

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC HEARING

+ + + + +

TUESDAY,

FEBRUARY 2, 2010

+ + + + +

The Regular Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 10:00 a.m., Marc D. Loud, Chairman, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

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

ZONING COMMISSION MEMBER PRESENT:

KONRAD SCHLATER	Commissioner
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OFFICE OF ZONING STAFF PRESENT:

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

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D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

SHERRY GLAZER, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

KAREN THOMAS
ARTHUR JACKSON
PAUL GOLDSTEIN

This transcript constitutes the minutes from the Public Hearing held on February 2, 2010.

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

10:07 a.m.

CHAIRMAN LOUD: I believe we are going to be starting the a.m. hearing. It looks like all decks are back on hand.

This hearing will, please, come to order. Ladies and gentlemen, this is the February 2nd Public Hearing of the Board of Zoning Adjustment of the District of Columbia.

As distinct from the Public Decision Meeting, you heard me go through most of this a few moments ago with respect to the Decision Meeting, but our rules require that the same introduction be made as we move into the hearing part of the day's calendar.

My name is Marc Loud. I'm chairperson. Joining me today are Vice Chair, Shane Dettman, representing the National Capital Planning Commission, Meridith Moldenhauer, representing BZA. Our new Board Member, Ms. Nicki Sorg on BZA.

Mr. Clifford Moy, Secretary of BZA,

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1 Ms. Sherry Glazer, Office of the Attorney
2 General, and Ms. Beverley Bailey, Zoning
3 Specialist in the Office of Zoning.

4 Copies of today's hearing agenda
5 are available to you and are located to my
6 left in the wall bin near the door. Please,
7 be advised that this proceeding is being
8 recorded by a Court Reporter and is also
9 webcast live. Accordingly, we must ask you to
10 refrain from any disruptive noises or actions
11 in the hearing room.

12 When presenting information to the
13 Board, please, turn on and speak into the
14 microphone, first, stating your name and home
15 address. When you are finished speaking,
16 please, turn your microphone off, so that your
17 microphone is no longer picking up sound or
18 background noise.

19 All persons planning to testify
20 either in favor or in opposition are to fill
21 out two witness cards. These cards are
22 located to my left on the table near the door

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1 and on the witness tables. Upon coming
2 forward to speak to the Board, please, give
3 both cards to the reporter sitting to my
4 right.

5 The order of procedure for special
6 exceptions and variances is as follows:
7 First, statement and witnesses of the
8 applicant. Second, Government reports,
9 including the Office of Planning, the
10 Department of Public Works, etcetera. Third,
11 the report of the Advisory Neighborhood
12 Commission. Fourth, parties or persons in
13 support, followed by parties or persons in
14 opposition. And then ending with closing
15 remarks by the applicant only.

16 Pursuant to Sections 3117.4 and
17 3117.5, the following time constraints will be
18 maintained: The applicant, appellant, persons
19 and parties, except an ANC, in support,
20 including witnesses, no more than 60 minutes
21 collectively. The appellee, persons and
22 parties, except an ANC, in opposition,

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1 including witnesses, again no more than 60
2 minutes collectively. Individuals are given 3
3 minutes to provide testimony. Individuals
4 representing organizations are given 5 minutes
5 to provide testimony.

6 These time restraints do not
7 include cross examination and/or questions
8 from the Board. Cross examination of
9 witnesses is permitted only by an applicant or
10 parties to the proceeding. The ANC within
11 which the property is located is automatically
12 a party in a special exception or variance
13 case.

14 Nothing prohibits the Board from
15 placing reasonable restrictions on cross
16 examination.

17 The record will be closed at the
18 conclusion of each case, except for any
19 material specifically requested by the Board.

20 The Board and the staff will specify at the
21 end of each hearing exactly what is expected
22 and the date when the persons must submit the

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1 evidence to the Office of Zoning. After the
2 record is closed, no other information will be
3 accepted by the Board.

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

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

13 The Board will now consider any
14 preliminary matters for this morning's
15 calendar. Preliminary matters are those which
16 relate to whether a case will or should be
17 heard today, such as requests for
18 postponement, continuance or withdrawal or
19 whether proper and adequate notice of the
20 hearing has been given. If you are not
21 prepared to go forward with a case on this
22 morning's calendar or if you believe that the

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1 Board should not proceed, now is the time to
2 raise such a matter.

3 Does the staff have any preliminary
4 matters?

5 MS. BAILEY: Mr. Chairman, Members
6 of the Board, and to everyone, good morning.
7 No, Mr. Chairman, I do not.

8 CHAIRMAN LOUD: Thank you, Ms.
9 Bailey, and good morning to you. Then why
10 don't we proceed with the first case on this
11 morning's calendar?

12 If you are planning to provide
13 testimony this morning, as Ms. Bailey had
14 indicated, you should stand and raise your
15 right hand and she will talk you through the
16 oath.

17 (Whereupon, the witnesses were
18 sworn.)

19 MS. BAILEY: Thank you.

20 CHAIRMAN LOUD: Thank you. And
21 good morning to everyone. Just by a show of
22 hands very briefly, we had five persons stand

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1 for the three cases that we have on this
2 morning's calendar. How many of those
3 witnesses are going to be in the, I hope I'm
4 pronouncing this correctly, Gudiswitz case?
5 Okay. Three, okay. Very good.

6 And how many witnesses will be for
7 the Maish case, M-A-I-S-H? Very good. Good
8 morning. And then finally, for the Saint
9 John's case? Are there any witnesses for
10 Saint John's? Okay. Very good. Thank you to
11 each of you and good morning again.

12 I believe you are going to call the
13 first case.

14 MS. BAILEY: Yes, Mr. Chairman.

15 CHAIRMAN LOUD: All right.

16 MS. BAILEY: Thank you.
17 Application No. 18026. This is the
18 application of Sheila Gudiswitz and it's
19 pursuant to 11 DCMR § 3104.1, for a special
20 exception to construct a rear terrace, that's
21 a deck and stair, addition to an existing one-
22 family row dwelling under section 223, not

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1 meeting the lot occupancy, that's section 403,
2 rear yard, section 404, requirements. The
3 property is Zoned R-4. It is located at 1845
4 Ingleside Terrace, N.W., Square 2617, Lot 148.

5 CHAIRMAN LOUD: Good morning. How
6 is everybody this morning?

7 ALL: Good.

8 CHAIRMAN LOUD: Good. Why don't
9 each of you introduce yourselves for our
10 record? And we can start on my left with you,
11 Commissioner.

12 MR. MCKAY: Jack McKay speaking for
13 ANC-1D.

14 MS. GUDISWITZ: Sheila Gudiswitz,
15 the homeowner at 1845 Ingleside Terrace.

16 MR. MINTON: Michael Minton,
17 architect in support of Sheila Gudiswitz.

18 CHAIRMAN LOUD: Good morning to
19 each of you. Let me commend you on a well put
20 together application this morning and commend
21 you for the outreach to the community and the
22 ANC.

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1 I believe our record is full and we
2 are prepared to either hear the case in terms
3 of a full presentation or move on the record
4 as it was presented to us. And I think I'm
5 going to ask Mr. Dettman to walk us through
6 your thoughts on this.

7 VICE CHAIRMAN DETTMAN: Thank you,
8 Mr. Chairman. Before I go into the Board's
9 analysis of the case under 223, if you don't
10 mind, I would like to ask maybe just one
11 question of the applicant.

12 And just for the record, I wanted
13 to find out whether or not you discussed your
14 application with your adjacent neighbors? And
15 that maybe we could get some thoughts on the
16 record from the ANC representative with
17 respect to their position on the case.

18 MS. GUDISWITZ: Yes. We did
19 discuss it with our adjacent neighbors before
20 the ANC hearing and including this weekend
21 when they happened to be over. To the right
22 side of the house is a rental housing, so we

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1 have talked to the guys there, but they are
2 less concerned than the family to the left.
3 And they did not have any issues.

4 VICE CHAIRMAN DETTMAN: Okay.
5 Great. Thank you.

6 MR. MCKAY: Speaking as the
7 representative for this area, I could identify
8 no quarrels with what the resident wishes to
9 do.

10 VICE CHAIRMAN DETTMAN: Okay.
11 Thank you. Thank you, Mr. Chairman. And if
12 there are no other questions of the Board for
13 the applicant, I can go into our analysis for
14 this case.

15 And in lieu of taking the Board
16 through the individual provisions of 223, I
17 can simply incorporate by reference the Office
18 of Planning's report, which is our Exhibit No.
19 22, and acknowledge their well-written report.

20 The Office of Planning is in
21 support of the application. And again, that's
22 our Exhibit No. 23.

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1 As stated by the applicant, she has
2 discussed the project with her adjacent
3 neighbors and the adjacent neighbors have not
4 raised any opposition to the case and the ANC
5 is also in support, as indicated in the Office
6 of Planning's report as well as by Mr. McKay
7 before us today.

8 So that being said, Mr. Chairman,
9 I'm certainly in support of the application
10 and would move for approval of Application No.
11 18026, pursuant to 11 DCMR 3104.1, for a
12 special exception to construct a rear terrace
13 and stair addition to an existing one-family
14 row dwelling, under section 223, not meeting
15 the lot occupancy requirements of 403, rear
16 yard requirements of 404, and I think, as
17 indicated in the Office of Planning's report,
18 the minimum lot dimension requirements of
19 section 401 at a premises located at 1845
20 Ingleside Terrace, N.W.

21 CHAIRMAN LOUD: Thank you, Mr.
22 Dettman. The motion has been made. I second

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1 the motion. Is there further discussion? The
2 motion has been made and seconded. As Mr.
3 Dettman indicated, this is confirmed by the
4 ANC testimony and that of the applicant
5 itself, there is tremendous support for it in
6 the community and the Office of Planning
7 issued a report recommending approval of it.
8 And they walked through light, air analysis
9 that we typically do.

10 And Mr. Dettman incorporated that
11 by reference into his comments. So the motion
12 has been made and seconded.

13 Hearing no further discussion, all
14 those in favor say aye.

15 ALL: Aye.

16 CHAIRMAN LOUD: All those who
17 oppose and/or any absentees, abstentions,
18 rather? And, Ms. Bailey, can you read back
19 the vote?

20 MS. BAILEY: Mr. Chairman, the vote
21 is recorded as 4-0-1 to grant the application
22 as it was amended. Board Member Dettman made

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1 the motion, Chairman Loud seconded, Mrs.
2 Moldenhauer and Board Member Sorg approve of
3 the motion. There is no Zoning Commission
4 present at this time.

5 CHAIRMAN LOUD: Thank you, Ms.
6 Bailey. There being no opposition, we can do
7 this as a summary.

8 MS. BAILEY: Summary order it is,
9 Mr. Chairman.

10 CHAIRMAN LOUD: Thank you. And
11 thank you to the applicants as well. Thank
12 you, Mr. Dettman, for your analysis and taking
13 us through that case.

14 Ms. Bailey, when you are ready, you
15 can call the 18030 case.

16 MS. BAILEY: Thank you, Mr.
17 Chairman. This is the application of Kemba A.
18 Maish and it is pursuant to 11 DCMR § 3104.2,
19 for a special exception to construct an
20 accessory detached garage serving a one-family
21 row dwelling under section 223, not meeting
22 the lot occupancy requirements of section 403.

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1 The property is Zoned R-3. It is located at
2 4619 5th Street, N.W., Square 3249, Lot 78.

3 CHAIRMAN LOUD: Thank you, Ms.
4 Bailey. And good morning. Can you state your
5 name for the record? I think Commissioner is
6 going to help you out. There you go. Thank
7 you, Commissioner.

8 MS. MAISH: Kemba Maish, 4619 5th
9 Street, N.W.

10 CHAIRMAN LOUD: Good morning. It's
11 Dr. Kaish? Okay. Good morning. I was
12 mispronouncing that.

13 MS. MAISH: Maish.

14 CHAIRMAN LOUD: Dr. Maish, Maish.

15 MS. MAISH: Maish.

16 CHAIRMAN LOUD: Okay. Thank you.
17 Dr. Maish, we have taken a look at your
18 application for what we call section 223
19 relief, addition to single-family dwelling now
20 meeting the lot occupancy requirements in the
21 R-3 under our section 403.2, a lot of
22 regulatory-ese language for saying that.

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1 It's a fairly minor request that
2 our rules authorize under section 223,
3 provided that the elements of those provisions
4 are met.

5 In your case, the Office of
6 Planning did a review and analysis of the
7 case. They recommend approval and they walked
8 through a light and air impact analysis and so
9 on and so forth.

10 So I believe that we think the
11 record is full. We think you pulled together
12 a very good application. ANC-4C, at our
13 Exhibit 21, did submit a report. They are
14 also in support of the application.

15 And we think that based on the
16 record before us, we have enough information
17 to vote. In my case affirmatively, I can't
18 speak for everyone else.

19 Is there anything that you would
20 like to add?

21 MS. MAISH: No, not at this time.

22 CHAIRMAN LOUD: Okay. Then what I

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1 would suggest, let me just turn to the Office
2 of Planning, so that Mr. Jackson could at
3 least introduce himself for the record. And
4 then if there is nothing you want to add,
5 certainly you are free to add anything, we
6 will go into deliberation on it.

7 MR. JACKSON: Mr. Chairman, thank
8 you for the acknowledgement. We don't have
9 anything to add for the record. In fact, we
10 will stand on the record.

11 CHAIRMAN LOUD: Okay.

12 MR. JACKSON: And we continue to
13 recommend approval of this application.

14 CHAIRMAN LOUD: Okay. Thank you
15 very much. Let me see if Board colleagues
16 have any thoughts or reflections on the case
17 that you wanted to offer.

18 Okay. Then what I would do is
19 recommend that we go into deliberation on it
20 very briefly. As indicated, it is an
21 application for 223. The applicant is adding
22 a garage in the rear.

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1 It doesn't meet lot occupancy.
2 There is a 60 percent cap on lot occupancy in
3 the R-3. This will take it up to 66 percent.

4 The Office of Planning, our Exhibit
5 24, did a very thorough analysis of the light
6 and air and privacy and whether there were
7 intrusions upon character and scale and so
8 forth and concluded that the applicant was
9 entitled to a recommendation of approval.

10 The ANC as well had an opportunity
11 to meet with the applicant and did submit a
12 written report in favor of the application.

13 In light of that, I would like to
14 recommend approval of this application. And
15 I'll do so by formal motion.

16 I would like to move to approve
17 Application No. 18030 of Dr. Kemba Maish,
18 special exception for a rear addition to a row
19 dwelling under section 223, in the R-3 at 4619
20 5th Street, N.W.

21 VICE CHAIRMAN DETTMAN: Second.

22 CHAIRMAN LOUD: A motion has been

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1 made and seconded. Is there further
2 discussion?

3 Hearing none, all those in favor
4 say aye.

5 ALL: Aye.

6 CHAIRMAN LOUD: Is there any
7 opposition or abstentions? Ms. Bailey, can
8 you read back the vote, please?

9 MS. BAILEY: Mr. Chairman, the vote
10 is recorded as 4-0-1 to grant the application.

11 The motion was made by Chairman Loud,
12 seconded by Vice Chairman Dettman. Board
13 Members Moldenhauer and Sorg approve of the
14 application. And a Zoning Commission Member
15 is not present today.

16 CHAIRMAN LOUD: Thank you, Ms.
17 Bailey.

18 MS. BAILEY: Summary order, Mr.
19 Chairman?

20 CHAIRMAN LOUD: Summary order, I
21 think, would be appropriate as there is no
22 opposition to it. And I would like to thank

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1 the applicant this morning and thank the
2 Office of Planning as well.

3 MS. MAISH: Thank you very much.

4 CHAIRMAN LOUD: Thank you. I
5 believe, Ms. Bailey, for our next case, the
6 Saint John's case, we received a couple of
7 filings. I received it this morning. It may
8 have come into the office yesterday. And I
9 think what we are going to do is break. If
10 you want to grab your seat early, you can, but
11 I think we're going to break for about 10
12 minutes, about 10.

13 About 10 minutes. I probably need
14 longer than Mrs. Moldenhauer. 10 minutes, so
15 that we can review some of the filings and
16 just come back out in about 10 minutes. Okay.

17 Okay. And, Mrs. Moldenhauer had a
18 good question regarding whether there are any
19 parties present in the room right now who are
20 going to be in opposition to the application?

21 Okay. We will break and come back about
22 10:30 or so.

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1 (Whereupon, at 10:23 a.m. a recess
2 until 10:59 a.m.)

3 CHAIRMAN LOUD: Good morning. We
4 are back in order. The hearing is back to
5 order with respect to the February 2nd
6 calendar. I believe we had one final case for
7 this morning and Ms. Bailey is going to call
8 that case.

9 MS. BAILEY: Mr. Chairman, it's the
10 application of Saint John's College, Inc. and
11 it is No. 18025, and it is pursuant to 11 DCMR
12 § 3104.1, for a special exception to allow the
13 installation of three Cricket
14 telecommunication antennas on an existing
15 Stealth flag pole and related ground equipment
16 under section 2706.

17 CHAIRMAN LOUD: Thank you, Ms.
18 Bailey. Is the ANC present in this case? It
19 doesn't appear as such. Okay.

20 Why don't we have you introduce
21 yourself for our record.

22 MR. DONOHUE: Okay. After all that

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1 time, good morning, Mr. Chair, Members of the
2 Board. My name is Ed Donohue on behalf of the
3 applicant, Cricket Communications. With me is
4 Erik Bohn and Jim McConnell, both in support
5 of the application.

6 CHAIRMAN LOUD: Thank you and good
7 morning to you. And I saw one of your clients
8 raise his hand this morning to give testimony?

9 MR. DONOHUE: He did. And the
10 other was a little late, so if you want to
11 swear in Mr. McConnell, that's probably a good
12 idea.

13 CHAIRMAN LOUD: Sure. Why don't we
14 do that?

15 (Whereupon, the witness was sworn.)

16 CHAIRMAN LOUD: Just very briefly,
17 what's the proffer of testimony for the two
18 and the distinction between their testimony?

19 MR. DONOHUE: Mr. Chairman, I asked
20 that they both be sworn and, of course, wanted
21 them here today in support and to answer
22 questions. Their area of expertise: Mr.

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1 McConnell is an RF or Radio Frequency
2 Engineer. And his job is to design the
3 network and make sure the network works and to
4 defend the site selection, the height
5 proposed, and explain the nuances of the
6 network, if you will, how this site fits among
7 the other sites within the District.

8 And Mr. Bohn is a site acquisition
9 specialist. And he has had the relationship
10 with Saint John's. He got the lease signed
11 and got the support from the Saint John's
12 School community and can answer questions
13 about -- he was also with me at the ANC
14 meeting back in November and can answer
15 questions about those proceedings.

16 CHAIRMAN LOUD: And is it your
17 understanding that under our special exception
18 rules, 2712, that an analysis of the RF
19 requirements are pertinent to the special
20 exception relief?

21 MR. DONOHUE: Well, it occurred to
22 me, Mr. Chairman that this Board hadn't heard

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1 a lot of the wireless cases. They predate a
2 lot of the folks that are on the Board. So I
3 thought there might be questions, but I don't
4 think it is necessary for the purposes of
5 2712, no, sir.

6 CHAIRMAN LOUD: Okay. Thank you.
7 Let me ask the Office of Planning. Good
8 morning.

9 MS. THOMAS: Good morning, Mr.
10 Chairman, Members of the Board. Karen, here.

11 CHAIRMAN LOUD: How are you this
12 morning?

13 MS. THOMAS: Fine, thank you.

14 CHAIRMAN LOUD: Good. Just as a
15 follow-up to the dialogue that I just had with
16 Mr. Donohue, under the section 2712 analysis
17 for the special exception, which I believe is
18 triggered in this case simply by the fact of
19 the height, the height exceeding what is
20 allowed under zoning, is there an element of
21 the 2712 that would require an RF analysis or
22 an RF review or an RF sort of engagement of

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1 that issue?

2 MS. THOMAS: No, sir. That was not
3 the intent of these sections and any type of
4 review for antenna review that we do at OP.
5 It is typically an administrative process. So
6 we don't -- the RF situation is governed by
7 FCC, so we don't look at that. We are not
8 mandated to look at RF emissions and anything
9 of that technical nature.

