstanding job and I think he's  
20 well qualified to serve not only as Vice  
21 Chair, but as Chair himself one day.

22 So, I'm very happy to nominate

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1 Shane Dettman as Vice Chair of BZA.

2 MEMBER MOLDENHAUER: I second. I  
3 think Mr. Dettman has done an amazing job and  
4 I was party to his great work during the  
5 December time frame.

6 CHAIRPERSON LOUD: Motion's been  
7 made and seconded. Is there further  
8 deliberation?

9 Hearing none, all those in favor  
10 say aye.

11 (Ayes.)

12 CHAIRPERSON LOUD: All those who  
13 oppose and are there any abstentions?

14 Mr. Moy, can you read back the vote  
15 please?

16 MR. MOY: Yes, sir, with pleasure,  
17 Mr. Chairman, that the final vote is 5 to 0 to  
18 0. This was on the motion of the Chairman to  
19 nominate Mr. Dettman as Vice Chairman for this  
20 coming year. Seconded by Ms. Moldenhauer.  
21 Also in support of the motion, Ms. Sorg, Mr.  
22 Schlater and I'm assuming also Mr. Dettman.

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1 So, again, it's 5 to 0 to 0.

2 Congratulations.

3 VICE CHAIRPERSON DETTMAN: Mr.  
4 Chairman, if I might make a remark.

5 Thank you for your comments. I  
6 very much appreciate that. I did contemplate  
7 voting against myself, but I have thoroughly  
8 enjoyed my time on the Board here and have  
9 learned something new every single Tuesday and  
10 very much look forward to every single week at  
11 the BZA and very much appreciate working with  
12 you, Mr. Loud.

13 Welcome, Ms. Sorg.

14 It's really great to have a full  
15 Board here. It's been a long time and it's  
16 going to be great being able to have a full  
17 Board and to make some very well informed  
18 decisions on the Board.

19 And then to Mr. Schlater and Ms.  
20 Moldenhauer, again, it's been great getting to  
21 know you and learning from you and working  
22 with you and again, all of the members of in

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1 Zoning Commission. They bring such a great  
2 perspective to the Board and really came  
3 through when we were down to three making sure  
4 that we had adequate coverage and I think  
5 that's a testament to the dedication of Mr.  
6 Hood to servicing the Board.

7 So, thank you.

8 CHAIRPERSON LOUD: Thank you, Mr.  
9 Dettman and I believe that we'll move on to  
10 the next item on the calendar which would be  
11 the Emory case and I'm going to depart because  
12 I recused myself earlier. I'm going to hand  
13 it over to Vice Chair Dettman.

14 VICE CHAIRPERSON DETTMAN: Thank  
15 you, Chairman Loud.

16 Ms. Bailey, if you're ready, why  
17 don't we go ahead and call the Emory case.

18 MR. MOY: I'll entertain that if I  
19 may --

20 VICE CHAIRPERSON DETTMAN: Oh,  
21 that's right.

22 MR. MOY: -- for the public

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1 meeting.

2 VICE CHAIRPERSON DETTMAN: That's  
3 right.

4 MR. MOY: That's fine.

5 This would be Application Number  
6 17964 of Emory Methodist Church pursuant to 11  
7 DCMR 3104.1 and 3103.2 for a variance from the  
8 height requirements under Section 770, a  
9 variance from the floor area ratio  
10 requirements under Subsection 771.2, a  
11 variance from the lot occupancy requirements  
12 under Section 772, a variance from the loading  
13 facility requirements under Section 2201 and a  
14 special exception for multiple roof structures  
15 and required setbacks under 770.6(a), 777 and  
16 411.11 to allow for construction of a new  
17 building containing church, office, retail,  
18 residential and recreation uses in the C-2-A  
19 District. This is at premises 6100-6120  
20 Georgia Avenue, N.W. The property is in  
21 Square 2940, Lots 801, 802, 808 and 813.

22 On December 15th, 2009 public

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1 hearing, the Board completed public testimony,  
2 closed the record and scheduled its decision  
3 on January 26. The Board requested additional  
4 information to supplement the record from the  
5 Applicant.

6 Mr. Chairman, I'm going to go very  
7 quickly. I'm going to group some of the  
8 filings that have been entered into the  
9 record. There have been a number of filings  
10 in addition to filings that have been  
11 requested by the Board.