10 CHAIRMAN LOUD: Okay.

11 MS. THOMAS: To the extent 2712
12 asks for it, we look at in terms of coverage.
13 So we are specific about why are they asking
14 for an installation, at this point, and the
15 focus on the coverage areas that they intend
16 to serve.

17 CHAIRMAN LOUD: Okay. Thank you.
18 I think what I would like to suggest to
19 colleagues is a review of the application
20 narrowly under 2712 with freedom, of course,
21 to individual Board Members to query the
22 applicant or OP on any of the RF issues that

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1 you think are helpful to understanding the
2 case overall or specifically helpful to 2712.

3 I don't want to put anyone in a
4 straightjacket. But I think that in terms of
5 proceeding, that the focus of our review is
6 what is required for the special exception
7 under 2712 and I think it may be helpful to
8 know some of the emissions information.

9 I'm just not certain that it is a
10 requirement in order to get or not get the
11 special exception relief.

12 Does that sound okay? Okay. So
13 with that then, I have reviewed the file. I
14 don't have a lot of questions on it, apart
15 from, I think, there was a question that one
16 of the Board Members may have regarding
17 questions of authority.

18 But why don't I open it up to Mrs.
19 Moldenhauer and then other Board Members to
20 see if there are any specific questions for
21 you and then you can give us as much of a
22 briefing as you would like to, given the sort

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1 of context that we have said.

2 MR. DONOHUE: Sure.

3 CHAIRMAN LOUD: Then perhaps we can
4 go to the Office of Planning.

5 MR. DONOHUE: Sure.

6 CHAIRMAN LOUD: All right.

7 MEMBER MOLDENHAUER: Mr. Donohue,
8 Chairman Loud actually touched on it. There
9 is an issue of authority. The initial
10 application and the property owner are Saint
11 John's College High School. We have a letter
12 which is in our exhibits, which authorizes you
13 to represent Cricket.

14 However, we don't have a specific
15 authorization letter, which is required, from
16 Saint John's authorizing you as an owner's
17 agent. Do you have that to supplement our
18 file?

19 MR. DONOHUE: I've prepared such a
20 letter this morning. It's out for signature
21 at Saint John's. I know you will have that by
22 the end of the day, whether it is in staff's

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1 hands right now, I don't know. I did speak
2 with the representative of the school and it
3 is in the process of getting signed.

4 MEMBER MOLDENHAUER: Great. Thank
5 you.

6 MR. DONOHUE: I apologize. We had
7 the signature on the application or on the
8 certification. And I thought that that was
9 enough, but we will have that letter for you
10 today.

11 MEMBER MOLDENHAUER: Thank you.

12 CHAIRMAN LOUD: We'll just take a
13 few moments to see if Board Members have any
14 additional questions, you know, targeted kinds
15 of questions that will save you some time when
16 you make your presentation.

17 MEMBER MOLDENHAUER: I guess one of
18 the questions, and this is more kind of a
19 point to maybe touch on in your application,
20 we have additional exhibits of opposition from
21 neighbors and we also have Exhibit No. 27,
22 which is the ANC report which is in support.

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1 And they have referenced an individual who
2 opposed.

3 In your presentation, if you can
4 just very briefly, I don't think it is needed
5 to expound upon, because, as discussed, it may
6 not actually be even necessary in our
7 analysis, but if you could just briefly, touch
8 upon maybe any communications you had and that
9 dialogue and then provide us maybe some
10 additional insight as to the ANC's final
11 deliberation. That would be helpful.

12 MR. DONOHUE: Sure.

13 CHAIRMAN LOUD: And just to
14 clarify, I'm certain that Mrs. Moldenhauer
15 clarified this anyway, but we are talking
16 about what we have labeled as Exhibit No. 32
17 and 31. Which 32 is a letter dated February
18 1, 2010 signed by Deborah Kavruck. Do you
19 have that?

20 MR. DONOHUE: I do.

21 CHAIRMAN LOUD: Okay.

22 MR. DONOHUE: Yes.

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1 CHAIRMAN LOUD: And then Exhibit 31
2 is a letter dated also February 1, 2010 and it
3 is signed by, I believe it is, Abid Aslam.
4 And I believe you are referring to those two
5 pieces. Okay.

6 MEMBER MOLDENHAUER: Yes, I am.

7 MR. DONOHUE: Mr. Chairman, I can
8 probably cover that briefly right now, if
9 that's your pleasure?

10 CHAIRMAN LOUD: Okay.

11 MR. DONOHUE: I received both
12 letters this morning. I'm aware of Mrs.
13 Kavruck. We corresponded back in November
14 when we presented to the ANC. Her questions
15 relate to RF emissions and whether the
16 proposed site would be in compliance with FCC
17 Guidelines.

18 I sent her a letter and a good deal
19 of information to explain sort of where things
20 are by way of RF emissions and what the state
21 of the knowledge is, including links to the
22 FCC's website, to the World Health

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1 Organization, American Cancer Society,
2 etcetera.

3 I also explained at the ANC meeting
4 that under the federal law, as Ms. Thomas has
5 told you, the question of RF emissions lies
6 with the Federal Government. There is pretty
7 clear exemption along those lines.

8 And it was codified in 1996 in the
9 Telecommunications Act. However, particularly
10 when we are talking about community meetings,
11 we have questions that come from citizens, we
12 try to extend ourselves to try to explain what
13 the RF emissions -- what it is and what it
14 isn't, importantly I think.

15 And in that regard, recently I
16 filed what is called an RF Emissions
17 Compliance report. And it was submitted to
18 the record by letter to Rick Nero on January
19 27th. Hopefully you have copies of that
20 report.

21 Site Safe is an industry standard,
22 if you will, on RF emissions. And it is an

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1 independent analysis of existing radio
2 frequencies at the site. And then adding the
3 additional antennas as proposed in the Cricket
4 application.

5 And it is a long report, so I guess
6 what I would suggest is if you go to the top
7 of page 2, Site Safe explains that "Under the
8 existing conditions and with the addition of
9 the Cricket Communications, the site would be
10 at 0.162 of what is known as Maximum Permitted
11 Exposure or MPE.

12 In other words, when the Feds set
13 the guideline, when the FCC sets the
14 guideline, these facilities combined are at
15 far less than 1 percent of MPE or Maximum
16 Permitted Exposure.

17 So clearly, well below the levels
18 established by the FCC, which meets our burden
19 of proof under the federal law to demonstrate
20 compliance with RF emissions.

21 There is a number of ways to look
22 at all things RF. And when I introduce Mr.

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1 McConnell, I guess what I was getting at was,
2 he can explain the network and how it works
3 and why calls are dropped in Rock Creek Park,
4 etcetera. And that's an RF design obligation.

5 And we do often explain those
6 things. RF emissions is much more discrete.
7 It's physics. And what we try to do with the
8 Site Safe is explain exactly what the numbers
9 are to try to assure folks that we are well
10 below the federal levels.

11 I thought I was going to be short
12 on that. I wasn't all that short, but I hope
13 that is responsive.

14 That, I think, addresses both of
15 the letters dated February 1 provided to us as
16 opposition.

17 CHAIRMAN LOUD: Thank you. Are
18 there other questions for Mr. Donohue? There
19 don't appear to be any. So if there is
20 something that you would like to cover sort of
21 walking us through how you meet the special
22 exception test?

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1 MR. DONOHUE: Sure.

2 CHAIRMAN LOUD: That would be
3 helpful.

4 MR. DONOHUE: Mr. Chairman, first,
5 I guess by way of background, both of the --
6 there is two flag poles at Saint John's High
7 School. And both have been there for a number
8 of years.

9 The first one I did for AT&T and I
10 think it was 1996. The second one was done by
11 Sprint, which is the one that is proposed for
12 extension here today. Both of those were done
13 as a matter-of-right.

14 Prior to the 2008 rewrite,
15 structures like this, which were deemed to be
16 flag poles, were built as a matter-of-right.
17 So it's the extension that we are talking
18 about here today. The pole to the north side
19 of the campus, the proposed extension by 10
20 feet.

21 It is, in fact, a Stealth device to
22 hide the antenna and there is ground equipment

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1 associated with it. Because of the size of
2 the campus and the distances and the property
3 lines, the ground equipment is virtually
4 invisible unless you are looking at an aerial
5 photograph.

6 It is set within the hillside on
7 the north side of the football stadium. So
8 that the extension will allow Cricket to
9 broadcast and meet its obligations to its
10 customers and address the coverage gap that
11 exists in that part of the District of
12 Columbia.

13 Cricket launched services in D.C.
14 and throughout the market in June of last
15 year. There are some 70 antenna sites for
16 Cricket within the confines of the District of
17 Columbia. Virtually all are rooftop sites or
18 are co-locations as the one proposed here.

19 Cricket was able to achieve its
20 launch largely by mounting on existing
21 structures. That is the case here, albeit,
22 with a minor extension.

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1 Even with the extension, we meet
2 all setback requirements. We think the photo
3 simulations that we have given you address the
4 questions of aesthetics. As I said, this is
5 an existing structure.

6 This one doesn't carry a flag.
7 Well, at least when I have been out there.
8 The other pole it is on the southern part of
9 the campus, they do fly a flag there and they
10 drop it in the evenings, so that the poles are
11 not lit. This one is a flagless flag pole, at
12 least based on my observation.

13 It does meet Cricket's need for
14 coverage objectives. Mr. McConnell will
15 testify that there is literally no other
16 structure out there that allows for an
17 installation of rooftop, if you will, or other
18 installation to meet the needs. It's a
19 challenging area, both by topography and the
20 proximity of Rock Creek Park.

21 It's an area that is overwhelmingly
22 residential. So in order to address both the

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1 folks on the road and using their vehicles and
2 also the folks at home that are using wireless
3 now in place of a landline device, it is
4 important to get the signals out into the
5 residential community and get the coverage as
6 is needed.

7 As I mentioned, Cricket was able to
8 launch in June of last year. Also opened a
9 number of stores, you may have seen around.
10 It got pretty heavy advertisement on Metro
11 Buses, etcetera. There are seven Cricket
12 stores in the District and a number of other
13 franchise places where Cricket services are
14 sold.

15 As I mentioned, I think the photo
16 simulations are perhaps the best demonstration
17 of what we think this is going to look like
18 and how we think it meets the objectives of
19 the zoning ordinance and also the
20 recommendations from the Office of Planning.

21 CHAIRMAN LOUD: If the height of
22 the antenna in the Stealth structure, and I'm

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1 looking at 2706, had been was it 80 feet or
2 less, that you would have been able to get
3 this antenna placed matter-of-right?

4 MR. DONOHUE: That's correct.

5 CHAIRMAN LOUD: Is that correct?

6 MR. DONOHUE: That's correct.

7 CHAIRMAN LOUD: Okay. And so the
8 ZA sent you here simply because you exceeded
9 2706(F)?

10 MR. DONOHUE: Correct.

11 CHAIRMAN LOUD: Okay.

12 MR. DONOHUE: Now, the existing
13 structure exceeds it as well, right? The pole
14 that is there is --

15 CHAIRMAN LOUD: It's 100 --

16 MR. DONOHUE: -- 116 feet.

17 CHAIRMAN LOUD: 116 feet.

18 MR. DONOHUE: Yes, sir.

19 CHAIRMAN LOUD: Okay.

20 MR. DONOHUE: So as I said, that
21 was under a previous guideline, previous
22 regulations.

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1 CHAIRMAN LOUD: Okay. All right.
2 Thank you.

3 MR. DONOHUE: Yes, sir.

4 CHAIRMAN LOUD: Board Members, any
5 additional questions for the applicant's
6 counsel? And the applicant indicated that he
7 had brought along a couple of witnesses in
8 case some of their proffered testimony might
9 be helpful. Do you see any need to do that?

10 Okay. That being the case, why
11 don't we now turn to -- Mr. Donohue, had you
12 concluded?

13 MR. DONOHUE: Yes, sir.

14 CHAIRMAN LOUD: Okay. Why don't we
15 now turn to the Office of Planning for its
16 report? And I think again, you know, in some
17 of our cases, we do rest on the record and we
18 go through things because it is very, very
19 clear.

20 I think, in this case, really
21 establishing how they meet the requirements of
22 2712, which is the applicable regulation

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1 before us, would be very helpful. And then we
2 will see if Board Members or the applicant or
3 the ANC, if it arrives, have any questions for
4 you.

5 MS. THOMAS: Mr. Chairman, Members
6 of the Board, good morning. Karen Thomas with
7 the Office of Planning again.

8 We are recommending approval of the
9 extension of this flag pole at Saint John's
10 College for Cricket's intended coverage. We
11 do believe that it meets the test of section -
12 - the criteria under section 2712, including
13 the applicant providing us with evidence of
14 where coverage is lacking, as required under
15 this section.

16 And we also believe and we know
17 that it is well setback from the neighborhood
18 to the west and to the north and south of the
19 site. So we don't believe that there is any
20 problems with respect to that.

21 And the intent of the regulations,
22 in one sense, is to provide visual mitigation

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1 from the antenna visibility and this is what a
2 Stealth flag pole is intended to do.

3 So we would support an extension of
4 the pole and not have another pole go in the
5 ground to provide service.

6 So with this regard, we would
7 recommend approval of the extension of this
8 pole by 10 feet to support Cricket's plans.

9 Thank you. I will be happy to take
10 any questions.

11 CHAIRMAN LOUD: Thank you. Why
12 don't we turn to the applicant and see if the
13 applicant has any questions for the Office of
14 Planning?

15 MR. DONOHUE: No, sir.

16 CHAIRMAN LOUD: All right. And
17 Board Members? It doesn't appear as if Board
18 Members have any questions.

19 In terms again of the discussion
20 that we were having earlier on about the
21 distinction between the matter-of-right
22 process versus the specific BZA approval

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1 process, the regulations contemplate that the
2 building permit, not the building permit, but
3 the permit application for the antenna would
4 be submitted to the Zoning Administrator, I
5 believe.

6 And there is a section that talks
7 about the Office of Planning submitting a
8 report and working with the Zoning
9 Administrator on these types of applications.

10 Is that correct? Are you familiar with it?

11 MS. THOMAS: Yes.

12 CHAIRMAN LOUD: Okay.

13 MS. THOMAS: You are speaking
14 specifically about the antenna, the
15 installation?

16 CHAIRMAN LOUD: Yes, just antenna
17 installation, not necessarily what we are
18 talking about here --

19 MS. THOMAS: Right.

20 CHAIRMAN LOUD: -- for the BZA.

21 MS. THOMAS: Right, yes.

22 CHAIRMAN LOUD: Okay.

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1 MS. THOMAS: Yes. Typically, it is
2 an administrative review process. The
3 applicant can submit a request to OP for that
4 installation and we provide an administrative
5 review, based on the visuals and if meeting
6 1:1 setback if it's for rooftop or, in this
7 case, it is within the south pole, so we would
8 have to provide a separate report.

9 CHAIRMAN LOUD: To the ZA?

10 MS. THOMAS: To the ZA.

11 CHAIRMAN LOUD: Okay.

12 MS. THOMAS: Yes.

13 CHAIRMAN LOUD: But in this case,
14 your understanding of what this is before BZA
15 is that it does not meet the height
16 requirement?

17 MS. THOMAS: That's correct, yes.

18 CHAIRMAN LOUD: Okay. And that's
19 the only reason it is before the BZA?

20 MS. THOMAS: That's correct.

21 CHAIRMAN LOUD: Okay.

22 MS. THOMAS: Yes.

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1 CHAIRMAN LOUD: And that as a
2 result, section 2712 would govern how we
3 review the special exception application?

4 MS. THOMAS: That's correct.

5 CHAIRMAN LOUD: Okay.

6 MS. THOMAS: Yes.

7 CHAIRMAN LOUD: Thank you. I don't
8 have any additional questions. Board Members
9 are there any follow-up questions? All right.

10 Then if the ANC were here, we would
11 turn to the ANC for its report, there not
12 being any other Government agencies with
13 reports in this matter. They are not present,
14 but I believe they did submit a written
15 report, correct?

16 And let me lean a little on Mrs.
17 Moldenhauer for an indication of their report.

18 MEMBER MOLDENHAUER: The ANC report
19 is our Exhibit No. 27. And that was dated
20 November 18, 2009. It indicates they had a
21 public meeting on November 9, 2009.

22 At this meeting, they had a

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1 representative from Cricket Communication
2 present information on the increased height
3 proposal, discuss the design and have a
4 discussion about additional information.

5 It does also indicate that there
6 was a member in the audience of the community
7 who opposed the variance. And specifically
8 said that they had questions regarding the
9 significance of the notice and potential
10 health problems associated with the proximity
11 of the cell towers.

12 Despite that opposition, the ANC
13 did have a quorum present and they did vote to
14 support this in a 5-2 vote. And this letter
15 is signed and meets all of our requirements
16 for great weight. And thus, we would be
17 providing ANC-3G with great weight in regards
18 to their support for this application.

19 CHAIRMAN LOUD: Thank you, Ms.
20 Moldenhauer. Thank you for your analysis.
21 And as indicated, it is going to receive great
22 weight, even though they are not present. It

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1 is a written report that meets the
2 requirements of our rules.

3 Okay. Did the applicant have any
4 questions or reflections with respect to the
5 ANC part of this?

6 MR. DONOHUE: Very minor, Mr.
7 Chair, but just to remind you that the
8 opposition that was referred to there was one
9 of the letters that you had. So the letter
10 that is dated February 1 is, essentially, the
11 position that was articulated at the ANC.

12 CHAIRMAN LOUD: Okay.

13 MR. DONOHUE: RF emissions
14 concerned about --

15 MEMBER MOLDENHAUER: By February 1,
16 I think, Mr. Donohue is referring to Exhibit
17 32. So I guess just to correlate those two
18 documents.

19 CHAIRMAN LOUD: Thank you both. I
20 think we may, in fact, get into that
21 momentarily.

22 This is the part of the hearing

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1 where if there are parties or persons who are
2 either in support or in opposition are allowed
3 to give their testimony.

4 If you represent yourself, you are
5 allowed up to three minutes. If you represent
6 an organization, you are given five minutes.

7 And so if you are in our audience
8 and you are in support of the application, now
9 would be the time to come up. And if you are
10 in the audience and you oppose the
11 application, now would be the time to come up.

12 Good morning. I don't believe you
13 have been sworn in. So the first thing to do
14 would be to get you sworn in and then you can
15 come up and have a seat at the table and
16 provide your testimony. Give your name and
17 information for the record and then provide
18 your testimony.

19 Good morning. First things first,
20 she is going to swear you in. Ms. Bailey?

21 MS. BAILEY: Hello.

22 (Whereupon, the witness was sworn.)

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1 MS. BAILEY: Thank you. Have a
2 seat at the table.

3 CHAIRMAN LOUD: Good morning.

4 MS. KAVRUCK: Hello.

5 COURT REPORTER: I need you to
6 speak into the microphone.

7 MS. KAVRUCK: Okay. I haven't been
8 to one of these meetings before, so I didn't
9 know all the rules. I don't know if I have to
10 talk very fast, but I will.

11 MEMBER MOLDENHAUER: You need to
12 first state your name for the record, please.

13 MS. KAVRUCK: Deborah Kavruck.

14 CHAIRMAN LOUD: Why don't you state
15 your address for the record. And we won't
16 start the 10 minutes until we get all of the
17 preliminaries out of the way.

18 MS. KAVRUCK: Okay. 5712 26th
19 Street, N.W.

20 CHAIRMAN LOUD: Okay. Very good.

21 MS. KAVRUCK: D.C. And I sent a
22 fax of seven pages. Have you all read that or

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1 do I have to repeat what is in my seven page
2 fax?

3 CHAIRMAN LOUD: If we have --

4 MEMBER MOLDENHAUER: We have that.

5 That's what we have been referencing, Exhibit
6 32, which is initially a letter dated February
7 1st. In addition to that, there is a letter
8 from November 9th to the ANC and attached to
9 that are additional email correspondence that
10 we have referenced.

11 CHAIRMAN LOUD: And to answer your
12 question, we did have an opportunity to read
13 it. We took a small break this morning and
14 reviewed that submission along with an
15 additional one. So we are familiar with the
16 contents of the fax transmittal.

17 MS. KAVRUCK: Okay. So do I now
18 restate my positions for opposing this
19 variance?

20 CHAIRMAN LOUD: I think it would be
21 helpful if you did go on our record and
22 indicated what is in the letter, but to

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1 highlight the most important parts of it and
2 perhaps to minimize the parts that are not
3 that important. And for those that you do
4 highlight, amplify with your reasoning and the
5 support that you have for the positions that
6 you take.

7 I think you talked about lack of
8 notice and you talked about concerns regarding
9 the RF reports and concerns regarding whether
10 the ANC fully represents the community and so
11 on and so forth.

12 MS. KAVRUCK: Yes. Also, the one
13 question that I had is visually, I see a third
14 tower on the property. We see the two very,
15 very tall towers. But there is another tower
16 that is silver, with silver spikes coming out
17 of it near the tower on the far -- towards the
18 north.

19 And I don't know what kind of
20 transmission tower that is. Do you know?

21 MR. DONOHUE: No.

22 MS. KAVRUCK: There is another

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1 tower on the property that hasn't been
2 mentioned. It is not nearly so tall as the
3 two towers we are talking about, but it is
4 there, so it's doing something. And I have
5 not been able to find out what that tower
6 does.

7 But I would like that -- someone,
8 if they could find out, to include that
9 information into the package.

10 CHAIRMAN LOUD: This applicant is
11 before us only on its application for relief.

12 MS. KAVRUCK: Yes.

13 CHAIRMAN LOUD: We characterize
14 that as special exception relief. And for
15 this applicant what drives that is that this
16 proposed antenna exceeds our height
17 limitation.

18 MS. KAVRUCK: Right.

19 CHAIRMAN LOUD: I think it is 110
20 right now and it is going to go up to 126.5
21 feet.

22 MS. KAVRUCK: And --

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1 CHAIRMAN LOUD: So there are a set
2 of regulations that this applicant has to
3 follow in order to receive the relief. Those
4 regulations don't require this applicant to
5 provide the information that you just
6 requested. But that -- I'm sure you could get
7 that information outside of this process.

8 MS. KAVRUCK: Would it have any
9 bearing on this?

10 CHAIRMAN LOUD: It does not appear
11 from our regulations to have any bearing. If
12 you have got some additional information,
13 you're free to share that with us. But our
14 regulations are found at Title 11 2712. And I
15 know you are not familiar with the entire
16 process, but that's what we are bound to
17 follow for this applicant's hearing.

18 MS. KAVRUCK: Okay. But my
19 understanding is that there has already been a
20 variance and this is a second variance on
21 height?

22 CHAIRMAN LOUD: This is --

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1 MS. KAVRUCK: Or not?

2 CHAIRMAN LOUD: -- actually a
3 special exception. I'm not familiar with the
4 earlier variance. I'm just not familiar with
5 it.

6 MS. KAVRUCK: Early on, I think,
7 someone mentioned that this already exceeded
8 the normal height restriction, because there
9 had been one variance and now this is a second
10 variance.

11 CHAIRMAN LOUD: Now, that part I do
12 understand to be correct. Although, the
13 terminology that we are using is different.
14 We are referring to this as a special
15 exception, which is what it is technically
16 called.

17 But I think Mr. Donohue mentioned
18 that they are at 110 feet right now, which is
19 above the 80 feet in the regulations. So I
20 think she may be asking for some, it's
21 certainly not your burden to do that,
22 understanding of how the initial height got to

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1 110.

2 And I don't think it was this
3 applicant's antennas that took it to 110, so I
4 don't think it is this applicant's burden to
5 provide that information. But certainly, if
6 you know, it might be helpful.

7 MR. DONOHUE: Well, as I mentioned
8 in my statement earlier, under the pre-
9 existing regulations, it was deemed to be a
10 matter-of-right and treated as a flag pole.
11 The flag poles didn't have a height
12 limitation.

13 I believe it was 2008 revisions
14 that said that if a Stealth structure to
15 support an antenna were going to exceed the 80
16 feet, it would require a special exception.
17 So effectively, that pole pre-exists the
18 change in the regs.

19 CHAIRMAN LOUD: Thank you, Mr.
20 Donohue.

21 MS. KAVRUCK: My information is
22 that it was going to be close to 130 feet. So

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1 if they are extending 10 feet, I understood
2 that it was already over, I think, 116 feet.

3 MR. DONOHUE: Mr. Chairman, I'm
4 happy to go through the parameters if you will
5 of the application, but they do speak for
6 themselves in terms of the plans and the
7 statements, etcetera.

8 I guess the other thing I would
9 like to ask is is her 3 minutes beginning to
10 run or not?

11 CHAIRMAN LOUD: Well, I think we
12 wanted to get some preliminaries out of the
13 way.

14 MR. DONOHUE: Okay.

15 CHAIRMAN LOUD: In terms of
16 clarifying the exhibits that were submitted
17 and then any threshold kinds of questions.
18 But I think Mr. Donohue raises the point that
19 I was getting ready to get to regarding as a
20 witness who is in opposition to the project,
21 you are allowed three minutes under our rules.

22 Those three minutes don't include

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1 questioning the applicant. It would just be
2 your testimony in opposition and what you use
3 as support for your testimony in opposition as
4 opposed to questioning different things about
5 the project.

6 So it would be helpful for us now
7 to move on and move to your testimony.

8 MS. KAVRUCK: But what about the
9 height? It doesn't seem the same numbers.

10 CHAIRMAN LOUD: Have you reviewed
11 the record in the case?

12 MS. KAVRUCK: I didn't even know
13 there was a record. I --

14 CHAIRMAN LOUD: Okay.

15 MS. KAVRUCK: -- didn't get a
16 record.

17 CHAIRMAN LOUD: Well, there is, as
18 a part of the application, a record of the
19 applicant's initial application, the referral
20 letter from the Zoning Administrator, a report
21 from the Office of Planning along with
22 specific information about the antenna and

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1 that information indicates that the height is
2 126.5 feet.

3 Those are all reviews that we
4 expect to have been completed prior to the
5 time that we come out for the hearing.

6 MS. KAVRUCK: Yes.

7 CHAIRMAN LOUD: As opposed to
8 things that we allow --

9 MS. KAVRUCK: Okay.

10 CHAIRMAN LOUD: -- to be hashed out
11 freshly at the hearing.

12 MS. KAVRUCK: But it is between 125
13 and 130 feet, that was what I had been told.
14 So that's okay.

15 CHAIRMAN LOUD: Okay.

16 MS. KAVRUCK: All right.

17 CHAIRMAN LOUD: So you are ready to
18 -- because we are going to start the clock on
19 you when you are ready to begin your
20 testimony.

21 MS. KAVRUCK: Yes.

22 CHAIRMAN LOUD: Okay. Why don't we

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1 start the clock?

2 MS. KAVRUCK: Well, I'm a resident
3 there and, frankly, I'm very concerned about
4 the way this was handled in our neighborhood.

5 Many of us think that our ANC represents us
6 and our interests. And we are realizing more
7 and more that this is not at all the case.

8 And talking about this particular
9 case, as you see from my fax, I went as a
10 concerned neighbor to the ANC meeting to
11 express my reservations about having such
12 transmission towers in our neighborhood when
13 what I did do research on is that nobody can
14 say for sure that there are no potential
15 health hazards with these.

16 They say well, in 10 years we will
17 know, but we don't know now. So people can
18 say well probably they are not harmful. Maybe
19 they are not harmful, but no one can say for
20 sure that they are not.

21 And we live very close to these
22 towers and receive no notification from

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1 Cricket Communications. Although, at the ANC
2 meeting, where I was present, I was told that
3 they were going to expand the coverage of the
4 neighbors who received information.

5 So pretty much I'm here asking that
6 more neighbors in a zone around these towers
7 must -- half of it is the park, a lot of it is
8 the football field, but on the other two
9 sides, the west and the north, it is single-
10 family home residences.

11 And probably nobody knows because I
12 spoke to a couple of neighbors a couple of
13 days ago and nobody knew. So when our ANC
14 distributes information, they do not really
15 give much of a picture. They refer to these
16 cell phone towers as flag poles.

17 Flag poles do not have
18 transmissions coming from them. These are
19 radio waves and they go through our houses.
20 They go through our bodies. And nobody is
21 able to tell us that they are safe. And they
22 are close to us.

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1 And there are five companies
2 transmitting from the towers. They are very
3 tall. Frankly, myself and my neighbors who
4 just learned about it expressed quite a lot of
5 concern about this.

6 Basically, we feel that our ANC is
7 helping Saint John's which profits from these
8 -- selling the rights to this property without
9 any regard to us. So our neighborhood has
10 nothing to gain from having these towers put
11 up. And potentially down the road, we will
12 possibly learn that we have got a lot to lose.

13 So frankly, I'm frightened of
14 having those towers there. So are my
15 neighbors. We do not want them. We were not
16 organized. We did not understand our ANC
17 representative does not take care of us. He
18 is taking care of special interests.

19 And I have other examples where
20 over and over --

21 CHAIRMAN LOUD: You are now in
22 excess of the three minutes, so I'm going to

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1 ask you to wrap up, please.

2 MS. KAVRUCK: Okay. He has
3 supported Saint John's with other variances
4 that have been denied by public places, but I
5 was hoping to ask him if he has any special
6 vested interest with Saint John's. Why he is
7 supporting them and not the neighbors.

8 CHAIRMAN LOUD: Thank you for your
9 testimony. Is it Mrs. Kavruck?

10 MS. KAVRUCK: It's miss.

11 CHAIRMAN LOUD: Ms. Kavruck.

12 MS. KAVRUCK: And also you all will
13 --

14 CHAIRMAN LOUD: Thank you.

15 MS. KAVRUCK: -- read my seven page
16 fax, right?

17 CHAIRMAN LOUD: We did read it
18 already.

19 MS. KAVRUCK: And you should have
20 received a fax at least from one other
21 neighbor.

22 CHAIRMAN LOUD: We did.

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1 MS. KAVRUCK: If not more.

2 CHAIRMAN LOUD: We did receive.
3 For the record, we indicated it earlier that
4 we received. Mrs. Moldenhauer indicated it.
5 We have labeled it Exhibit No. 31. It is from
6 Mr. Abid Aslam. I hope I'm pronouncing that
7 correctly. And it is a two page fax. And we
8 did have an opportunity to review both of
9 those and now we have heard your testimony as
10 well.

11 I want to thank you for your
12 testimony and thank you for taking the time to
13 come down here. I'm going to ask the
14 applicant, to whom we now turn, for closing --

15 MS. KAVRUCK: Can I just ask a --

16 CHAIRMAN LOUD: -- remarks.

17 MS. KAVRUCK: -- very quick
18 question? I made some requests in my fax
19 regarding having information sent to the
20 neighbors in a quarter mile area. Is that
21 going to be considered and that the letter be
22 distributed in very plain simple language,

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1 rather than all this complex technology that
2 is long that nobody understands at all?

3 CHAIRMAN LOUD: A couple of answers
4 to that. I think the Board may deliberate on
5 this case today. It seems like we have a full
6 enough record to do that. And we could,
7 colleagues, in the course of that deliberation
8 address some of these points that were raised
9 in Exhibits 32 and 31.

10 And so I think that that might be
11 the way that we address it. But we certainly
12 don't intend to allow it to slip into a black
13 hole as if these issues had never been raised.

14 But we will address them. We will address
15 them in our deliberation.

16 MS. KAVRUCK: Here?

17 CHAIRMAN LOUD: Absolutely,
18 absolutely.

19 MS. KAVRUCK: Okay.

20 CHAIRMAN LOUD: Because we should
21 be able to get through this. You have to
22 repeat your questions, because your microphone

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1 was not on.

2 MS. KAVRUCK: I'm hoping to have a
3 wider distribution of notification within a
4 quarter mile area of the towers and we would
5 like that notification to be in simple, plain,
6 easy to understand, rather than long and
7 technical that people look at it and they
8 throw it in the trash.

9 And we would also like in that to
10 be included in that that nobody can say for
11 sure that there is no health risk to having
12 constant radio waves permeate our homes and
13 bodies. Nobody can say anything about it for
14 10 years, I was told.

15 CHAIRMAN LOUD: Mrs. Kavruck,
16 again, I want to thank you for your patience
17 this morning. Thank you for coming down as
18 well. I know that it was probably not easy to
19 adjust your schedule, so we appreciate that.

20 We are going to move along in the
21 case. I believe we turn now to the applicant
22 for --

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1 MS. KAVRUCK: How soon can she be
2 heard?

3 CHAIRMAN LOUD: I'm sorry? Is
4 there another witness that would like to
5 testify this morning? I'm very sorry. If you
6 would step forward? That's okay. And Ms.
7 Bailey will swear you in.

8 COURT REPORTER: First turn on your
9 mike.

10 (Whereupon, the witness was sworn.)

11 MS. BAILEY: Thanks.

12 MS. MILLER: Hi. My name is Carrie
13 Miller.

14 CHAIRMAN LOUD: Good morning, Ms.
15 Miller.

16 MS. MILLER: Good morning. This is
17 my first time doing something like this as
18 well. However, I just moved into the
19 neighborhood. Deborah is my neighbor. I'm
20 learning about these towers going up and it is
21 a growing concern of mine that I haven't been
22 aware or notified of these towers that are

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1 going to be growing in size.

2 Just, you know, living in the
3 community, I know that we have a lot of
4 children in the area. The families are
5 growing. It's something that I would like to
6 investigate a little bit further as far as
7 what these towers are transmitting out to the
8 neighborhood that surrounds the towers.

9 And that way, you know, we know
10 whether or not we will be affected in the long
11 term or even present day.

12 So it is something that, again, in
13 November came up in the ANC meeting that by
14 now the community would be informed a little
15 bit more about these towers. And I have not
16 heard one word. No news letters or pamphlets
17 going out to people. So I have just been
18 oblivious.

19 My neighbor thankfully has come
20 around and kind of informed people. And I'm
21 here today asking that before it gets approved
22 that, at least, the community around the

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1 football field that wants to improve their
2 Cricket towers will provide enough time for
3 some further investigation, so that we can
4 feel safe in our neighborhood. And we are not
5 going to be like, you know, sick in a few
6 years due to the more radioactive waves going
7 around.

8 So that's all I -- oh, and can I
9 ask a question?

10 CHAIRMAN LOUD: Sure, yes.

11 MS. MILLER: We came in late. You
12 did say that there is a special exception on
13 this. I didn't catch that part. What is the
14 exception on this?

15 CHAIRMAN LOUD: The process that
16 the applicant is before us on and that you are
17 now a part of is called a special exception.
18 It is a way for an applicant to receive zoning
19 relief under our Zoning Regulations for a
20 proposed project.

21 And in this case, because the
22 height of the proposed three additional

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1 antennas exceed what the regulations would
2 allow the applicant to do as a matter-of-
3 right, the applicant has to submit a special
4 exception request to BZA. And that's what all
5 of this is.

6 Your being a witness, the applicant
7 making his presentation, the Office of
8 Planning submitting a report, it's all
9 referred to as a special exception request.

10 Can I ask you for your address for
11 the record?

12 MS. MILLER: Yes. It's 5701 26th
13 Street.

14 CHAIRMAN LOUD: Okay. And did you
15 receive any notification of the proposed
16 special exception?

17 MS. MILLER: No.

18 CHAIRMAN LOUD: Did you attend the
19 ANC meeting?

20 MS. MILLER: No.

21 CHAIRMAN LOUD: Okay. Did you know
22 about the ANC meeting?

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1 MS. MILLER: No.

2 CHAIRMAN LOUD: Okay. How did you
3 first learn about the antenna, proposed
4 antenna and the special exception?

5 MS. MILLER: Through my neighbor.

6 CHAIRMAN LOUD: Okay. And when did
7 you first learn that?

8 MS. MILLER: Around the time of the
9 meeting. However, I couldn't attend the ANC
10 meeting. I would have liked to be there just
11 to gather up some information for myself as
12 well as for other neighbors that wouldn't be
13 able to attend the meeting. But again, I was
14 waiting during this time for further
15 information regarding this project that is
16 going to be taking place.

17 And I haven't received any, so I'm
18 concerned that this is something that is going
19 to be passed and the community around this
20 area, you know, has no say in this matter.

21 CHAIRMAN LOUD: Were you not able
22 to make any part of the ANC meeting on the

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1 night that it was held?

2 MS. MILLER: I wasn't. I spoke to
3 Deborah beforehand and kind of gave her some
4 of my thoughts. So she spoke. I mean, on
5 behalf of myself as well as other people. So
6 I trusted that, you know, at least somewhat of
7 my voice was heard during that meeting.

8 CHAIRMAN LOUD: And have you spoken
9 to -- when you say Deborah, you mean, Ms.
10 Kavruck?

11 MS. MILLER: Yes, sorry.

12 CHAIRMAN LOUD: Have you spoken to
13 her since the ANC meeting?

14 MS. MILLER: Yes.

15 CHAIRMAN LOUD: And do you have a
16 comfort level that she did adequately
17 represent some of the concerns you had?

18 MS. MILLER: Yes.

19 CHAIRMAN LOUD: At the ANC meeting?

20 MS. MILLER: Yes.

21 CHAIRMAN LOUD: Okay. All right.

22 I don't have any additional questions.

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1 MS. KAVRUCK: Can I ask something
2 really quickly?

3 CHAIRMAN LOUD: No. We have an
4 order to proceed by and it is fair. It is
5 only fair to everybody that we proceed in
6 accordance with our rules and our regulations.

7 So what we are going to do now -- thank you,
8 if you have concluded your testimony. Ms.
9 Miller, thank you.

10 All right. We appreciate your
11 taking the time and your patience this
12 morning.

13 And then we now turn back to the
14 applicant for your closing. And to the extent
15 that you have heard things in the testimony of
16 Ms. Miller and Ms. Kavruck that you can
17 respond to in the closing, it would probably
18 be helpful to do that.

19 MR. DONOHUE: Sure.

20 CHAIRMAN LOUD: Okay.

21 MR. DONOHUE: And I think I'll be
22 brief, Mr. Chairman. We were, obviously,

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1 aware of some concerns about the RF issue.
2 This was debated at the ANC meeting back in
3 November, November 9th.

4 Ms. Kavruck's position, certainly,
5 was heard by the ANC. We also heard her and
6 we heard her earlier today express displeasure
7 at the ANC and the way it represents her
8 interests or doesn't represent her interests.

9 We are not really a party to that.

10 But as I mentioned, I did correspond with Ms.
11 Kavruck. I prepared some materials that I
12 thought would be useful to her in response to
13 the questions about what is the state of the
14 industry in terms of RF emissions.

15 And I provided information, as I
16 mentioned, links to the World Health
17 Organization, American Cancer Society, of
18 course, the FCC to try to explain and try to
19 address the questions about RF emissions. It
20 is an emotional issue. There is no question,
21 it's an emotional issue and we get it all the
22 time.

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1 But I guess a couple of things.
2 I'll remind the Board the Chair's discussion
3 with the D.C. Office of Planning, you know, if
4 this is a rooftop installation that goes
5 through as a matter-of-right. The District
6 doesn't ask for a Site Safe report or an RF
7 emissions report. There is no obligation to
8 certify it to the FCC.

9 The FCC has determined that these
10 sites are what is known as "categorically
11 excluded" from regular reporting. They are so
12 far below the levels deemed to be troublesome
13 that they do not have to give regular reports
14 as does, for example, a broadcast station.

15 And the reason is and the reasons
16 reflected in the '96 Act that I mentioned at
17 the outset is because, you know, Congress took
18 note of the fact that in zoning hearings,
19 there was going to be concerns and questions
20 about RF emissions.

21 But given the state of the
22 knowledge, given the state of the industry and

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1 the world organizations and U.S. organizations
2 that have studied this, it is determined that
3 the wireless base stations and facilities we
4 are talking about here today are so far below
5 levels deemed to be safe as to warrant an
6 exemption from regular zoning review.

7 And that's what I mentioned
8 earlier. And it is set forth in the '96 Act
9 which says that it is outside your hands. So
10 but coming back to what I mentioned at the ANC
11 and the dialogue we had, we do try, Cricket,
12 in particular, is very good about community
13 outreach and tried to explain what we are
14 doing and what the network is.