12 First and foremost is that the  
13 Applicant filed a motion requesting the Board  
14 to delay its decision until February 23rd,  
15 2010 and that's in your case folders  
16 identified as Exhibit 58.

17 The next grouping is of filings  
18 that were requested by the Board. The first  
19 is a filing from Ms. D. Kamili Anderson.  
20 Testimony that was presented at the public  
21 hearing. That is identified as Exhibit 51.

22 The second filing which was

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1 requested by the Board from the Applicant is  
2 identified as Exhibit 53. It's a preliminary  
3 matter because it's untimely since it was --  
4 the deadline was December 28th. It was  
5 received in the office December 30th.

6 We also have in our next grouping  
7 of filings a filing from Mr. Burn, Exhibit  
8 Number 52. Apparently this filing is a  
9 corrected letter to replace a letter that he  
10 filed earlier in the hearing identified as  
11 Exhibit 45, but this filing's Exhibit 52.

12 The next series of filings, Mr.  
13 Chairman, are untimely because the record was  
14 closed on December 15th and I'm just going to  
15 go very quickly and identify the case exhibit  
16 number.

17 Is Exhibit Number 50, Exhibit  
18 Number 54, 55, 56, 57, 59 and there was a  
19 filing that was submitted today January the  
20 26th which is Exhibit Number 60.

21 So, the Board is to act on the  
22 preliminary motion -- on the motion to

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1 postpone its decision and depending on the  
2 outcome of that Board's decision, then act on  
3 the merits of the requested multiple zoning  
4 related.

5 That completes the staff's  
6 briefing, Mr. Chairman.

7 VICE CHAIRPERSON DETTMAN: All  
8 right. Thank you, Mr. Moy. I appreciate  
9 that.

10 Colleagues, I guess I see that the  
11 Applicant's representative is here and Mr.  
12 Keys, although the Board's in deliberation, I  
13 think we may need to hear from you on a couple  
14 of issues.

15 But, before we get there,  
16 colleagues, I would suggest that the order of  
17 procedure could be that we would take up the  
18 motion for postponement which was submitted by  
19 the Applicant in our Exhibit Number 58. We  
20 can address that motion and then going  
21 further, we can decide whether or not at this  
22 point we want to address the late filings.

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1           We need to address the late filing,  
2           our Exhibit Number 53, which was the  
3           Applicant's submission of the photos that we  
4           requested. So, we need to take that up as a  
5           late filing.

6           And then collectively, I think we  
7           can look at whether or not we want to address  
8           the other additional late filings that Mr. Moy  
9           described.

10           So, colleagues, is that on the  
11           right course of action? Okay.

12           MR. KEYS: Excuse me, Mr. Chairman.

13           VICE CHAIRPERSON DETTMAN: Yes,  
14           sir.

15           MR. KEYS: I'd like to take issue  
16           with the statement that the filing was late.  
17           The filing was timely. I don't think the  
18           Board -- the staff, Office of Zoning, opened  
19           the e-mail, but we certainly got it here on  
20           the day it was to be filed.

21           So, I think -- I mean I'd like to  
22           engage on that question if at all possible.

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1 Because there's no need for consideration of a  
2 late filing.

3 VICE CHAIRPERSON DETTMAN: Okay.  
4 The filing we have it is dated December 28th.  
5 It is stated December 30th.

6 Would you happen to have, I guess  
7 this is a question for you, Mr. Keys, or even  
8 staff, a copy of the e-mail that was submitted  
9 along with the attached filing?

10 MR. KEYS: I don't have it with me,  
11 but I can certainly produce it.

12 This was an occasion where we got  
13 the materials late in the day. We e-mailed  
14 them over. I sent it, I believe, directly to  
15 Mr. Moy. Mr Moy was not in the office. I  
16 called and spoke to Mercedes in the Office of  
17 Zoning. She couldn't confirm its receipt  
18 because she didn't have access to Mr. Moy's e-  
19 mail.

20 So, you know, and there was not  
21 time sufficient to hand deliver before the  
22 Office of Zoning closed.

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1 I called the next day with the same  
2 result. Same problem.

3 It wasn't until Mr. Moy came back  
4 that he opened his e-mail and that was the  
5 30th when it was logged.

6 MEMBER MOLDENHAUER: Mr. Keys, can  
7 I just point out one thing. On the document,  
8 it actually says at the top, you know, hand  
9 delivery to Marc Loud, you know, Chairman of  
10 BZA and has it dated the 28th.