15 And as I said a couple of times
16 now, more importantly, what it is not. And it
17 is not an unsafe situation. The existing
18 facilities that are there and the proposed
19 installation by Cricket all fall way, way
20 below what is deemed to be safe by the FCC.
21 And they are the arbiter when it comes to all
22 things RF emissions.

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1 Beyond that, Mr. Chair, I think
2 that the record speaks for itself. The photo
3 simulations, the plans reflect that what we
4 are talking about here is an existing
5 structure, be it with a 10 foot height
6 increase, it will be Stealth as is the
7 existing structure.

8 The ground equipment will be
9 virtually invisible from anybody but an aerial
10 photographer. And we are talking about a 10
11 foot extension on the flag pole that has co-
12 existed here for a number of years and really
13 worked quite well.

14 So that's really all I have, Mr.
15 Chairman, unless there are questions for me.

16 CHAIRMAN LOUD: Thank you, Mr.
17 Donohue. I don't have any questions. We'll
18 see if other Board Members do.

19 I just wanted to share this
20 reflection. It sounds like federal law
21 clearly preempts local law on this issue.
22 That's a very basic doctrine that is taught in

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1 law schools, preemption.

2 And tying that to my next point,
3 you mentioned that Cricket has a very
4 aggressive community outreach effort. And so
5 it may be worth considering, as a part of that
6 outreach, if there are provisions in federal
7 law that direct consumers to how these kinds
8 of issues are addressed, if there is a federal
9 regulatory regime in place for consumer
10 feedback or consumer complaints, that that be
11 something that is communicated to persons that
12 believe that their local regulatory bodies,
13 like the Zoning Commission, would have that
14 authority.

15 Clearly, if it is preempted,
16 clearly we don't. And so as a part of that
17 communication piece, that might be very, very
18 helpful.

19 Let me see if Board Members have
20 any questions for you.

21 MEMBER MOLDENHAUER: I only have
22 one question.

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1 CHAIRMAN LOUD: Yes.

2 MEMBER MOLDENHAUER: Ms. Miller and
3 Kavruck both referenced additional information
4 that they were, I guess, told they were going
5 to receive at the ANC and then you referenced
6 the fact that you provided an additional
7 letter to Ms. Kavruck. Is that -- I'm trying
8 to make sure I understand the facts.

9 Are you saying that that was the
10 additional information that you were going to
11 provide? And it was provided just to Ms.
12 Kavruck?

13 MR. DONOHUE: That's my response.
14 I'm not entirely clear what Ms. Kavruck
15 understood from the ANC. She did suggest that
16 in cases where there was a broader impact, if
17 you will, that the area of notice, the area of
18 dialogue be widened.

19 You know, we obligate under 11
20 DCMR. We send out the notices as required.
21 But the question was whether that ought to be
22 widened in cases where there may be more folks

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1 interested. You know, that's a change in the
2 Zoning Regs. I don't have any real response
3 to that.

4 The letter that I provided to Ms.
5 Kavruck, as she requested, was a letter dated
6 November 17, 2009. I did provide a copy to
7 the Office of Planning. I didn't file it in
8 the record, but I can certainly do that. In
9 fact, I can do it today.

10 MEMBER MOLDENHAUER: No. I don't
11 need or I don't believe we need a copy of
12 that. My issue was just trying to find out
13 what was potentially promised in regards to
14 some additional information and then what your
15 understanding was. And obviously, her
16 understanding, which was, I guess from my
17 understanding, then communicated to Ms.
18 Miller, that they were going to get some
19 additional notice.

20 You are saying that you just simply
21 told her that you were going to send her some
22 additional information?

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1 MR. DONOHUE: Correct.

2 MEMBER MOLDENHAUER: Is that
3 correct?

4 MR. DONOHUE: That's correct.

5 MEMBER MOLDENHAUER: All right. I
6 have no additional question.

7 CHAIRMAN LOUD: Okay. If neither
8 Mr. Dettman or Ms. Sorg have any questions, I
9 think we have a full record before us. I
10 think we can deliberate. And I would like to
11 turn to Mrs. Moldenhauer and ask you to start
12 us off.

13 MEMBER MOLDENHAUER: Sure. Thank
14 you, Mr. Loud. I believe that we do have a
15 full record. Right now, we are going to
16 deliberate on the analysis of Application
17 18025, which is for a special exception to
18 extend the height of an existing Stealth flag
19 pole located at 2607 Military Road, N.W.,
20 which it currently is 116 and 5 inches in
21 height to 126 feet and 5 inches, which would
22 be a 10 foot increase on that flag pole to

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1 provide for an additional antenna for Cricket
2 Communications.

3 The Board, in this case, has very
4 limited jurisdiction. The only review that we
5 are permitted to analyze this case on is
6 section 2712, which reviews whether or not the
7 applicant could satisfy the special exception
8 for this increased height.

9 In doing that, I will incorporate
10 and go through the Office of Planning's
11 report, which Ms. Thomas reviewed and
12 discussed. And that report goes through and
13 discusses the map area and service needed for
14 a new antenna.

15 There was analysis done by the
16 Office of Planning to show those proposed
17 coverages. There was sufficient information
18 to show that there is an inadequate level of
19 service in that area, along Military Road, and
20 that this service provider has contacted in
21 trying to determine different location sites
22 and that this location site was provided. And

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1 that there was identified some additional
2 potential sites that would not work.

3 As seen, this is not a rooftop
4 structure. We have documentation of the
5 elevation drawings of the flag pole to show
6 the extension of the 10 feet on top of the
7 existing flag pole for this additional
8 antenna.

9 We have pictures of the proposed
10 antenna. In addition to that, there has been
11 testimony by Mr. Donohue of the ground
12 structure equipment and that that would not be
13 visible from the road, but that that would
14 only be visible from an aerial view of the
15 property.

16 The Office of Planning also states
17 that in their analysis and their review that
18 this does provide for the required setback
19 from the road of the 1:1 setback for the flag
20 pole and that it would not have any potential
21 adverse impact pursuant to section 2712.2 or
22 any need for additional screening to that

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1 effect.

2 We have an ANC report, which is our
3 Exhibit 27, which we reviewed. No one came to
4 testify from the ANC today. But the report
5 does satisfy our requirements for great
6 weight. It states the date of the meeting,
7 which was November 9th.

8 It states that there was a vote, a
9 quorum present of four and that there was a
10 vote of 5-2 in support. There was a member in
11 the audience, which was Ms. Kavruck. And we
12 had testimony from two parties opposing this
13 application, both Ms. Kavruck and Ms. Miller.

14 And they testified to the concerns
15 about health. And as we hear their concerns,
16 unfortunately, we do not have the jurisdiction
17 as was testified.

18 The FCC has jurisdiction over this
19 issue. And as a state body, we are preempted
20 by federal rules. And so we cannot dive into
21 that issue. And there will be, as Ms. Thomas
22 discussed, a separate review process by the ZA

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1 which will look at some of the additional
2 issues of the RF report, but that is not
3 something that is reviewed in our
4 determination of whether or not they can go up
5 that additional 10 feet.

6 So we are considering the Exhibit
7 27, which is in support of the application and
8 in considering both Exhibit 32, which is a
9 multi-page, I believe it is like, a two page
10 letter within a seven page fax, documentation
11 from Ms. Kavruck in opposition to the
12 documentation.

13 In that letter, she references
14 concerns not only about health, but also
15 concerns about notice. And under the Zoning
16 Regulations, there are multiple avenues of
17 required notice.

18 There is a requirement that is
19 provided for by the Office of the Surveyor who
20 determines the notice circumference in regards
21 to which notice goes out. That was provided
22 in our files, which is Exhibit No. 7. And

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1 that shows that the applicant satisfied the
2 Zoning Regulations and provided notice to
3 those homeowners within the circumference that
4 is required.

5 In addition to that, our Zoning
6 Regs require that the property is posted for
7 all public individuals to see that there will
8 be an application before the BZA of specific
9 zoning requests. And that is -- we have
10 confirmation that the applicant posted notice
11 and we have pictures of that in our Exhibit
12 No. 28. Thank you.

13 And that shows that it was posted
14 in two locations on the campus, which would be
15 visible to any public member. And then that
16 also includes information on what the
17 application is, what the applicant is seeking
18 in regards to relief.

19 In addition to that, we have
20 testimony that there was a public hearing by
21 the ANC, which discussed this issue. And it
22 is the ANC's job to make sure that that

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1 information then is disseminated and
2 discussed. And obviously, if -- you know, we
3 hope and we impress upon the ANC that they do
4 represent their interest and community
5 interests.

6 And I would, you know, hope that,
7 you know, if certain members of the community
8 do not feel as though the ANC is supporting
9 their interests, that they pursue that within
10 their community.

11 Those are the statements. Based on
12 that, I think that in reviewing the different
13 requirements under 2712, the applicant has
14 satisfied the different issues: That there is
15 visual mitigation that this is a Stealth flag
16 pole for the antennas; that the flag poles are
17 setback sufficiently; and that they do satisfy
18 the requirements for a special exception under
19 2712.

20 At this point, I would be willing
21 to submit a motion, if there is no additional
22 deliberation.

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1 CHAIRMAN LOUD: Thank you, Board
2 Member Moldenhauer. That was an excellent
3 recap, I think, of the presentation of the
4 applicant, as well as the witnesses today and
5 the Office of Planning, as well as an analysis
6 of the law that pertains to where we are in
7 this type of case.

8 Let me see if Board Members have
9 any additional questions. There don't appear
10 to be any.

11 I have one question regarding the
12 authorization letter that we talked about
13 earlier. Now, we can, under our Rule, if we
14 want to decide today, 3100.5 waive the
15 requirement for that authorization letter and
16 rely upon -- I think the application has a
17 signature or certification from the Saint
18 John's representative or if we don't want to
19 do that and we want to -- I think the counsel
20 testified -- didn't testify, but stated on the
21 record that the request has been made already
22 for such a letter, we can hold off a vote

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1 today until we get that letter.

2 I'm inclined to think that the
3 overwhelming circumstances of the presentation
4 on paper and the statements by counsel would
5 indicate that there is authority to move
6 forward and that the signed certification on
7 the form 120, I think it is, would indicate
8 that the school authorizes that.

9 So I would be inclined to support a
10 section 3100.5 waiver, but I defer to you. I
11 think you have done an excellent job of laying
12 it out.

13 MS. BAILEY: Mr. Chairman?

14 CHAIRMAN LOUD: Yes?

15 MS. BAILEY: There is a third
16 option.

17 CHAIRMAN LOUD: Okay.

18 MS. BAILEY: And that is that we
19 don't issue the order until we receive that
20 letter.

21 CHAIRMAN LOUD: Okay.

22 MEMBER MOLDENHAUER: That would be

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1 my recommendation that we wait for that
2 letter, but that we can deliberate the
3 decision now based upon the testimony of
4 counsel that we will receive it.

5 CHAIRMAN LOUD: Okay. Well, let me
6 thank Ms. Bailey for that third option. And
7 had you made your motion?

8 MEMBER MOLDENHAUER: I had not yet.

9 CHAIRMAN LOUD: Okay.

10 MEMBER MOLDENHAUER: I hadn't. I
11 submit a motion to approve Application No.
12 18025 for a special exception to increase the
13 height of an existing Stealth flag pole
14 located at 2607 Military Road pursuant to
15 requirements under 2712.

16 CHAIRMAN LOUD: I second the
17 motion. The motion has been made and
18 seconded. Further deliberation?

19 I just wanted to add two things,
20 Mrs. Moldenhauer and colleagues.

21 First, with respect to the whole
22 notice issue, I empathize with the witnesses

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1 that appeared today. However, I wanted to
2 point out that the record, and I think you
3 mentioned this, Mrs. Moldenhauer, portrays a
4 slightly different story.

5 It suggests that there was a lot of
6 notice in the community. And I think even the
7 witness testified that she appeared at the ANC
8 meeting, Mrs. Kavruck, and that Ms. Miller
9 indicated that she was aware of it. She had a
10 conflict, but she was able to get some
11 information to Ms. Kavruck to present at the
12 ANC meeting.

13 It sounds like what may have
14 happened was that all of the neighbors didn't
15 come to an agreement on the issue, but
16 certainly it sounds like with 50 persons
17 present at the meeting and the witnesses that
18 appeared before us today being aware of it and
19 the various means of notification that you
20 talked about, that the word did get out. So I
21 wanted to comment on that.

22 The second thing I wanted to

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1 comment on was that I think there was some
2 very interesting testimony that came from Ms.
3 Kavruck and Ms. Miller regarding what we know
4 and what we don't know about the health
5 effects of the wireless transmission
6 technology.

7 And equally interesting testimony
8 from, not testimony, but statements, counsel
9 regarding these facilities, as I understood
10 it, these wireless facilities as opposed to
11 broadcast facilities being so far under the
12 radar in terms of harmful impacts, that the
13 FCC and the science that backs up the FCC has
14 determined that they are not even on a
15 schedule for regular review.

16 That is very, very interesting and
17 I hope that that discussion plays out. But I
18 think all of us up here are kind of clear that
19 that's not our jurisdiction. It's not our
20 skill set. It's not our jurisdiction. And
21 more importantly, the FCC and federal law has
22 preempted local authorities from reviewing

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1 that type of analysis.

2 So I hope that the discussion can
3 continue forward in its appropriate forum,
4 which would not be the BZA. And that the
5 concerns that are raised by Mrs. Kavruck and
6 Ms. Miller have an appropriate forum to be
7 expressed.

8 Now, if there is nothing further,
9 the motion has been made and seconded.

10 All those in favor say aye.

11 ALL: Aye.

12 CHAIRMAN LOUD: All those who are
13 opposed? And are there abstentions? Ms.
14 Bailey, if you could read back the vote?

15 MS. BAILEY: Mr. Chairman, the vote
16 is recorded as 4-0-1 to grant the application
17 as amended. And it is amended because it was
18 advertised under section 2706. The Board
19 approved the application under section 2712.

20 The vote again is 4-0-1. Board
21 Member Moldenhauer made the motion, Mr. Loud
22 seconded, Board Members Dettman and Sorg

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1 support the motion. And no other Board
2 Members are present, at this time.

3 CHAIRMAN LOUD: Thank you, Ms.
4 Bailey. And so I think this would be
5 appropriate for a summary order.

6 MS. BAILEY: Thank you.

7 CHAIRMAN LOUD: Okay. Given that
8 the ANC has not opposed it.

9 But as I understand it, we will not
10 issue that order until there is on the record
11 a letter of authorization from Saint John's.

12 MS. BAILEY: Yes, sir.

13 CHAIRMAN LOUD: Okay. Is there
14 anything further on this case?

15 MS. BAILEY: No, Mr. Chairman.

16 CHAIRMAN LOUD: Okay. Let me thank
17 the applicant for your time and patience this
18 morning. Let me thank the witnesses as well
19 and the Office of Planning.

20 Good luck to everybody.

21 MS. GLAZER: Mr. Chair?

22 CHAIRMAN LOUD: Yes.

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1 MS. GLAZER: I just want to state
2 that in terms of the sections, I think the
3 original application was filed under 2706 and
4 that is the section that is pertinent, because
5 that's the section with the height requirement
6 that is not being met.

7 So I agree with Ms. Bailey though,
8 we could add 2706 and 2712, but that's the
9 more procedural section.

10 CHAIRMAN LOUD: Well, then let's
11 leave it right there. You agreed with Ms.
12 Bailey and we can probably close the case out.

13 MS. GLAZER: I would keep the old
14 section as well.

15 COURT REPORTER: Microphone,
16 please.

17 CHAIRMAN LOUD: Can you hear?

18 MS. GLAZER: I'm sorry. I would
19 keep the old section as well and add 2712, if
20 you wish.

21 CHAIRMAN LOUD: I stand corrected.

22 So this is relief from section 2706 pursuant

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1 to section 2712.

2 MS. GLAZER: Correct.

3 CHAIRMAN LOUD: Okay. Does that
4 take care of that part of it?

5 MS. GLAZER: Yes.

6 CHAIRMAN LOUD: Okay. Then is
7 there anything further in this case?

8 MS. KAVRUCK: I would like to say
9 just one thing, even though I know it has no
10 impact now, but it would just -- I would just
11 like to say one thing. Something in my fax,
12 which is the American Cancer --

13 COURT REPORTER: If you're going to
14 say something, say it on the microphone.

15 CHAIRMAN LOUD: Ms. Kavruck, we
16 have already voted on the case. We have
17 already actually approved the case.

18 MS. KAVRUCK: I understand that you
19 have. I understand this is fruitless. But I
20 want to say something that was in the fax that
21 you received, which is the American Cancer
22 Society has re-evaluated its position and so

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1 have England, France and Israel on cell phones
2 and radio waves. That's in the communication
3 I have already sent.

4 So I just feel powerless in this
5 sort of situation. Not that -- coming here
6 made no point whatsoever, that's how it feels.

7 CHAIRMAN LOUD: Well, again, we, I
8 think, are not without empathy for the issues
9 raised, speaking for myself. I know that I'm
10 not. And I'm hopeful that the correct forum
11 for this, since the feds have decided to
12 preempt it, they have got a responsibility to
13 put something in place that would allow those
14 kind of concerns to be addressed.

15 But the federal law has preempted
16 it. It is too long and too long a discussion
17 to start at the end of a decision. Perhaps in
18 communicating with the Cricket representative,
19 who has indicated that they have a very
20 aggressive community outreach program, that
21 some discussion of what preemption means and
22 the responsibility of the feds in this matter

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1 is something that can be addressed.

2 And I think with that, we are going
3 to close the case out. Thank you so much for
4 your participation today. We appreciate it.

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

7 MS. BAILEY: No, Mr. Chairman.

8 CHAIRMAN LOUD: All right. Then I
9 believe we are adjourned for this morning's
10 calendar. And again, thanks to everyone.

11 (Whereupon, the Public Hearing was
12 recessed at 12:05 p.m. to reconvene at 1:22
13 p.m. this same day.)

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

1:22 p.m.

CHAIRMAN LOUD: This hearing will, please, come to order. Good afternoon, ladies and gentlemen. This is the February 2 Public Hearing of the Board of Zoning Adjustment of the District of Columbia.

My name is Marc Loud, Chairperson.

And joining me to day are Vice Chair, Shane Dettman, representing the National Capital Planning Commission, Konrad Schlater representing the Zoning Commission, Meridith Moldenhauer, Board of Zoning Adjustment, Ms. Nicki Sorg, who is in her second week on BZA and we continue to welcome you.

Mr. Cliff Moy, Secretary of BZA, Ms. Sherry Glazer, Office of the Attorney General and Ms. Beverley Bailey, Zoning Specialist in the Office of Zoning.

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

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

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

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

22 The order of procedure for special

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1 exceptions and variances is: Statement and
2 witnesses of the applicant; Government
3 reports, including the Office of Planning, the
4 Department of Transportation, etcetera; The
5 report of the Advisory Neighborhood
6 Commission; Parties or persons in support;
7 Parties or persons in opposition; and finally,
8 Closing remarks by the applicant only.

9 Pursuant to Sections 3117.4 and
10 3117.5, the following time constraints will be
11 maintained: The applicant, appellant, persons
12 and parties, except an ANC, in support,
13 including witnesses, no more than 60 minutes
14 collectively. The appellees, persons and
15 parties, except an ANC, in opposition,
16 including witnesses, no more than 60 minutes
17 collectively. Individuals are allowed to
18 testify for 3 minutes. Individuals that
19 represent organizations are given 5 minutes.

20 These time restraints do not
21 include cross examination or questions from
22 the Board. Cross examination of witnesses is

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1 permitted by the applicant or parties only.
2 The ANC within which a property is located is
3 automatically a party in a special exception
4 or variance case.

5 Nothing prohibits the Board from
6 placing reasonable restrictions on cross
7 examination.

8 The record will be closed at the
9 conclusion of each case, except for any
10 material specifically requested by the Board.

11 The Board and the staff will specify at the
12 end of the hearing exactly what is expected
13 and the date when the persons must submit the
14 evidence to the Office of Zoning. After the
15 record is closed, no other information will be
16 accepted by the Board.

17 The decision of the Board in
18 contested cases must be based exclusively on
19 the public record. To avoid any appearance to
20 the contrary, the Board requests that persons
21 present not engage the Members of the Board in
22 conversation.