11 In the future, it may alleviate  
12 this problem if you are electronically sending  
13 a document with a specific date on it, you  
14 could then identify it as being electronically  
15 delivered with an e-mail address and a date  
16 and that way we would know.

17 The way that this looks at it, it  
18 says hand delivered with the date of the 28th  
19 and then it doesn't have a stamp until  
20 December 30th. So, you know, in that regard  
21 from what we're looking at, it says hand  
22 delivered and it was not actually then I guess

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1 received by hand until the 30th. So.

2 MR. KEYS: Ms. Moldenhauer, that  
3 was my oversight. The intent was hand deliver  
4 it, but we didn't get the photograph until  
5 late in the day and it was not possible to  
6 hand deliver them.

7 So, I should have changed the  
8 caption on the document. My apologies.

9 MS. BAILEY: Mr. Chair --

10 MR. KEYS: And I'll be happy to  
11 supply the e-mail of the transmittal from my  
12 end.

13 MS. BAILEY: Mr. Chairman, it is my  
14 understanding that we just recently began  
15 accepting electronic filings. We just  
16 received the official notification from the  
17 Director quite recently and heretofore, we did  
18 not accept electronic filings.

19 VICE CHAIRPERSON DETTMAN: Well,  
20 I'm going to propose this. Thank you, Ms.  
21 Bailey.

22 Mr. Moy, do you happen to recall

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1 receiving that e-mail and the date that you  
2 received it?

3 MR. MOY: Yes, now that -- the way  
4 that Mr. Keys is presenting it, it's coming  
5 back to me because I remember trying to open  
6 the graphics because I had difficulty  
7 converting the files. So, that part's coming  
8 back to me. I do remember that.

9 But, certainly, prior to the  
10 Director's new procedures for accepting e-mail  
11 transmissions, there was always the policy  
12 that the hard copies would follow into the  
13 record. So, and we took the timeliness  
14 certainly on the fax. If a document was  
15 transmitted by fax, that was the timing of the  
16 document.

17 But, I did receive it earlier.  
18 That's coming back to me.

19 VICE CHAIRPERSON DETTMAN: Well,  
20 here would be my -- this would be my proposal  
21 and I can see us approaching it in two ways  
22 and I think we get to the same spot.

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1           Because we don't have the e-mail in  
2 front of us and it's a little bit fuzzy when  
3 it was e-mailed, we can accept what we have  
4 before us, consider it a late filing and I  
5 personally -- and I'll get the comments from  
6 my colleagues here, but I personally am  
7 inclined to waive our rules. I think that  
8 there's good cause shown. They did not  
9 receive the photographs until the 11th hour  
10 and I don't see any potential for any  
11 prejudice to any other party to the case which  
12 would be only the ANC. I would be inclined to  
13 waive our rules and allow this in.

14           The second alternative before I  
15 turn it over to Ms. Sorg and Ms. Moldenhauer  
16 is that we can just put off waiving -- put off  
17 waiving this issue. Put off the issue of  
18 waiving it into the record until we reconvene  
19 in February if we are inclined to grant the  
20 motion to postpone and at that time, Mr. Keys  
21 might be able to supply that e-mail.

22           So, Board Members, do you have an

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1 opinion as to which direction you want to go?

2 MEMBER SORG: I would be more  
3 inclined to agree with your second suggestion  
4 of putting off the judgment of the late  
5 filings until after taking up the  
6 postponement.

7 MEMBER MOLDENHAUER: I would be  
8 amenable to either option. I think that we  
9 have sufficient good cause shown and we could  
10 just simply allow it in and thus whether it  
11 was late or not or it's coming into the record  
12 at this point or I'd be fine depending upon  
13 your view, Mr. Dettman, of simply just waiting  
14 as Ms. Sorg's recommends until we bring the  
15 issues at a later date.

16 VICE CHAIRPERSON DETTMAN: Then one  
17 last question before we put this issue to  
18 rest. Mr. Keys, if we were to go the route  
19 where we were going to consider this as a late  
20 filing, do you have any issues with that? The  
21 record would show that there was a late  
22 filing.

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1           If you prefer us just to put this  
2 off so that you can provide us with your e-  
3 mail, I think that I'd be amenable to that as  
4 well.