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1 Please, turn off all beepers and
2 cell phones, at this time, so as not to
3 disrupt these proceedings.

4 The Board will make every effort to
5 conclude the Public Hearing calendar for this
6 afternoon as near as possible to 6:00 p.m. If
7 for some reason the afternoon cases are not
8 completed by 6:00 p.m., the Board will assess
9 whether it can complete the pending case or
10 cases remaining on the agenda for tonight.
11 And if we are not able to, we will continue
12 the case to the first available date on our
13 calendar.

14 At this time, the Board will
15 consider any preliminary matters. The Board
16 will now consider any preliminary matters.
17 Preliminary matters are those that relate to
18 whether a case will or should be heard today,
19 such as requests for postponement, continuance
20 or withdrawal or whether proper and adequate
21 notice of the hearing has been given. If you
22 are not prepared to go forward with a case

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1 today or if you believe that the Board should
2 not proceed, now is the time to raise such a
3 matter.

4 Does the staff have any preliminary
5 matters?

6 MS. BAILEY: Mr. Chairman, Members
7 of the Board, good afternoon.

8 CHAIRMAN LOUD: Good afternoon.

9 MS. BAILEY: Yes, Mr. Chairman. It
10 has to do with postponement of one of the
11 cases. We did not receive written
12 notification, but orally it was expressed to
13 staff that the Application of the Department
14 of Real Estate Services, Application 18020, is
15 requesting a postponement.

16 And additionally, Mr. Chairman,
17 there is a request for party status in
18 opposition to the application from a Mr. Peter
19 Gambrill.

20 CHAIRMAN LOUD: Thank you, Ms.
21 Bailey. Why don't we do this then, why don't
22 we have everybody sworn in who is going to be

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1 giving testimony for the afternoon? And then
2 let's call the cases a bit out of order
3 starting with the D.C. Government case that
4 you talked about that is requesting a
5 postponement.

6 MS. BAILEY: Yes, sir.

7 CHAIRMAN LOUD: Thank you.

8 MS. BAILEY: Please, stand to take
9 the oath, everyone who will be testifying
10 today.

11 (Whereupon, the witnesses were
12 sworn.)

13 MS. BAILEY: As indicated, Mr.
14 Chairman, this is Application of the District
15 of Columbia Department of Real Estate
16 Services. The number is 18020. It is
17 pursuant to 11 DCMR § 3103.2, for a variance
18 from the off-street parking requirements under
19 section 2101.1, to construct a new five story
20 Government office building in the C-3-A
21 District at premises 4085 Minnesota Avenue,
22 N.E., Square 5052, Lot 821.

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1 We do have a letter of
2 authorization to be represented by Attorney
3 Joseph P. Lapon.

4 CHAIRMAN LOUD: Thank you, Ms.
5 Bailey. Is the applicant here for that case?

6 If you could, please, step forward? And is
7 the party status applicant present for that
8 case? Why don't you hold on for one second,
9 we're going to hear from the applicant in that
10 case.

11 And let me just ask as you are
12 preparing to give us your request for a
13 continuance, that of the eight persons who
14 raised their hands to give testimony this
15 afternoon, if you are going to give testimony
16 for the case that we are going to continue
17 right now, can you raise your hand? Okay.
18 All right.

19 And if you are here to give
20 testimony for the Rose-Marie Harris case, can
21 you raise your hand? Very good. And if you
22 are here for the Stephen McKinney case, can

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1 you raise your hand? Very well. Thank you.
2 I just wanted to get a sense of the witnesses
3 for this afternoon.

4 Well, good afternoon.

5 MR. LAPON: Good afternoon. I'm
6 Joe Lapon, Assistant Attorney General in the
7 real estate section of the Attorney General's
8 Office appearing on behalf of the District
9 Department of Real Estate Services in this
10 case.

11 As staff indicated, we are
12 requesting a postponement of this Public
13 Hearing. Subsequent to the previous
14 continuance of this case, we did become aware
15 of some concerns of an adjoining landowner and
16 subsequently have met with that landowner and
17 that conversation, as I understand, is
18 ongoing.

19 There is some outcomes from that
20 conversation and we would like to just give a
21 little more time to continue that
22 conversation. And apologies for any

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1 inconvenience to the Board, but I think
2 ultimately it will probably be the most
3 efficient use of the Board's time to allow
4 that conversation to go a little bit further
5 before we present testimony to the Board.

6 CHAIRMAN LOUD: Have you -- you are
7 making a representation on the part of the
8 party status applicant who is here? We may or
9 may not need to hear from that party status
10 applicant.

11 MR. LAPON: Sure.

12 CHAIRMAN LOUD: But have you worked
13 out a date that you would like to come back
14 before the BZA?

15 MR. LAPON: Our request would be to
16 get back before the Board, you know,
17 expeditiously, as soon as possible. I think
18 some of the outstanding matters with Mr.
19 Gambrill are matters that can be discussed and
20 hopefully tied up in relatively short order.

21 So depending on the Board's
22 calendar, we would request to come back before

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1 the Board as soon as possible date.

2 CHAIRMAN LOUD: It looks like if
3 you and, Mr. Gambrill, right, okay, Mr.
4 Gambrill are available on March 2nd in the
5 afternoon, we could hear the case then.

6 MR. LAPON: I won't speak for Mr.
7 Gambrill, but I think that works well for the
8 applicant.

9 CHAIRMAN LOUD: Okay. And I'll
10 state on the record that Mr. Gambrill has said
11 that that works for him as well.

12 And so I think that we can hear the
13 case on March 2nd. I think the Board is very
14 amenable to allowing you to continue this
15 dialogue and hopefully it will yield some
16 outcome that will be beneficial to the
17 process.

18 In our review of the materials that
19 we had, we had several questions that it might
20 be fruitful to take a look at between now and
21 March 2nd, so that when you return, all of the
22 relevant issues are addressed.

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1 One of which, and I'll share mine
2 on the record and then open it up to others,
3 is the availability to the applicant to
4 request a 25 percent parking reduction under
5 section 2104.2, I believe it is, for being
6 within 800 feet of a Metro Station.

7 We didn't see that request as a
8 part of the application and we are curious.
9 We didn't see it in OP's report either. We're
10 curious as to if that is something you want to
11 address.

12 Secondly, a number of us were a
13 little confused from the pleadings as to
14 whether the WMATA structured garage and the
15 DOES on-site garage are on separate lots or
16 are on the same lot. And if they are on
17 separate lots, whether there would be a need
18 to request relief from the provisions that
19 require parking to be on the same lot as the
20 principal building.

21 Again, not addressed and we're not
22 sure if we are overlooking something or if

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1 it's something that you had considered.

2 I think those were the primary
3 concerns I had. Are there others that Board
4 Members would like the applicant to take a
5 look at?

6 Okay. Mr. Dettman is reminding me
7 that I think the reduction is a matter-of-
8 right under the revised text amendment that we
9 were provided with yesterday.

10 So that certainly impacts whether
11 you need relief of 281 or you need relief for
12 281 minus 25 percent, which would be around
13 211. You still need to address, I think, in
14 the pleadings in terms of identifying the
15 amount of relief that you need.

16 Is there anything else, Mr.
17 Dettman?

18 VICE CHAIRMAN DETTMAN: No. I
19 think that's right, Mr. Chairman.

20 CHAIRMAN LOUD: Okay.

21 VICE CHAIRMAN DETTMAN: I think
22 that the applicant will need to demonstrate to

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1 the Board that they are within 800 feet of a
2 Metrorail, but if that is the case, they would
3 be entitled to a matter-of-right reduction of
4 up to 25 percent.

5 I think that Zoning Text Amendment
6 is Case No. 03-10A, which was a recent
7 amendment to the regs that made it a matter-
8 of-right instead of a special exception from
9 the Board.

10 CHAIRMAN LOUD: Thank you, Mr.
11 Dettman. I'm going to check my notes one last
12 time before you leave, just to make sure that
13 you are coming back with a sense of some of
14 our questions.

15 There is also some confusion in the
16 record about the correct lot. It is referred
17 to differently by OP and by yourself. Some
18 exhibits record it as Lot 821, I think OP
19 Exhibit 23. And some exhibits refer to it as
20 Lot 0012. So just clarification, I guess, on
21 the lot.

22 And clarification on the address.

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1 It is referred to as 4085 and some exhibits
2 4058 in others. But those are minor points.
3 I think that the main points are the issue of
4 whether we are talking about additional relief
5 being needed for the parking being on a
6 separate lot and the whole parking reduction
7 piece. Okay?

8 MR. LAPON: Great.

9 CHAIRMAN LOUD: All right.

10 MR. LAPON: Thank you for your
11 input. We will address those and see you on
12 March 2nd.

13 CHAIRMAN LOUD: Thank you.

14 MR. LAPON: Okay.

15 MS. BAILEY: Mr. Chairman, I had
16 left the room momentarily. Is that in the
17 morning or in the afternoon?

18 CHAIRMAN LOUD: It's in the
19 afternoon, Ms. Bailey.

20 MS. BAILEY: Thank you.

21 CHAIRMAN LOUD: And now, Ms.
22 Bailey, if you could call the Rose-Marie

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1 Harris case?

2 MS. BAILEY: Application 18023 of
3 Rose-Marie Harris and it is pursuant to 11
4 DCMR § 3103.2, for a variance from the use
5 provisions to continue the use of a four unit
6 apartment house under subsection 320.3. The
7 property is located at 3139 N Street, N.W.,
8 Square 1232, Lot 59. And the property is
9 Zoned R-3.

10 CHAIRMAN LOUD: Thank you, Ms.
11 Bailey. Good afternoon. Why don't you state
12 your names for the record?

13 MR. SULLIVAN: Good afternoon. My
14 name is Martin Sullivan.

15 MS. HARRIS: Good afternoon. My
16 name is Rose-Marie A. Harris.

17 CHAIRMAN LOUD: Good afternoon, Mr.
18 Sullivan and Ms. Harris. I believe the record
19 is full in this case, in the sense that a very
20 well put together package has been presented
21 by Mr. Sullivan. And it has garnered the
22 support of the Office of Planning and I

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1 believe the ANC as well.

2 So I don't think we are going to go
3 through a full blown evidentiary hearing. I
4 think that there may be some very specific
5 questions that one or more Board Members will
6 have.

7 And so rather than turn it over to
8 you for the presentation of your case, why
9 don't we start with seeing if Board Members
10 have specific questions for you and then we
11 can proceed from there?

12 VICE CHAIRMAN DETTMAN: Thank you,
13 Mr. Chairman. Mr. Sullivan, just wondering
14 very quickly, you have already taken the Board
15 through the three prongs of the use variance
16 test in your filings.

17 And I wanted to give you the
18 opportunity to supplement what you have
19 already filed, additional testimony, about the
20 undue hardship. So did your client look at
21 what it would cost to convert this back to a
22 conforming use or what kind of impact would

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1 this have on the rental income that is
2 currently being generated by the property?

3 MR. SULLIVAN: Yes. And I think it
4 wasn't -- we didn't get any expert testimony
5 on that or expert report. I think it is more
6 just a sense of the trouble that it would be
7 to convert a building that had obviously been
8 an apartment building for so long.

9 And it was not just that, but there
10 were a variety of factors. Also the tenant
11 displacement would be a hardship, in part for
12 the owner as well, because the tenants have
13 been there a long time. She has had a long
14 history with the tenants.

15 So no, we don't have any specific -
16 - we didn't do any studies on the cost of a
17 reconfiguration, but just assume that it would
18 be a prohibitive cost.

19 VICE CHAIRMAN DETTMAN: What about,
20 specifically, the tenant displacement? The
21 undue hardship needs to go to the property
22 owner. And I suspect that that would have an

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1 impact on the property owner in the form of
2 lost rental income.

3 So is there anything that you can
4 provide to the Board orally or in writing to
5 that effect?

6 MR. SULLIVAN: I would agree that
7 it would result in lost tenant income,
8 particularly because the tenants are so
9 stable. I don't really have anything other
10 than that to add other than that.

11 VICE CHAIRMAN DETTMAN: Okay.

12 CHAIRMAN LOUD: Thank you, Mr.
13 Dettman. Are there other questions for the
14 applicant? Okay.

15 Then again, in lieu of a full blown
16 presentation, including the Office of Planning
17 going through its report, I think the record
18 is full. And I think that we probably can
19 deliberate on this case, based on the record,
20 up to this point, the pleadings and so on.

21 And unless I'm wrong, I'm going to
22 suggest and ask Mr. Dettman if he could walk

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1 us through what we need to for a motion and a
2 vote?

3 VICE CHAIRMAN DETTMAN: Thank you,
4 Mr. Chairman. As you know, this is a request
5 for a use variance to continue or establish a
6 four unit apartment house in an R-3 District.

7 The property has operated as a four unit
8 apartment house for some time, definitely
9 since the property owner acquired the
10 structure, roughly, I think, 46 years ago.

11 Nonetheless, in order to prevail on
12 the request, the applicant is required to meet
13 the three prongs of the use variance test.

14 And that first prong is whether or
15 not the property is affected by an exceptional
16 or extraordinary situation or condition. I
17 think the applicant has met its burden for
18 that prong. And the factors that kind of
19 contribute to the first prong, I think, are
20 the longstanding use of the property as an
21 apartment building, again, at least for 46
22 years, since the applicant acquired the

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1 property.

2 In addition to that, the
3 longstanding configuration of the building as
4 a four unit apartment house. It was granted
5 the right to operate as a rooming house, I
6 think, in the 1950s, but even prior to, again,
7 the property owner acquiring the building, it
8 had already been configured as four separate
9 apartment units.

10 And finally, the fact that the
11 property in and of itself. Its location is
12 surrounded by commercial uses, I think,
13 immediately behind as well as to the west
14 along Wisconsin Avenue.

15 So I think those three factors
16 allow the applicant to meet its burden under
17 the first prong, exceptional situation or
18 condition.

19 With respect to the second prong,
20 whether or not the exceptional or
21 extraordinary conditions give rise to, in this
22 case, an undue hardship on the property owner,

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1 I think that the cost of converting the
2 building back to a conforming use, wherein in
3 this case, it would probably be perhaps a
4 single-family dwelling or a flat at the most,
5 would be an economic hardship upon the
6 property owner.

7 I think the effort and the cost to
8 reconfigure the property would certainly be
9 substantial.

10 In addition to that, the property
11 owner has not only lived within one of the
12 units, but has continually rented out the
13 remaining three units for the duration that
14 they have lived there.

15 So I think that contributing to the
16 second prong of the test would be the loss of
17 rental income. And in addition, the
18 displacement of the tenants, which the tenant
19 mix has been very, very stable over the years.

20 Finally, with respect to the third
21 prong of the variance test, whether or not the
22 granting of this use variance will cause any

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1 substantial detriment to the public good or
2 substantially impair the intent, purpose and
3 integrity of the Zone Plan, I think the
4 applicant has met its burden under that prong
5 as well.

6 The four unit apartment building
7 has existed for many, many years. And as
8 stated in the applicant's filings, it is a
9 good transitional use between the commercial
10 corridor along Wisconsin Avenue and the R-3
11 Residential District that exists to the east.

12 As I stated already, the tenant
13 history has been very, very stable. And the
14 owner has lived there since purchase. The
15 character and intensity of the use of the
16 apartment building fits in with the
17 surrounding context and the surrounding
18 commercial corridor.

19 And finally, that there is no
20 change to the use or the structure being
21 contemplated here. So I think with all that
22 being said, Mr. Chairman, the applicant has

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1 met its burden for this request.

2 I will note that the Office of
3 Planning's report, that's our Exhibit No. 24,
4 OP is also in support of the application. And
5 also indicated in that report is that ANC-2E
6 voted in support of the use variance at its
7 January 11, 2010 meeting.

8 So I think that's all I have, Mr.
9 Chairman. I can turn it back to you for
10 further comment.

11 CHAIRMAN LOUD: Thank you, Mr.
12 Dettman. That was an excellent summary of the
13 case. Is there a motion to be made?

14 VICE CHAIRMAN DETTMAN: If there is
15 nothing further, I'll move for approval of
16 Application No. 18023, pursuant to 11 DCMR
17 3103.2, for a variance from the use provisions
18 to continue the use of a four unit apartment
19 house under subsection 320.3, in the R-3
20 District, located at 3139 N Street, N.W.

21 CHAIRMAN LOUD: Motion seconded.
22 The motion has been made and seconded. Is

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1 there further deliberation?

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

4 ALL: Aye.

5 CHAIRMAN LOUD: All those who
6 oppose? And, Ms. Bailey, can you read back
7 the vote, please?

8 MS. BAILEY: Mr. Chairman, the vote
9 is recorded as 5-0-0 to grant the application.

10 Board Member Dettman made the motion, Mr.
11 Loud seconded, in support of the motion also
12 are Board Member Schlater, Moldenhauer and
13 Sorg.

14 CHAIRMAN LOUD: Thank you, Ms.
15 Bailey. This would be appropriate for a
16 summary order.

17 MS. BAILEY: Yes, sir.

18 CHAIRMAN LOUD: Okay. Why don't we
19 do that. And is there anything further in
20 this case?

21 MS. BAILEY: Not on this case, Mr.
22 Chairman.

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1 CHAIRMAN LOUD: All right. Thank
2 you. Appreciate your presentation this
3 afternoon.

4 MR. SULLIVAN: Thank you.

5 CHAIRMAN LOUD: Good luck. I think
6 the next case on the calendar and the final
7 case for the day is the McKinney case. But I
8 believe we are going to take about a, what
9 would you say, 10 minute break, about a 10
10 minute break. And then we will be back out
11 here maybe about 1:55 or so and then we will
12 finish up for the afternoon.

13 (Whereupon, at 1:46 p.m. a recess
14 until 2:07 p.m.)

15 CHAIRMAN LOUD: Good afternoon. We
16 are back in order for the February 2nd
17 afternoon calendar, hearing calendar of the
18 BZA. I believe we have one additional case to
19 hear.

20 And, Ms. Bailey, you had not called
21 it yet.

22 MS. BAILEY: No, Mr. Chairman.

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1 CHAIRMAN LOUD: Okay.

2 MS. BAILEY: Application of Stephen
3 A.W. McKinney. It is Application No. 17989
4 and it is pursuant to 11 DCMR § 3103.2, for a
5 variance from the lot area requirements under
6 section 401, a variance from the alley width
7 requirements under subsection 2507.3, to
8 convert an existing building, it's a carriage
9 house, on an alley lot to a one-family
10 dwelling. The property is Zoned R-2. It is
11 located in the rear of 4615 42nd Street, N.W.,
12 Square 1732, Lot 816.

13 This hearing was initially
14 scheduled for November 3, 2009 and it was
15 postponed until today.

16 CHAIRMAN LOUD: Thank you, Ms.
17 Bailey. And I do believe that the parties are
18 at the table, so why don't we have you
19 introduce yourselves for the record. We can
20 start on my left and work our way over. Good
21 afternoon.

22 MS. LIENDO: Good afternoon. I'm

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1 Rosalinda Liendo. I live in 4616 42nd Street.
2 I'm the owner of the house.

3 CHAIRMAN LOUD: Good afternoon.

4 MR. LOWREY: Good afternoon,
5 Members of the Board. My name is Bruce F.
6 Lowrey and I live at 4117 Brandywine Street,
7 N.W.

8 CHAIRMAN LOUD: Good afternoon,
9 sir.

10 MR. MCKINNEY: I am Stephen
11 McKinney. I'm the applicant.

12 CHAIRMAN LOUD: Good afternoon to
13 you.

14 MR. SULLIVAN: Good afternoon. My
15 name is Martin Sullivan. I represent the
16 applicant, Mr. McKinney.

17 CHAIRMAN LOUD: Good afternoon to
18 everyone. Let me ask for the ANC, this is
19 ANC-3E, if they are present here this
20 afternoon. It doesn't look like they are.
21 They have submitted a couple of reports
22 however.

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1 I think we have a preliminary
2 matter regarding party status applications.
3 One is the Exhibit 21 of Bruce Lowrey for
4 party status application. The second is
5 Exhibit 29 of Rosalinda Liendo for party
6 status.