5           MR. KEYS: I think I would rather  
6 have the recognition of having timely  
7 responded to the Board's order and submitted a  
8 document on time.

9           So, I'll provide the e-mail and I  
10 can do it as soon as I get back to my office.

11           VICE CHAIRPERSON DETTMAN: Okay.  
12 And so, I think that's the direction we'll go.  
13 We'll put it off until we reconvene. Again,  
14 we're still having to take up the motion to  
15 postpone and if for some reason we can't  
16 supply the e-mail, then we'll just take this  
17 up as a late filing then.

18           Okay. Colleagues, I think our next  
19 action here is considering the Applicant's  
20 request for a postponement of our decision.  
21 That's our Exhibit Number 58 and the Applicant  
22 is requesting that the Board delay its

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1 decision until February 23rd, 2010.

2 The basis for the motion is that it  
3 appears the Applicant met with the National  
4 Park Service on December 30th, 2009 to address  
5 some of their concerns. The National Park  
6 Service did not respond until January 14th and  
7 also requested a subsequent meeting with the  
8 Applicant on January 15th.

9 The Applicant did express to the  
10 National Park Service the need to respond by  
11 the January 19th deadline.

12 So, it seems that the Applicant is  
13 just in the process of discussing the project  
14 with the National Park Service. It looks like  
15 the National Park Service submitted some  
16 variations on the project that the Applicant  
17 is willing to entertain and just needs  
18 additional time to find out whether or not the  
19 National Park Service's revisions are feasible  
20 or not.

21 So, treating this as a motion and  
22 not a late filing, I would be inclined to

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1 grant the motion and I'll turn it over to my  
2 colleagues.

3 MEMBER MOLDENHAUER: Mr. Dettman, I  
4 agree. I also think that we should consider  
5 Exhibit 60 which is a letter from the  
6 Department of Interior consenting or agreeing  
7 to the idea of an extension of time and I  
8 think that based on both of those motions  
9 there's sufficient evidence in the record to  
10 grant an extension.

11 MEMBER SORG: I should also say I  
12 guess before we move forward that I've  
13 reviewed the record and read the testimony and  
14 the case in full. So, that should allow me to  
15 be able to also weigh in on this matter.

16 VICE CHAIRPERSON DETTMAN: Ms.  
17 Sorg, are you in favor of granting the motion  
18 to postpone?

19 MEMBER SORG: Yes.

20 VICE CHAIRPERSON DETTMAN: Okay.  
21 Thank you.

22 Mr. Moy or Ms. Glazer, is this

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1 something we can do by consensus or should we  
2 make a motion? A motion on the motion?

3 MS. GLAZER: It appears that you  
4 all agree and by consensus are willing to  
5 grant an extension.

6 VICE CHAIRPERSON DETTMAN: Okay.  
7 The Applicant requested February 23rd, but  
8 maybe we can look at our calendar very quickly  
9 to see if that actually works.

10 Mr. Moy, I know we discussed this  
11 briefly.

12 I think what we'd be doing is -- I  
13 think maybe this is a question for Mr. Keys as  
14 well. What do you anticipate happening on  
15 February 23rd? Should we anticipate new  
16 plans? Is it just a -- should we schedule  
17 this for the 23rd and it's just kind of a  
18 reporting date?

19 MR. KEYS: Mr. Dettman, I think  
20 what I would look at is we're essentially  
21 requesting a 30-day extension. Which means  
22 that the week prior to the 23rd, the 16th, we

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1 would supply the Board with whatever we were  
2 going to supply the Board with.

3 That will either be revised  
4 elevations showing how we could possibly  
5 reconfigure if it's financially and  
6 architecturally structurally feasible or we'll  
7 advise the Board that, you know, our best  
8 effort was the effort we put forward on  
9 December 30th with the revised elevations that  
10 we presented and put into the record and we  
11 couldn't make this plan work and the Board  
12 would then proceed to the case on the 23rd if  
13 it fits the Board's schedule. That's what we  
14 anticipated.

15 VICE CHAIRPERSON DETTMAN: Okay.

16 MR. KEYS: We just needed -- we  
17 knew we needed at least two weeks to be able  
18 to take the suggestions to the architects, to  
19 the engineers, the builders to see if it could  
20 be accommodated.