7 With respect to Exhibit 21 of Mr.
8 Lowrey's, this was an application that was
9 filed in accordance with our rules. The rules
10 for party status applicants are contained in
11 section 3106 of Title 11 and they identify the
12 requirements to be considered for party
13 status. And I think upon our review of your
14 application, we are persuaded, and I'll
15 certainly let Board Members speak for
16 themselves as they request, that you meet the
17 criteria for party status and are prepared to
18 grant that for you.

19 With respect to Exhibit 29,
20 Rosalinda Liendo, part of the rule that allows
21 for party status also requires that there be a
22 14 day period within which it is filed 14 days

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1 prior to the hearing that the party status
2 application is filed.

3 And it does not appear that you
4 have met that threshold requirement of our
5 rule. It looks like your application was
6 filed, again it's our Exhibit 29, January 26th.

7 And the hearing is, obviously, today,
8 February 2nd. So if you do the math, it does
9 not compute to the 14 day requirement.

10 Did you care to respond?

11 MS. LIENDO: I send it by email,
12 the application. And I never got any answer,
13 so January the 26th was the time that I faxed
14 the application to be sure that they have it.

15 But initially, I sent by email in December.

16 CHAIRMAN LOUD: Okay. Okay. And
17 it would -- what you just said would tend to
18 be corroborated by Form 140. I guess this is
19 Exhibit 29, which looks like there is a
20 December date. It is not clear which date,
21 but I guess if, in accordance with your
22 testimony and if this is accurate that this

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1 was originally filed as dated December 17th, it
2 looks like, that perhaps you do have good
3 cause under Rule 3100.5 for us allowing this
4 into the record in terms of considering your
5 request.

6 Why don't we hear briefly from the
7 applicant in the case regarding this request?

8 I stand corrected. It appears as though we
9 do have a record of it being filed timely. So
10 that at least the threshold requirement of the
11 rule has been met. And it also appears that
12 given the proximity of your property to the
13 applicant's property, that you would be --
14 your interests would be set apart sufficiently
15 to be afforded party status.

16 Let me suggest though and/or ask a
17 question as to your participation as a party
18 separate and apart from Mr. Lowrey. Do the
19 two of you see an opportunity for you to
20 combine your party status applications, so
21 that you are presenting a single coherent
22 case?

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1 MR. LOWREY: Yes, sir.

2 CHAIRMAN LOUD: Okay.

3 MR. LOWREY: Yes, sir, we do.

4 CHAIRMAN LOUD: And consistent with
5 that, would you be able to designate one of
6 you to do all of the cross examination, for
7 example, if you plan to take advantage of that
8 opportunity?

9 MR. LOWREY: Yes, sir. I will be
10 doing that.

11 CHAIRMAN LOUD: Okay. And will you
12 call the -- are you planning on calling any
13 witnesses?

14 MR. LOWREY: No, sir.

15 CHAIRMAN LOUD: Okay. Then,
16 colleagues, I would be prepared to support the
17 individual party status applications with the
18 understanding that both parties will proceed
19 as a uniform party with Mr. Lowrey taking the
20 lead on any and all cross examination and
21 there being an understanding that they are not
22 going to call any witnesses.

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1 Certainly, if they wanted to call
2 witnesses, they could, but the representation
3 right now is that they are not going to call
4 any witnesses.

5 Any thoughts on that from
6 colleagues? And Mr. Sullivan?

7 MR. SULLIVAN: The applicant has no
8 objection to the party status applications.

9 CHAIRMAN LOUD: Okay. So then you
10 have been accorded party status. Do we need
11 to formally vote on that, Ms. Glazer?

12 MS. GLAZER: I think it would be
13 good for the practice for the Board.

14 CHAIRMAN LOUD: Okay. So let's do
15 that. Then I move that we accept Mr. Lowrey
16 under Exhibit 21, Ms. Rosalinda Liendo under
17 Exhibit 29 as a consolidated party opponent in
18 this case. Is there a second?

19 VICE CHAIRMAN DETTMAN: Second.

20 CHAIRMAN LOUD: Motion has been
21 made and seconded.

22 All those in favor say aye.

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1 ALL: Aye.

2 CHAIRMAN LOUD: All those who
3 oppose? And, Ms. Bailey, can you read back
4 the vote, please?

5 MS. BAILEY: Mr. Chairman, the vote
6 is recorded as 5-0-0 for the Lowrey/ Liendo
7 party. The motion was made by Mr. Loud,
8 seconded by Board Member Dettman, Board
9 Members Moldenhauer, Schlater and Sorg approve
10 the motion.

11 CHAIRMAN LOUD: Thank you. And I
12 believe now we are ready to start the case and
13 we turn back to you, Mr. Sullivan.

14 MR. SULLIVAN: Thank you. Good
15 afternoon, Mr. Chairman and Members of the
16 Board. My name is Martin Sullivan and I'm
17 here on behalf of the applicant, Mr. Stephen
18 McKinney, the owner of the property located at
19 4615-R 42nd Street, N.W.

20 The applicant is requesting
21 variance relief from section 2507.3, so that
22 he may convert an existing carriage house to a

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1 single-family dwelling use on a lot that faces
2 an alley that is less than 30 feet in width.

3 In this case, we have a building
4 that has existed for almost 100 years. We are
5 proposing no additional construction. We are
6 not adding space. We are not putting a new
7 apartment over a garage.

8 We instead of a building that was
9 most likely never intended to be used solely
10 as a garage, as told by the fact that it has
11 three levels.

12 I would like to briefly summarize
13 the application's compliance with the variance
14 test. This is by no means an exhaustive
15 review, but I just wanted to point out some of
16 the primary factors.

17 The first prong of the test that
18 there be an extraordinary or exceptional
19 situation or condition of this property is met
20 in part by the -- just by the configuration of
21 the property as a three story structure on a
22 rear alley lot.

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1 It is not typical that you have a
2 garage or a carriage house of this size and
3 height in a rear alley. And just because it
4 is three levels, it doesn't -- it's not suited
5 to garage use. It certainly makes it unique.

6 This property has been on a
7 separate lot well before the applicant
8 purchased it. And I think there is some
9 evidence that maybe that was before 1958. We
10 don't really know exactly.

11 Also, another situation or
12 condition is that because of the age of the
13 building, upkeep and maintenance of the
14 building has called for considerable effort
15 and resources.

16 The second prong of the test is
17 that the exceptional condition causes an undue
18 hardship to the applicant in using the
19 property for a permitted use. Specifically,
20 that no other permitted use provides a fair
21 and reasonable return to the owner.

22 Mr. McKinney will present testimony

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1 that I think strongly supports that argument.

2 The third prong, that relief can be
3 granted without substantial detriment to the
4 public good and without substantially
5 impairing the intent, purpose and integrity of
6 the Zone Plan, as embodied in the Zoning
7 Regulations and the Map.

8 This proposal enjoys the unanimous
9 support of ANC-3E. It enjoys the support of a
10 couple of neighbors. And it is quite simply
11 the most appropriate use for this structure in
12 this neighborhood.

13 Regarding the integrity of the Zone
14 Plan, although it is a use variance, we are
15 asking for single-family residential use in a
16 single-family Residential Zone, R-2.

17 In our opinion, there will be no
18 impact on the integrity of the Zone Plan for
19 that reason, let alone any substantial
20 impairment of this integrity.

21 If there are no questions, I would
22 like to introduce the applicant, Stephen

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1 McKinney.

2 CHAIRMAN LOUD: Thank you, Mr.
3 Sullivan. Let's see if there are any
4 questions or if Board Members want to hold off
5 until later. There doesn't appear to be any
6 questions.

7 MR. SULLIVAN: Thank you.

8 MR. MCKINNEY: Good afternoon. I
9 am Stephen McKinney and the property I'll be
10 addressing is a carriage house located in the
11 upper Northwest neighborhood of Tenleytown.
12 Thank you for the opportunity to address the
13 Board.

14 My property is identified on the
15 D.C. Tax Records as 4615-R 42nd Street, N.W.,
16 Lot 816, Square 1732. It is a stone structure
17 built as a carriage house some time in the
18 early 1900s. It was built and owned by the
19 Louis Perna Stone Company to house the carts
20 and mules used to bring stone into the city
21 from a quarry they owned in Maryland.

22 At the time, there were several

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1 Perna family residences and a stone yard
2 adjacent to the carriage house. The Perna
3 property was subdivided in a separate deeded
4 lot for the carriage house and was created,
5 approximately, 1948. The property has a lot
6 size of 2,700 square feet which is uncommon
7 with most of the adjacent residential lots.

8 The building is of stone
9 construction with three levels. The two upper
10 floors I have finished in a manner that will
11 accommodate a single family residence.

12 The lowest level, which is a
13 daylight walkout basement is unfinished and
14 will remain so. I intend to use it for my
15 storage.

16 The building is built on a sloping
17 lot to the rear, which is how the basement
18 level at the rear is above grade.

19 The property is located in an
20 alley, which runs parallel to Wisconsin Avenue
21 between Chesapeake and Brandywine Streets.
22 Directly across the alley to the east is a

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1 four level office building owned by American
2 University.

3 To the north on the same side of
4 the alley is a residence owned by Mr. and Mrs.
5 Volker Treichel for whom I have a letter of
6 support on my application.

7 Next to the Treichels is a
8 residence owned by Mr. and Mrs. John LeMon.
9 Mr. LeMon is here today to speak in favor of
10 my application.

11 Behind and to the east is a single
12 residence separated by our respective
13 backyards.

14 To the south of my lot are several
15 adjacent narrow lots on all of which the
16 houses are at least 80 feet from my house.
17 One of these is the property owned by Mr.
18 Lowrey, who has registered opposition to my
19 application stating that even though his house
20 is over 80 feet away from mine, that my living
21 there will impair his privacy.

22 The house adjacent to him is

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1 approximately 5 feet away.

2 Traffic density has been a stated
3 concern of Mr. Lowrey's also. But I am not
4 proposing any increase in current permitted
5 density or intensive use. To the contrary, my
6 one car coming and going would go unnoticed
7 compared to the traffic from the very busy
8 Friendship Animal Hospital 20 feet across the
9 alley from Mr. Lowrey.

10 The hospital parking garage has
11 numerous vehicles coming and going 24 hours a
12 day.

13 At the time I bought the property,
14 it had long been neglected. The owner, Dr.
15 William Amoroso was a grandson of Louis Perna
16 and had held on to the property strictly for
17 sentimental reasons.

18 In fact, when I originally
19 approached Dr. Amoroso and offered to purchase
20 the property in 1995, he stated that he would
21 not sell until his father passed on. I was
22 intrigued by the stone construction, the

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1 architecture and the large lot and thought it
2 would be a great place to live.

3 Subsequently, I purchased from him
4 an option to buy the property and settled in
5 2001 after his father had passed on.

6 The building had been for years
7 empty or intermittently rented for storage.

8 Immediately upon purchasing the
9 property, I had to take measures to protect
10 the property and to prevent further
11 deterioration. The backyard and basement had
12 been used by kids from nearby Georgetown Day
13 School and homeless people for drinking,
14 drugging and other activities. Unknown
15 individuals had broken into the upper levels
16 on several occasions as well.

17 I secured a building permit for the
18 building, for the only use the regulations
19 would currently allow, which was as an artist
20 studio, so that I could take action to
21 preserve the property as soon as possible.

22 I built a fence around the property

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1 with iron gates at the entrance to the
2 driveway. I replaced the windows and
3 installed iron security bars over the windows.

4 I removed the old broken down garage doors
5 and walled in the front of the building with
6 windows and entrance doors in the style of a
7 Tudor-style facade.

8 The interior I finished in the open
9 floor loft-style, including 1.5 bathrooms. I
10 fell in love with this unique stone structure
11 and became committed to restoring it and
12 living there.

13 I had understood that getting a
14 variance for a residential of a carriage house
15 was a regularly approved process.

16 I have made a considerable
17 investment of time and construction to make
18 this property an attractive and secure
19 addition to the community. Frankly, I have
20 been surprised that anyone would oppose my
21 using the property as a personal residence.

22 I believe I have demonstrated my

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1 commitment to making this property a positive
2 contribution to the community by the
3 improvements I have completed.

4 I am committed to the District of
5 Columbia. I have owned and operated a
6 business, the Zoo Bar Cafe in Woodley Park for
7 going on 10 years and have lived in the
8 Washington, D.C. area since 1957.

9 I believe for many reasons that
10 using the building as a residence is the only
11 one that makes sense here. And it is
12 certainly the only use that would provide a
13 fair and reasonable return on my investment of
14 time and money.

15 I would like to make it my
16 residence. I understand that the current
17 Zoning Regulations limit the use as an artist
18 studio. I have had several artists inquire in
19 regards to renting the carriage house, but
20 they all wanted to live there as well.

21 Others were interested in
22 commercial retail uses. In my opinion, this

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1 is not a building or a location that would be
2 attractive to an artist. I am sure there are
3 more inexpensive options available for an
4 artist studio elsewhere in the city and it's
5 just not in their interest to pay upper
6 Northwest prices for a studio and not be able
7 to reside in or sell their work there.

8 It does not make sense to me that
9 my residential use would impede my neighbor's
10 privacy, add to pollution or traffic over any
11 current allowed use. I'm merely asking to use
12 the existing building as a residence in a
13 Residential Zone. I also believe that my 24
14 hour presence will be a benefit to the
15 security of the block.

16 Without being able to use the
17 property for residential use, I believe the
18 value and utility is greatly diminished to
19 that of a storage facility.

20 The Tenleytown ANC-3E has
21 unanimously approved and supports my use of
22 the property as a residence. I have several

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1 letters of support from my neighbors,
2 including the immediate neighbor to the north,
3 whose property runs the complete length of my
4 property and the next door neighbor to that
5 property.

6 That is Mr. LeMon who is here
7 today, as I mentioned before, to testify in
8 support of my application. This has been a
9 long term commitment for me. I am committed
10 to making this property a positive
11 contribution to the neighborhood. And I would
12 like to make the carriage house my home. And
13 I believe that that is the only reasonable use
14 for this unique property.

15 I would like to thank the Board for
16 considering this application and respectfully
17 request that the Board grants this request.
18 Thank you.

19 CHAIRMAN LOUD: Thank you, Mr.
20 McKinney. Board Members, are there any
21 questions for the applicant?

22 COMMISSIONER SCHLATER: Thank you,

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1 Mr. Chair. Mr. McKinney, I have a few
2 questions just going to the hardship argument
3 squarely.

4 How much did it cost you to
5 rehabilitate the carriage house into its
6 current state?

7 MR. MCKINNEY: Approximately,
8 \$175,000 out of pocket. That doesn't include
9 the cost of my labor. I did most of the
10 carpentry work myself.

11 COMMISSIONER SCHLATER: Do you know
12 off the top of your head what your taxable
13 assessment is and how much you pay in property
14 taxes on that site?

15 MR. MCKINNEY: Really to tell you
16 the truth, off the top of my head, I do not
17 know.

18 COMMISSIONER SCHLATER: Okay. It
19 might be helpful information just to
20 understand what the ongoing costs of
21 maintenance and ownership are related to this
22 structure to understand what you are paying in

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1 taxes and what the maintenance costs are on
2 the property, just to understand.

3 MR. McKINNEY: I think it is
4 assessed at \$185 or something.

5 COMMISSIONER SCHLATER: Okay.

6 MR. McKINNEY: But it is as a non-
7 residential property right now and vacant. So
8 it's a different tax base than it would be if
9 there were, you know --

10 COMMISSIONER SCHLATER: It's taxed
11 as commercial as opposed to residential. Is
12 that what you're saying?

13 MR. McKINNEY: No.

14 COMMISSIONER SCHLATER: Oh, I
15 thought artist or vacant?

16 MR. McKINNEY: I think it's vacant,
17 yes.

18 COMMISSIONER SCHLATER: Okay.

19 MR. McKINNEY: As vacant.

20 COMMISSIONER SCHLATER: I think
21 that would be helpful information, just to
22 supplement the record with before we make a

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1 decision, so that we have an understanding of
2 that.

3 With respect to your efforts on
4 outreach to artists who rent the spaces,
5 studio space, can you go into a little bit
6 more detail on the steps that you took to try
7 and rent out this space for artist space?

8 MR. MCKINNEY: Basically, I was
9 contacted by artists.

10 COMMISSIONER SCHLATER: Yes.

11 MR. MCKINNEY: And like I said in
12 my testimony, they all wanted to live there.
13 And I know a lot of people in the artist
14 community and they are not typically people
15 that have deep pockets.

16 COMMISSIONER SCHLATER: Yes.

17 MR. MCKINNEY: And they wouldn't
18 particularly want to pay upper Northwest
19 prices for a studio.

20 COMMISSIONER SCHLATER: Yes.

21 MR. MCKINNEY: Now, they might go
22 to Takoma Park or Southwest or Southeast

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1 Washington or Capitol Hill.

2 COMMISSIONER SCHLATER: How much do
3 you think you would need to rent the space out
4 for to an artist to make it financially
5 worthwhile?

6 MR. MCKINNEY: A minimum of \$2,500
7 or more.

8 COMMISSIONER SCHLATER: Per month?

9 MR. MCKINNEY: Yes. My debt on the
10 property right now is \$185,000 plus. And you
11 know, the debt service on that is about \$1,200
12 a month. And then with real estate taxes and,
13 you know, whatever other costs would pass
14 through as far as water, sewer, gas and
15 electric.

16 COMMISSIONER SCHLATER: Yes.
17 That's what you would need in order to pay for
18 that investment? And in terms of some other
19 uses that are allowed by right, storage, have
20 you looked at just using that bottom space as
21 storage space?

22 MR. MCKINNEY: I have --

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1 COMMISSIONER SCHLATER: How much
2 money you could --

3 MR. MCKINNEY: -- actually
4 subletted for storage space. But typically,
5 no one wanted to pay more than \$200, \$300 or
6 \$400. The most I ever got was \$400.

7 COMMISSIONER SCHLATER: Okay. And
8 when you say that no other use provides a
9 reasonable return on your investment, what
10 kind of return do you think is a reasonable
11 return on your investment?

12 MR. MCKINNEY: Minimum of \$2,500.

13 COMMISSIONER SCHLATER: Okay. Per
14 month. I also read in the record, I'm sorry I
15 forget everybody's names, but that the
16 adjacent property owner had inquired about
17 actually purchasing your property. Is that
18 correct?

19 MR. MCKINNEY: I have not received
20 any formal offer.

21 COMMISSIONER SCHLATER: Okay. Had
22 you had discussions about that?

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1 MR. MCKINNEY: I believe my
2 attorney may have been contacted by Mrs.
3 Liendo.

4 COMMISSIONER SCHLATER: Okay.

5 MR. SULLIVAN: Martin Sullivan for
6 Mr. McKinney. Yes, I was. I got a 5:00 a.m.
7 phone call on my work voicemail from Ms.
8 Liendo offering \$160,000 for the property.

9 COMMISSIONER SCHLATER: And when
10 was that offer received?

11 MR. SULLIVAN: Monday morning a
12 week ago.

13 COMMISSIONER SCHLATER: Okay. One
14 question I would have is if this variance
15 relief is not granted by this Board, what
16 would happen to this building?

17 MR. MCKINNEY: Well, financially,
18 it would be devastating to me. I don't know
19 what I would do. I have always intended to
20 live here. That's why I have been involved
21 with this. I have been committed with the
22 property for so long.

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1 COMMISSIONER SCHLATER: Yes.

2 MR. McKINNEY: It's a very unique
3 building. And I admired it for its
4 architecture and its history and I know the
5 history of the family that was involved and
6 the history of the Louis Perna Stone Company
7 and, you know, that interests me. It's not
8 just a plain frame single-family house.

9 COMMISSIONER SCHLATER: Yes.

10 MR. McKINNEY: I find that not as
11 interesting as a stone structure with a lot of
12 history.

13 COMMISSIONER SCHLATER: And did I
14 read that in your negotiations with the ANC on
15 this that you had agreed to place a covenant
16 on the property, that it would be --

17 MR. McKINNEY: Yes, there seems to
18 be --

19 COMMISSIONER SCHLATER: -- who
20 would live there?

21 MR. McKINNEY: -- concern by Mr.
22 Lowrey that this property would be turned into

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1 a frat house for American University students.

2 COMMISSIONER SCHLATER: A
3 reasonable concern, I would say.

4 MR. McKINNEY: Well, as small as it
5 is, it would be kind of unreasonable. The
6 floors are only 500 square feet per floor.

7 COMMISSIONER SCHLATER: Yes.

8 MR. McKINNEY: It wouldn't be
9 conducive for unrelated persons living
10 together two at a time on either floor. But
11 the Board asked as a -- the ANC Board asked
12 that am I willing to live there? I said I
13 always intended to live there. So then they
14 said well, would you sign a covenant to the
15 fact that you would live there? I said sure,
16 that has been my intent all along.

17 COMMISSIONER SCHLATER: Are there
18 other, I'm trying to remember reading through
19 the record, are there any other alley
20 residences on that alley? Is there anybody
21 else living on that alley?

22 MR. McKINNEY: Not that I know of.

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1 COMMISSIONER SCHLATER: Okay. And
2 how would you characterize the traffic on the
3 alley? I mean, are there a lot of people back
4 there? Is there a lot of cars back there?

5 MR. MCKINNEY: There is traffic
6 coming and going from the Friendship Animal
7 Hospital.

8 COMMISSIONER SCHLATER: Yes.

9 MR. MCKINNEY: Which is at the end
10 of the alley. And which is right across from
11 the alley from Mr. Lowrey.

12 COMMISSIONER SCHLATER: Yes.

13 MR. MCKINNEY: Where my property is
14 located is in the middle and certainly not as
15 much traffic there as there would be at the
16 end.

17 COMMISSIONER SCHLATER: Yes.

18 MR. MCKINNEY: And you know, I can
19 only drive one car at a time, so I don't know
20 how that I would compare with an animal
21 hospital that's open 24 hours a day with
22 numerous patients coming and going constantly.

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1 COMMISSIONER SCHLATER: Okay.
2 Thank you for your testimony. That's all my
3 questions.

4 MR. MCKINNEY: Thank you.

5 MEMBER SORG: Mr. McKinney, I have
6 one question for clarification. Can you
7 clarify what has been the use of the property
8 since you purchased and renovated it, I think,
9 in 2001, as you testified?

10 MR. MCKINNEY: Strictly storage.

11 MEMBER SORG: Strictly storage. So
12 you have no artist tenants?

13 MR. MCKINNEY: I'm sorry?

14 MEMBER SORG: You have not actually
15 rented it to any artists in the past?

16 MR. MCKINNEY: No.

17 MEMBER SORG: Okay. Thank you.

18 MR. MCKINNEY: You're welcome.

19 MEMBER MOLDENHAUER: Mr. McKinney,
20 so I'm just trying to understand the finances.
21 You have owned this since '01. And you have
22 been paying a mortgage on it and property

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1 taxes on it. And you have put in additional
2 costs to renovate it. But the only income
3 that you have had is a sublease of about \$400
4 a month for storage?

5 MR. MCKINNEY: That's correct.

6 MEMBER MOLDENHAUER: And so then
7 you are stating that you would need in order
8 for a fair and reasonable return to be able to
9 get \$2,500 a month for a rental studio for an
10 artist and you wouldn't be able to get that,
11 because most artists are looking at a lower
12 price per month? So I don't understand.

13 Can you explain why you have been
14 able to maintain the property financially for
15 the last couple of years with such a small
16 price per rental and that, you know,
17 obviously, there would be no ability to rent
18 it out for any other use?

19 MR. MCKINNEY: It has been very
20 difficult. It has been a financial difficulty
21 for me. I expected this to have gone through
22 a lot sooner. It would be and it has been a

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1 financial difficulty for me.

2 MEMBER MOLDENHAUER: And you
3 indicated that you have spoken with a couple
4 of artists. Have you received any potential
5 leases? Have you looked for leases that have
6 not gone through?

7 MR. MCKINNEY: As soon as I told
8 them they couldn't live there, they were not
9 interested. And as well, one or two people
10 that have contacted me were interested in
11 running retail operations out of there.

12 One was an artist, I don't know
13 what you would call her, the people that frame
14 paintings, a framing operation. But it is not
15 -- cannot be used for a retail commercial use.

16 In fact, an artist studio, in my
17 understanding, if somebody wants to create
18 their work there and sell it, they would not
19 be able to sell it from there, that being a
20 Residential Zone.

21 MEMBER MOLDENHAUER: Okay.

22 MR. MCKINNEY: And I don't know why

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1 an artist would create their art if they could
2 not sell it.

3 MEMBER MOLDENHAUER: Yes. I mean,
4 there are, obviously, artist studios where
5 they just create the art and then they sell
6 maybe on the Internet or something.

7 MR. MCKINNEY: Donate it to
8 Goodwill.

9 MEMBER MOLDENHAUER: Yes, who
10 knows. But okay. And then let me just see if
11 there are any other questions. I think that's
12 it. Thank you.

13 MR. MCKINNEY: Thank you.

14 CHAIRMAN LOUD: Mr. McKinney, at
15 1,500 square feet and \$2,500 a month, I did
16 some rough calculations, the per square foot
17 rental rate would be about \$20 per square
18 foot. Is it \$1,500 square feet we're talking
19 about?

20 MR. MCKINNEY: That's including the
21 basement.

22 CHAIRMAN LOUD: And you would not

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1 be renting the basement as part of an art
2 gallery use?

3 MR. MCKINNEY: No.

4 CHAIRMAN LOUD: Okay.

5 MR. MCKINNEY: It's a basement.
6 It's below grade.

7 CHAIRMAN LOUD: So we are talking
8 about 1,000 square feet for an art gallery?
9 If we were --

10 MR. MCKINNEY: It couldn't be an
11 art gallery, because then the gallery would be
12 showing art to the public and requiring the
13 public to come and go.

14 My understanding of the art studio
15 limitation is that the one artist and one
16 apprentice can actually create work there, but
17 they can't sell it. They can't live there.
18 And they can't necessarily have shows or
19 gallery openings.

20 The purpose of a gallery opening,
21 in my understanding, is to sell the art.

22 CHAIRMAN LOUD: Okay. Well, let's

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1 work with your understanding then. But for
2 the two levels, it would be 1,000 square feet.

3 Is that --

4 MR. MCKINNEY: Yes.

5 CHAIRMAN LOUD: -- fairly accurate?

6 MR. MCKINNEY: It's actually
7 probably a little bit less, but for round
8 figures --

9 CHAIRMAN LOUD: Maybe a little
10 less.

11 MR. MCKINNEY: -- 1,000 square
12 feet.

13 CHAIRMAN LOUD: And if you were to
14 generate \$2,500 a month, then roughly we would
15 be talking about \$30 per square foot. I think
16 it would work out to something like that. And
17 have you had it appraised in terms of whether
18 that is a market rental rate that is viable in
19 that area?

20 MR. MCKINNEY: The only appraisal I
21 have is the appraisal when I refinanced the
22 property in 2006.

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1 CHAIRMAN LOUD: Yes. And the only
2 reason I'm asking these questions relate to
3 whether the \$2,500 a month is the price point
4 that one would be looking at as a reasonable
5 return. Again, it boils down to \$30 a square
6 foot for the use.

7 And there may be a way to quantify
8 through a broker or some related expertise how
9 much that square footage is worth. And then
10 to further support your argument by indicating
11 that in the marketplace there aren't any
12 takers at whatever the fair and reasonable
13 rate would be.

14 So I mean, it's something you may
15 want to think about. I think Mr. Schlater
16 asked for some additional information anyway,
17 so it appears as though we may leave our
18 record open. That may be something you want
19 to consider.

20 And in terms of the specific
21 marketing outreach that you did, I think both
22 Mr. Schlater and Mrs. Moldenhauer asked you

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1 about that and you mentioned that every time
2 that you raise the issue, the artist wanted to
3 live in the alley. But what was the context
4 of you raising the issue? How did you reach
5 this artist community?

6 MR. McKINNEY: No. I had a for
7 rent sign on the property.

8 CHAIRMAN LOUD: You did?

9 MR. McKINNEY: For a long period of
10 time.

11 CHAIRMAN LOUD: Okay.

12 MR. McKINNEY: When I first
13 purchased it. And they would contact me.

14 CHAIRMAN LOUD: And what was the
15 period of time that you had the for rent sign
16 on it?

17 MR. McKINNEY: I don't recall
18 exactly, but a couple of years maybe.

19 CHAIRMAN LOUD: In the last two
20 years or --

21 MR. McKINNEY: Not in the last two
22 years, no.

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1 CHAIRMAN LOUD: Okay, that was
2 initially. You bought it in 2001, you said?

3 MR. MCKINNEY: 2001.

4 CHAIRMAN LOUD: Okay.

5 MR. MCKINNEY: I'm not clear on
6 exactly what dates. But as far as I know the
7 date I bought it, but I don't remember the
8 dates the sign was up there.

9 CHAIRMAN LOUD: And you may have
10 answered this already. How long was the for
11 rent sign up?

12 MR. MCKINNEY: How long --

13 CHAIRMAN LOUD: Approximately.

14 MR. MCKINNEY: -- was the for rent
15 sign up?

16 CHAIRMAN LOUD: Yes, sir.

17 MR. MCKINNEY: I do not recall.

18 CHAIRMAN LOUD: Do you recall
19 generally? Was it a couple of months, six
20 months, a year?

21 MR. MCKINNEY: A couple of years.

22 CHAIRMAN LOUD: I'm sorry?

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1 MR. MCKINNEY: A couple of years.

2 CHAIRMAN LOUD: A couple of years,
3 okay. And in those two years, you got about
4 how many bites from the artist community, if
5 you can remember?

6 MR. MCKINNEY: I would say three or
7 four.

8 CHAIRMAN LOUD: Okay. Thank you.

9 MR. MCKINNEY: Thank you.

10 MEMBER MOLDENHAUER: Sorry, just
11 one more question. Can you maybe just go
12 through, I guess, the process? You said that
13 you purchased it with the intent to always
14 live there. That you liked the history of it.

15 But then at what point in time did you
16 understand that you could not use the property
17 as a residence and then put the property up
18 for potential lease and then, obviously, move
19 forward with the renovation?

20 Can you just kind of walk through
21 that time line for us?

22 MR. MCKINNEY: I'm not clear on the

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1 question. I mean, I bought it. I closed on
2 it in 2001. And soon afterwards began the
3 renovation proceedings to protect the
4 property, because it had been extremely
5 neglected. It was deteriorating.

6 And during that time, I had a for
7 rent sign up. In the past, I guess, year or
8 so, I have been vigorously pursuing this
9 procedure of getting the variance to occupy
10 it. I wasn't aware of how involved it was
11 when I got into it.

12 I was told simply to go down and
13 get a permit at the District building and
14 that's a very simple procedure. I was,
15 obviously, misinformed.

16 Mr. Sullivan was just suggesting
17 that there is a gap of time in the time from
18 when I purchased the property, because of
19 family reasons. I didn't realize that would
20 be of importance to mention that.

21 But there was a delay from the time
22 I bought the property, renovated the property

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1 and have followed this procedure that I was
2 taking care of my mother who had Alzheimer's
3 and who subsequently passed away.

4 My brothers and I had committed to
5 her to keep her in her home as long as she
6 could and was aware of it. So it was a very
7 much time involved commitment on myself and my
8 brothers to do that. And so I was not able to
9 pay full time and attention to this property
10 or we probably would have been at this stage
11 four years ago.

12 And there was a good three and a
13 half years or so where my time was involved
14 with running my business and caring for my
15 ailing mother.

16 MEMBER MOLDENHAUER: No additional
17 questions.

18 CHAIRMAN LOUD: Thank you. If
19 there are no additional questions from the
20 Board, we will turn now to the party status
21 opponents for an opportunity to cross examine
22 Mr. McKinney.

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1 Let me say at the outset that cross
2 examination, just by way of some parameters
3 and not sort of your background, you could
4 very well be an attorney and be very
5 experienced at this or could be your first
6 time finding yourself in that seat. Cross
7 examination is limited to the scope of what
8 was brought out on direct.

9 It is an opportunity to ask
10 questions and only to ask questions.
11 Statements are generally not allowed during
12 cross examination. And further, cross
13 examination is limited by the need for what
14 you are asking to be relevant to the relief
15 that is being requested.

16 He is seeking variance relief, so
17 it would need to be relevant to the prongs of
18 the variance test that are in play. And there
19 are a bunch of smaller rules regarding the
20 form of the question and the like, but as you
21 go through your cross, if for some reason you
22 are stepping outside of what is permissible,

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1 myself or some other Member of the Board will
2 let you know or counsel will object.

3 Okay? All right.

4 MR. LOWREY: Thank you, Mr.
5 Chairman.

6 CROSS EXAMINATION

7 MR. LOWREY: Mr. McKinney, the
8 basement of the carriage house is that
9 basement a full basement or is it a partial
10 basement? I believe the house is built into a
11 hill. So do you have a full basement there or
12 is it only a partial basement?

13 MR. McKINNEY: It's a full
14 basement.

15 MR. LOWREY: And if it is a partial
16 basement, how much?

17 MR. McKINNEY: I'm sorry. It is a
18 full basement.

19 MR. LOWREY: Okay. So the basement
20 goes all the way the width and breadth of the
21 entire house and at a height of how many feet?

22 MR. McKINNEY: The height I believe

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1 is 7 feet. The length and width is the width
2 of the house. The length and width of the
3 house.

4 MR. LOWREY: Okay. So the entire
5 basement is 7 feet high in all locations?

6 MR. McKINNEY: That's correct.

7 MR. LOWREY: Okay. Just for the
8 record, and this is just a small point, but,
9 Mr. McKinney, you state that your carriage
10 house is 80 feet away from my home. My
11 measurements indicate 78 feet. Did you
12 actually measure that distance?

13 MR. McKINNEY: I estimated it.

14 MR. LOWREY: Okay. Do you have the
15 exact measurement?

16 MR. McKINNEY: Yes.

17 MR. LOWREY: Okay.

18 MR. McKINNEY: Mr. Sullivan has an
19 exact measurement of 83.33 feet.

20 MR. LOWREY: Okay.

21 MR. McKINNEY: From D.C. GIS.

22 MR. LOWREY: Mr. McKinney, with

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1 regard to your statement about the drinking
2 and drugging activity at that location behind
3 your carriage house, did you have any records,
4 any police records to indicate that that
5 activity was going on there?

6 MR. McKINNEY: Well, I don't think
7 I needed police records to indicate it when I
8 saw the wine bottles, liquor bottles and
9 various other sundry things left behind.

10 MR. LOWREY: Okay. With regard to
11 your statement on the garage doors on the
12 front of the building, my recollection is that
13 there were two large garage doors there prior
14 to your buying the building. Is that correct?

15 MR. McKINNEY: There were garage
16 doors, but they weren't functioning when I
17 bought the property.

18 MR. LOWREY: Yes, sir. But those
19 garage doors could they have been opened? Was
20 it possible to open those garage doors and
21 park a car inside those -- that space?

22 MR. McKINNEY: With great effort,

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1 yes, they could have been opened.

2 MR. LOWREY: Okay. Mr. McKinney,
3 when you bought the building, did you -- you
4 testified that the condition of the building
5 was not very good. Was that only on the
6 interior or the exterior as well?

7 MR. McKINNEY: Interior/exterior
8 and grounds.

9 MR. LOWREY: I see. The exterior
10 of the building, did you make any improvements
11 to the exterior of the building?

12 MR. McKINNEY: As far as the
13 building envelope, which would include the
14 windows, yes, sir. I replaced the windows. I
15 put security bars on. And added a deck at the
16 rear of the property. And did roof repairs.

17 MR. LOWREY: Okay. What kind of
18 roof repairs did you have to make?

19 MR. McKINNEY: Gutters, downspouts,
20 flashing and repairs to the roof surface.

21 MR. LOWREY: Okay. Mr. McKinney,
22 during the time that you were renovating the

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1 property, the carriage house, you were at that
2 point still living with your mother in
3 Montgomery County. Is that correct?

4 MR. MCKINNEY: That's correct.

5 MR. LOWREY: Okay. And I'm sorry
6 to hear that your mother has passed. But
7 before she died, and I believe that was in the
8 August time frame, did you, at that point,
9 inherit the property or did you purchase the
10 property from her? Because now you are the
11 owner of her former home. Is that correct?

12 MR. MCKINNEY: Why is that relevant
13 to the carriage house?

14 MR. LOWREY: In the application, I
15 believe it was stated that this would be your
16 primary home, but, at this point, you do have
17 another home at -- on, I believe, Western
18 Avenue in Montgomery County. Is that correct,
19 sir?

20 MR. MCKINNEY: Yes. I bought the
21 family homestead from the estate of my mother.
22 I bought my brothers out for the benefit of

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1 my daughter. My daughter is living in the
2 house with me now.

3 MR. LOWREY: I see.

4 MR. MCKINNEY: And when I move into
5 the carriage house, my daughter would take
6 over the house.

7 MR. LOWREY: I see. How old is
8 your daughter, sir?

9 MR. MCKINNEY: 28.

10 MR. LOWREY: Okay. Is she married
11 with family?

12 MR. MCKINNEY: She is single.

13 MR. LOWREY: Okay.

14 MR. MCKINNEY: I don't see the
15 relevance.

16 MR. LOWREY: Okay. I'm sorry. So
17 you plan to move out of your mother's home.
18 And it seems, if I recall the records, the tax
19 records correctly, the purchase price was
20 somewhere in the area of \$600,000. Was that
21 correct?

22 MR. MCKINNEY: You seem to be

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1 overly concerned with the house that I bought
2 for my daughter. And I do not see the
3 relevance to the carriage house.

4 MR. LOWREY: Am I out of line,
5 Board Members?

6 MR. SULLIVAN: I would say so and I
7 would object finally.

8 MR. LOWREY: Okay.

9 MR. SULLIVAN: No relevance
10 whatsoever to the case.

11 MR. LOWREY: Okay. I'm sorry.

12 CHAIRMAN LOUD: I would tend to
13 agree. And if you could move on?

14 MR. LOWREY: Okay.

15 CHAIRMAN LOUD: I think that house
16 matter-of-right use is residential and it
17 doesn't preclude a 28 year-old single person
18 from living there.

19 MR. LOWREY: Okay.

20 CHAIRMAN LOUD: I think the subject
21 of the proceeding would be the carriage house.

22 MR. LOWREY: Yes, sir. Thank you.

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1 Mr. McKinney, you stated that you -- I
2 believe when you purchased the carriage house
3 in March of 2001, you spent for the purchase
4 and I think you gave the purchase money to
5 either Dr. Amoroso or his estate for -- you
6 purchased it from him for \$150,000, right?

7 MR. MCKINNEY: That's correct.

8 MR. LOWREY: Okay. And then you
9 spent \$175,000 out of pocket to renovate the
10 carriage house subsequent to the purchase?

11 MR. MCKINNEY: Yes, in excess of
12 \$175,000.

13 MR. LOWREY: Okay. Can you tell me
14 what you spent the \$175,000 on or is that out
15 of line here? It seems to me that that's a
16 lot of money to spend to renovate, basically,
17 the interior of a 1,000 square foot structure.

18 CHAIRMAN LOUD: I don't think it's
19 out of order. Let me chime in. I don't think
20 it is out of order, but I think it has been
21 asked and answered. He is talking about the
22 windows, the deck, the gutters, the downspouts

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1 on the exterior. And then on the interior he
2 did include some testimony about that. But I
3 think if you can add to it and just clarify,
4 as best as you can recall.

5 MR. MCKINNEY: Well, one of the
6 major expenses was bringing water and sewer to
7 the property. The plumbing contract alone in
8 that was in excess of \$30,000. And that
9 didn't include the fees paid to WASA and the
10 bond set with WASA and all the other related
11 fees including buying an easement from the
12 neighbor that allowed the water and sewer to
13 pass across the property.

14 MR. LOWREY: Okay. Mr. McKinney,
15 you stated that several artists did contact
16 you. Do you remember their names or what type
17 of art they were --

18 MR. MCKINNEY: No, I do not
19 remember their names.

20 MR. LOWREY: Do you remember the
21 name of the retail shop, the framing shop that
22 wanted to put a framing shop in the carriage

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1 house?