21 VICE CHAIRPERSON DETTMAN: Do you  
22 see any potential where changes might be made

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1 to the plans that might create new areas of  
2 relief or extend the areas of relief that are  
3 being --

4 MR. KEYS: I think we indicated in  
5 the letter that one of the suggestions was  
6 that the Park Service wanted us to set back a  
7 portion of rear of the building and then  
8 wanted us to further step back the upper  
9 story. That would entail a significant loss  
10 of FAR and it was proposed, actually it was  
11 the Park Service's suggestion, that we look at  
12 additional height to pick that up and it  
13 looked as though superficially that you could  
14 recover that same area with an additional  
15 partial story on the building. That would be  
16 an increase in the height variance by 10 feet  
17 or at least 10 feet.

18 VICE CHAIRPERSON DETTMAN: Should  
19 the Board have any concern about notice issues  
20 then with such a -- I'll call it a drastic  
21 change in plans? It's a 10-foot increase in  
22 the height variance and --

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1 MR. KEYS: I think the Board would  
2 have to decide that.

3 VICE CHAIRPERSON DETTMAN: Okay.

4 MR. KEYS: If it's presented. I'm  
5 not saying that that's what's going to be  
6 presented, but I was just saying that that was  
7 where the discussion went and I wanted the  
8 Board to understand the significant nature of  
9 what the Park Service is requesting. I mean  
10 this is not a facade treatment.

11 This would be below grade/above  
12 grade significant alteration in the design of  
13 the north part of the building.

14 VICE CHAIRPERSON DETTMAN: Well,  
15 here's what I think we can do. We can set it.  
16 Mr. Moy, if February 23rd works, we can set  
17 it for decision and that would be the morning  
18 of the 23rd? Mr. Moy, does that work?

19 MR. MOY: Yes, that's correct.

20 VICE CHAIRPERSON DETTMAN: Okay.  
21 We can set it for decision in the event that  
22 there are no further changes to the plans or

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1 there are changes to the plans, but the net  
2 result is a reduction in the areas of relief  
3 for the magnitude of the relief that's being  
4 requested and I guess kind of hold on the side  
5 whether or not -- if there are changes to the  
6 plans that create new areas of relief or  
7 drastically increase what's being requested,  
8 then at that time the Board can take up  
9 whether or not we have to address any notice  
10 issues with the community and whatnot and so,  
11 why don't we put that in for February 23rd for  
12 the morning for a decision.

13 And then finally, to address the  
14 number of additional filings that we received  
15 and Mr. Moy, you read them off, Exhibits 50,  
16 54-57, 59 and 60, I think the standard that we  
17 used in order to decide whether or not to  
18 waive filings into the record once the record  
19 is closed is 3100.5. That for good cause  
20 shown and no prejudice to any party, the Board  
21 can waive their rules, open up the record and  
22 allow it in.

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1 I think since we have an additional  
2 party to this case which is the ANC and it  
3 doesn't appear as if they're here, I think at  
4 the February 23rd date we can address whether  
5 or not the Board wants to open up the record  
6 and allow these in once we get the input from  
7 all the parties in the case.

8 MEMBER MOLDENHAUER: I agree with  
9 you. I think that the one modification to  
10 your statement would be that Exhibit Number 60  
11 is not an additional exhibit, but rather a  
12 response to Mr. Keys' motion which was Exhibit  
13 58. So, I think that all of the other  
14 elements we can just simply wait and address  
15 as additional exhibits.

16 VICE CHAIRPERSON DETTMAN: I think  
17 maybe between now and then, too, I know that  
18 we had one filing that was simply a corrected  
19 letter and another one that appears to be from  
20 the Civil War Roundtable I think. It was  
21 actually verbatim from an earlier filing and  
22 so, maybe we can take a look at those during

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1 the postponement period and decide which ones  
2 actually are new material coming into the  
3 record and which ones are just redundant.

4 I think that takes care of all the  
5 issues that we need to address. I did want to  
6 say that, and hopefully the National Park  
7 Service is watching, that the Board has  
8 granted a postponement here simply -- mainly  
9 because of the National Park Service getting  
10 back to the Applicant at such a later hour and  
11 I'm actually pleased to see that the Applicant  
12 is open to working with the National Park  
13 Service given the opposition in this case even  
14 though they don't have to.

15 So, if the National Park Service is  
16 watching, I certainly hope that during this  
17 month-long period they are as vigilant in  
18 pursuing whatever issues are outstanding with  
19 this case just like the Applicant has been.

20 So, I think that completes  
21 everything I want to say. Colleagues,  
22 anything?

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1                   MS. GLAZER:       Mr. Chair, just  
2                   briefly, procedural question. If this is set  
3                   only for decision, does that mean that the ANC  
4                   will not be present? Do you want the ANC  
5                   present in the event that there is discussion  
6                   about how to proceed and notice or see if the  
7                   ANC has any comments or response to any  
8                   revisions that may come in?

9                   Presumably, there will be a  
10                  response from the ANC as to whether they agree  
11                  or disagree to the new proposal if there is  
12                  one.

13                  VICE CHAIRPERSON DETTMAN: Thank  
14                  you, Ms. Glazer. If there were substantial  
15                  changes made to the plans and the ANC showed  
16                  up on the 23rd and said that they didn't need  
17                  to review the plans again at a monthly or  
18                  anything like that, would that allow the Board  
19                  to go forward?

20                  MS. GLAZER: I think it's difficult  
21                  to evaluate this in the abstract.  
22                  That was why I had previously suggested that

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1 you use the 23rd as more of a conference  
2 reporting date with all of the parties present  
3 to determine how to approach it afterwards,  
4 after we see, you know, what the Applicant is  
5 going to do in terms of the revision.

6 VICE CHAIRPERSON DETTMAN: Okay.  
7 Well, why don't we do this then? Mr. Moy, can  
8 we contact the ANC and ask them to send a  
9 representative on the 23rd and if in the event  
10 that we're going to go forward, then we're  
11 just into the deliberations and we'll make our  
12 decision, but otherwise, if we see a need to  
13 push it off further in order to take care of  
14 any notice and community input issues, we'll  
15 at least have them here to address the late  
16 filings and we can dispose of that issue at  
17 that date?

18 MR. MOY: Staff can take care of  
19 that.

20 VICE CHAIRPERSON DETTMAN: Okay.  
21 Thank you.

22 MEMBER MOLDENHAUER: Mr. Dettman,

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1 just for the record, I just want to clarify  
2 that if the Applicant feels as though they can  
3 work with the Park Service and they are going  
4 to potentially take on some of these  
5 modifications and thus have some potential  
6 changes to their design and they know that  
7 prior to February 16th, it may behoove them  
8 for their own time efficiency, I know this  
9 project has been long outstanding, to contact  
10 the ANC or contact Mr. Moy and try to  
11 determine an earlier date.

12 If it's necessary, what notices  
13 need to go out so that, you know, if we don't  
14 need to have a decision or we can't have a  
15 decision on the 23rd that potentially certain  
16 time requirements are already starting to  
17 toll.

18 Again, you know, as, you know, OAG  
19 said this is all hypothetical. We don't know  
20 what will actually happen, but if it doesn't,  
21 we're just trying to put everything on the  
22 record so that if there is some additional

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1 notice that needs to go out we don't have to  
2 specifically wait until the 16th or the 23rd  
3 to start that.

4 So, I'm just throwing it out there  
5 on the record for all parties.

6 VICE CHAIRPERSON DETTMAN: Thank  
7 you, Ms. Moldenhauer. It's a very good point.

8 And I guess with that, if there are  
9 no other issues --

10 MR. MOY: Mr. Chairman, if I may  
11 intervene for a second. Just to note for the  
12 record that Mr. Anthony Hood's also  
13 participating on the application. He did file  
14 an absentee ballot to agree to postpone the  
15 Board's decision to a later date.

16 VICE CHAIRPERSON DETTMAN: Thank  
17 you, Mr. Moy. So, it's unanimous -- unanimous  
18 consent and I guess we'll see you, Mr. Keys,  
19 on the 23rd.

20 MR. KEYS: Thank you, Mr. Dettman.  
21 Thank you.

22 VICE CHAIRPERSON DETTMAN: Mr. Moy,

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1 Ms. Bailey, does that complete our day?

2 MR. MOY: Yes, as far as I'm  
3 concerned.

4 VICE CHAIRPERSON DETTMAN: Great.  
5 Well, once again, welcome, Ms. Sorg. It's a  
6 good first day. It's only 2:43.

7 MEMBER SORG: I know. Thank you  
8 very much.

9 VICE CHAIRPERSON DETTMAN: And  
10 we'll stand adjourned.

11 (Whereupon, the meeting was  
12 concluded at 2:45 p.m.)

13

14

15

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