2 MR. MCKINNEY: No, I do not.

3 MR. LOWREY: I see. Do you
4 currently have a mortgage on the property, the
5 carriage house, or is that not relevant?

6 MR. MCKINNEY: Well, I have already
7 stated that the debt service that I have on
8 the property is \$1,200 a month. And that is
9 related to the debt of \$185,000 on the
10 property, which is a mortgage.

11 MR. LOWREY: Okay. So you do --

12 MR. MCKINNEY: First trust on the
13 property.

14 MR. LOWREY: I see. Okay. So a
15 third-party is holding a mortgage on the
16 property. Okay. And you, I believe, stated
17 that your -- the artist space that you did --
18 you never advertised the artist space in any
19 papers or on-line services. Is that -- that's
20 correct, right?

21 MR. MCKINNEY: I did not advertise.

22 MR. LOWREY: I have no further

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1 questions.

2 CHAIRMAN LOUD: Thank you, Mr.
3 Lowrey. Mr. Sullivan, did you have any rehab
4 of the witness?

5 MR. SULLIVAN: I do not.

6 CHAIRMAN LOUD: Okay. Unless Board
7 Members have questions, we will turn now to
8 the Office of Planning for its report. And
9 good afternoon.

10 MR. GOLDSTEIN: Good afternoon, Mr.
11 Chairman and Members of the Board. For the
12 record, my name is Paul Goldstein and I am a
13 Development Review Specialist with the D.C.
14 Office of Planning.

15 The Office of Planning cannot
16 support the use variance relief to accommodate
17 the proposed conversion of an existing
18 carriage house on an alley lot to residential
19 use, as you have heard, at 4616 Rear 42nd
20 Street, N.W.

21 As you have also heard, the alley -
22 - the lot fronts an alley, which is about 20

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1 feet in width and it is improved.

2 Section 2507.3 provides that "Non-
3 residential structures and alleys of less than
4 30 feet width shall not be converted, altered,
5 remodeled, restored or repaired for human
6 habitation regardless of cost." Since the
7 conversion of the human habitation is not
8 permitted, the applicant must satisfy the
9 three-part variance test, as seen in greater
10 detail on our report.

11 OP believes that the proposal does
12 not satisfy the requirements for a use
13 variance.

14 First, OP recognizes that the
15 property does exhibit a specific uniqueness.
16 You have heard testimony to this effect. It
17 is the only alley lot within the square. The
18 lot was created prior to 1958. I believe 1945
19 was the date listed in my report. And it
20 contains a carriage house that significantly
21 predates the Zoning Regulations.

22 Second, the application has not

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1 demonstrated how uniqueness would cause the
2 owner of the property to suffer an undue
3 hardship if the property was not converted to
4 residential use, rather than a permitted use.

5 We have certainly heard a bit more
6 testimony today from the applicant regarding
7 this topic. Just for the record, permitted
8 uses do include an artist studio, which the
9 property received a permit to repair the
10 existing building to in 2003.

11 And by special exception, it could
12 operate as public storage or parking.
13 Certainly, additional information on this
14 prong may be needed from the applicant.

15 The applicant has not yet
16 sufficiently demonstrated that there would
17 also be no undue impact to the public good.
18 It seems there is some opposition to it. It
19 is a change of use from permitted. We would
20 be willing to hear a bit more as well on this
21 prong of the test.

22 And additionally, there are

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1 concerns regarding the impact on the Zone
2 Plan, given the very strict language of
3 section 2507.3. I know that is a discussion
4 the Board has had in the past and we may have
5 to agree to disagree on that one.

6 Should the Board determine that a
7 use variance is justified to allow the
8 proposed residential use on the site, OP finds
9 that the applicant has satisfied the three
10 part area variance test for lot area relief.
11 I can so expand on this analysis, if needed,
12 in response to any Board questions.

13 Finally, FEMS submitted comments to
14 the Office of Planning concerning the proposal
15 and that they had no objection to it, assuming
16 that certain conditions or standards are met.

17 OP also notes, as you have heard,
18 that ANC-6B has voted in unanimous support
19 with a condition for the relief.

20 I would like to conclude by saying
21 that OP is continuing to look at alley
22 dwellings as part of the Comprehensive Zoning

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1 Review. What that review will reveal, I'm
2 still not sure, at this point, but we are
3 certainly examining these types of cases.

4 That concludes my presentation. I
5 am now available for any questions.

6 CHAIRMAN LOUD: Thank you. Let's
7 start with Board Members and see if there are
8 any questions and then we can move to the
9 applicant and then the party opponent.

10 COMMISSIONER SCHLATER: Mr.
11 Goldstein, I want to talk a little bit about
12 the undue hardship prong with you. Which you
13 say the applicant did not meet in its
14 application and is one of the reasons why OP
15 can't support the applicant in this case.

16 When you look at this property and
17 I'm just trying to -- walk me through the
18 analysis of how a property that cost \$185,000
19 to rehabilitate, how that sort of investment
20 could be supported through the use, you know,
21 as an artist space or storage or parking?

22 MR. GOLDSTEIN: Well, I do think

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1 that, in part, this is one of the burdens that
2 the applicant needs to satisfy how those
3 possible conforming uses could not support
4 that type of renovation.

5 I would suggest, however,
6 unfortunately, it sounds like the applicant
7 ended up putting quite a lot of money into a
8 property for a nonconforming, an expectation
9 of a use that is nonconforming to the
10 regulations, which through either
11 misinformation or what have you, it's an
12 unfortunate situation if that is the case.

13 COMMISSIONER SCHLATER: In your
14 role as a development review specialist, is it
15 not a better outcome to have a vacant historic
16 structure vested in and preserved, rather than
17 -- I understand the timing is a little
18 unusual, but say we roll back the clock to
19 2001 and we are looking at a vacant structure
20 that has been used, based on the testimony of
21 the applicant, as a place for vagrants, for
22 partying, if we are looking at it from that

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1 point and we had two paths to go on, one was
2 restricted to artist use, which we know how
3 much rent we are going to be able to get as an
4 artist studio, which is not going to be enough
5 to support the rehabilitation of a property or
6 you can go down the path of undue hardship and
7 say the only way we are going to get this
8 property rehabilitated is through granting the
9 use variance as a single-family residential.
10 Which path would OP want to go down there?

11 MR. GOLDSTEIN: It's an interesting
12 question with a lot of assumptions and
13 judgments. I really am not quite sure how to
14 answer that question. I'm not sure that there
15 are only two paths. I'm not sure that those
16 are the only options.

17 Certainly, I would think that we
18 don't want a decrepit vacant property
19 anywhere, but as far as what option is the
20 proper conforming option to the Zoning Code,
21 that's another story.

22 COMMISSIONER SCHLATER: What would

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1 be the other options? I guess that's what I'm
2 trying to wrap my head around. That's the
3 question before us today.

4 MR. GOLDSTEIN: Well, I think that
5 a part of it depends on if you feel the
6 applicant has met the burden that these other
7 conforming uses can't work at this location.
8 I'm not sure we have quite crossed that
9 threshold yet.

10 MEMBER MOLDENHAUER: Good
11 afternoon, Mr. Goldstein. Mr. Schlater asked
12 a question and you answered about the repairs
13 stating that potentially the applicant needs
14 certain repairs or went through all the
15 expenses of making certain repairs with the
16 intent of using it for a nonconforming use.

17 However, I was just wanting to kind
18 of go through that a little bit in more depth,
19 because from what we have heard, some of the
20 repairs included working on the roof, putting
21 in gutters, putting in new windows. One of
22 the more expensive aspects was plumbing and

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1 WASA and an easement.

2 If this was to be used as an artist
3 studio, wouldn't there need to be a restroom,
4 which would require plumbing and an area for
5 them to wash their brushes, wash their hands,
6 do those things during the day? So aren't
7 those expenses that would actually be in
8 conjunction with the conforming use?

9 MR. GOLDSTEIN: That's actually a
10 good question, a good follow-up. I shouldn't
11 predispose to know exactly what would need to
12 be -- what the structure would need to be
13 renovated for for an artist studio, whether
14 water is essential or what have you.

15 Certainly, that's a good question.
16 I could have been a bit over-broad in my
17 statement. It only sounded like there was an
18 expectation that this would be made to a
19 certain standard where someone would be living
20 there, that seemed to be the expectation.

21 Whether those repairs would
22 duplicate for an artist studio, it's possible.

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1 A lot of it may have. Whether those repairs
2 are necessarily needed for storage or a
3 parking garage, again, I don't know.

4 MEMBER MOLDENHAUER: I guess my
5 question would be is in analyzing the new
6 information we have now from the hearing, you
7 know, someone would be buying it under the
8 second prong of the test, you know, for the
9 highest and best use and then a fair and
10 reasonable return, I would assume that an
11 artist studio for someone who would want to
12 get to work at 9:00, work until 3:00 or 4:00
13 would need, you know, a washroom, a restroom
14 and thus plumbing and things of that effect.
15 And you know, wouldn't want water coming in
16 from a roof, you know, ruining their paintings
17 or their sculptures or whatever they were
18 doing.

19 I mean, it seems as though, and I
20 don't -- you have the expertise. And I'm
21 asking spending \$175,000 on repairs in those
22 aspects that we have heard testimony to, would

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1 that then meet the hardship burden for then
2 not being able to rent out or based on what we
3 have heard testimony of in regards to the cost
4 of what an artist would pay and then what
5 expenses have gone into the property to
6 improve it? What's your opinion on that?

7 MR. GOLDSTEIN: Two things. One is
8 I just want to make sure, highest and best use
9 is not the standard here. I think you said a
10 second clause after that though.

11 MEMBER MOLDENHAUER: I was throwing
12 that in there, because I guess comparing it
13 between --

14 MR. GOLDSTEIN: Yes.

15 MEMBER MOLDENHAUER: -- using it as
16 a storage facility, which I think it was being
17 used as by the prior owner, and now, you know,
18 he was repairing it to potentially use it as
19 an artist studio, that's where that concept
20 came from.

21 MR. GOLDSTEIN: Okay.

22 MEMBER MOLDENHAUER: I think, for

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1 clarification.

2 MR. GOLDSTEIN: Okay. No, thank
3 you. And I thank you. The second part of
4 that clause may have changed it.

5 I have certainly heard a lot of
6 testimony today. I don't know for sure if I
7 would feel comfortable saying it meets the
8 undue hardship test as of yet. I would
9 certainly prefer to see more information about
10 the expenses, about what the market would bear
11 as far as rental in this property.

12 So I'm not quite sure I'm there yet
13 on saying that given what I have heard in
14 testimony today would satisfy that second
15 prong of the test.

16 MEMBER MOLDENHAUER: Okay. Thank
17 you. That may mean that we need to keep this
18 open for additional information.

19 CHAIRMAN LOUD: Just a follow-up to
20 Mrs. Moldenhauer's question. In terms of what
21 you have heard regarding the artist studio,
22 not the storage, not the parking, were you

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1 aware when you wrote your report that the
2 property had been marketed for two years for
3 rent?

4 MR. GOLDSTEIN: I was not aware of
5 that.

6 CHAIRMAN LOUD: Were you aware that
7 only three or four responses, that the
8 applicant only got, that were artist-related
9 uses and that all of those, according to the
10 testimony, wanted to also live in the
11 structure?

12 MR. GOLDSTEIN: I was also not
13 aware of that.

14 CHAIRMAN LOUD: If you had known
15 that before you wrote your report, would you
16 have reached a different conclusion, just on
17 the artist studio use part of the undue
18 hardship test?

19 MR. GOLDSTEIN: I still think I
20 would need a bit more information --

21 CHAIRMAN LOUD: Okay.

22 MR. GOLDSTEIN: -- about when it

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1 happened, what the discussions were. I think
2 there would still be more I would need to
3 know.

4 CHAIRMAN LOUD: And just elaborate
5 in terms of the information that you would
6 need that would be contextual. Just about
7 that during that two year period and the --
8 just help me understand what you would be
9 looking for.

10 MR. GOLDSTEIN: Sure. I would need
11 some type of information to show how the
12 property has been marketed in the past, what
13 amounts it has been marketed for and why it
14 hasn't worked to meet a reasonable return on
15 their property.

16 Frankly, these cases get a little
17 difficult for undue hardship. It is a very
18 high burden. It is hard for me to say that
19 one piece of information will be the silver
20 bullet for the applicant to be able to make
21 their argument. But certainly that type of
22 information would be helpful.

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1 CHAIRMAN LOUD: Okay.

2 MR. GOLDSTEIN: Including also
3 expenses in the house, things like that, the
4 investment made. In part, this would also be
5 something that the Board would then need to
6 weigh. It is difficult for me to say what
7 information is enough for the undue hardship
8 without actually seeing it.

9 CHAIRMAN LOUD: Okay. Thank you.
10 I don't think I have any additional questions.
11 Why don't we turn to, first, the applicant to
12 see if there are any questions? And then we
13 will turn to you, Mr. Lowrey.

14 CROSS EXAMINATION

15 MR. SULLIVAN: Thank you. Hi, Mr.
16 Goldstein. I have a question. Based on your
17 expertise as a professional planner, what is
18 your sense of the attractiveness of this
19 property as an artist studio? Based on it has
20 a hidden location, it is a solitary location,
21 separate from art uses, lack of natural light.
22 It has got some shadow from the building in

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1 front of it.

2 It has sat vacant for some time,
3 despite a for rent sign on it. No evidence of
4 any art use before. It is larger than your
5 typical artist studio space. Just using that
6 information, from your observation of the
7 property and what is in the record, as a
8 professional planner, what is your sense about
9 the attractiveness of that property for an
10 artist studio?

11 MR. GOLDSTEIN: Frankly, I am a
12 professional planner, but I'm not a
13 professional renter to artists, so I certainly
14 can't necessarily say what the various artists
15 would want in their property. I think I'll
16 just leave it at that.

17 MR. SULLIVAN: Thank you. I have a
18 question about the third prong. Do you think
19 that relief can be granted in this case
20 without substantial detriment to the public
21 good?

22 MR. GOLDSTEIN: It may. It could.

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1 MR. SULLIVAN: It could? So we
2 meet the second -- the first half of the prong
3 we meet then?

4 MR. GOLDSTEIN: I'm saying based if
5 -- I would like to hear more information from
6 the opposition as well, but I'm not saying
7 it's impossible to meet. I'm just saying it's
8 possible it could be met.

9 MR. SULLIVAN: A little more on the
10 issue of the integrity of the Zone Plan. You
11 stated that there was some discussion by the
12 Board and you had agreed to disagree. Can you
13 explain more about that?

14 MR. GOLDSTEIN: Sure. I think
15 there has been discussion in the past about
16 whether this language in the third prong that
17 is very specific as far as human habitation of
18 alley dwellings, whether granting a human
19 habitation, a use variance for the use of that
20 property is contrary to the intent of the Zone
21 Plan, I think it is our position that the
22 language is rather extraordinary in explaining

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1 the intent to not allow human habitation under
2 these circumstances.

3 MR. SULLIVAN: So you think some
4 sections of the Zoning Regulations are more
5 strict than others?

6 MR. GOLDSTEIN: I'm not sure I'm
7 going to make such a broad statement. But I
8 think that this regulation seems to be very
9 explicit in what it is intending to do.

10 MR. SULLIVAN: It is a use
11 variance, but if the alley was 30 feet in
12 width, would this be permitted as a single-
13 family dwelling?

14 MR. GOLDSTEIN: I believe it would
15 be.

16 MR. SULLIVAN: No further
17 questions. Thank you.

18 CHAIRMAN LOUD: Thank you, Mr.
19 Sullivan. Mr. Lowrey, do you have any
20 questions for the office of Planning?

21 MR. LOWREY: No, sir, I do not.

22 CHAIRMAN LOUD: Okay. Thank you.

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1 Thank you, Mr. Goldstein. As noted, the ANC
2 did submit a report. They are not present
3 here to provide their testimony. The report
4 is our Exhibits, well, two reports, 25 and 27.

5 And as I understand the reports,
6 the ANC voted for approval with the condition
7 that the alley dwelling be owner-occupied in
8 perpetuity. Is that the condition, in
9 perpetuity?

10 And you are familiar with that
11 report? You have seen the report?

12 MR. SULLIVAN: Yes, we have.

13 CHAIRMAN LOUD: Okay. And you have
14 seen it as well, Mr. Lowrey?

15 MR. LOWREY: Yes, sir. I believe
16 you are speaking of the resolution. I'm not
17 aware of any other reports. It's just the
18 resolution.

19 CHAIRMAN LOUD: That's correct.

20 MR. LOWREY: Okay. Yes.

21 CHAIRMAN LOUD: I referred to it as
22 a report, but it's, in fact, a resolution.

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1 MR. LOWREY: I have seen the
2 resolution, yes.

3 CHAIRMAN LOUD: Okay. We will now
4 turn to -- if there are persons in the
5 audience in support, this would be the time to
6 come up and give the testimony. I think we
7 mentioned there was one person. And I'm
8 certain you have been sworn in. All right.

9 And you are allowed 3 minutes to
10 provide your testimony in support.

11 MR. LEMON: Thank you. My name is
12 John LeMon. I live in the residence on 4619
13 42nd Street, N.W. I have been there for 32
14 years. I just want to say that during the
15 time that I have lived in my residence, I have
16 watched an increase of building and traffic in
17 the alley. There are several restaurants that
18 face Wisconsin Avenue, which is the street
19 just behind 42nd Street or in front of 42nd
20 Street. And there are trash trucks and
21 delivery trucks all day long in and out of
22 that alley.

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1 You know, in my opinion, Mr.
2 McKinney living there would not increase the
3 traffic density to make any sort of difference
4 at all.

5 I think that in terms of the
6 improvement of the building, and I know that
7 this may not fly well in the face of the --
8 Mr. Goldstein's comments, but, in my opinion,
9 for seeing that building over 32 years of
10 living there, Mr. McKinney's living there
11 would be a great improvement not only to the
12 security of the alley, but to the integrity of
13 the neighborhood.

14 Using it as a structure for storage
15 or, as in the past, before Mr. McKinney
16 purchased it, it was rented out to a couple
17 of, at different times, people who called
18 themselves contractors, who were, you know,
19 using it for storage or workshop or what have
20 you. And they were in and out of there all
21 the time and not necessarily to the
22 improvement of the neighborhood or the area.

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1 And I just want to say that I am in
2 total favor of Mr. McKinney living there. And
3 as I said, I believe it will be an improvement
4 to the community. Thank you.

5 CHAIRMAN LOUD: Thank you, Mr.
6 LeMon. Can I ask you for the spelling of your
7 name and to state your address again?

8 MR. LEMON: Yes. It is capital L
9 small E capital M small O-N. And you may or
10 may not want to put a space between the E and
11 the M. Just as an aside, I went to DMV a
12 couple of years ago to renew my registration
13 and they had me in three different spellings.
14 So it's kind of a strange one.

15 And my address is 4619 42nd Street,
16 N.W.

17 CHAIRMAN LOUD: Thank you, sir.
18 Are there any questions for Mr. LeMon from the
19 Board? Okay. And how about from Mr.
20 Sullivan?

21 MR. SULLIVAN: No.

22 CHAIRMAN LOUD: Okay. And Mr.

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1 Lowrey?

2 MR. LOWREY: Yes, sir.

3 CROSS EXAMINATION

4 MR. LOWREY: Mr. LeMon, you are the
5 owner of your residence. Is that correct?

6 MR. LeMON: Yes.

7 MR. LOWREY: Okay. At the December
8 4 ANC meeting, you stated that the alley --
9 that the carriage house had been used as an
10 artist studio in the past. Is that correct?

11 MR. LeMON: I may have. I'm not
12 aware of an artist, particularly, other than
13 the contractor who may have constructed
14 bookcases or what have you.

15 MR. LOWREY: So you did not state
16 at the 4 January 2010 ANC meeting that the
17 carriage house had been used as an artist
18 studio in the past?

19 MR. LeMON: As I said, I don't
20 recall using the word artist. I may have, but
21 a carpenter is an artist.

22 MR. LOWREY: I see.

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1 CHAIRMAN LOUD: Mr. Lowrey, I just
2 wanted to remind you the witness did answer
3 the question. But in terms of the cross
4 examination, it is limited to actually what
5 was brought out by the witness. So that the
6 earlier statements at the December meeting of,
7 I guess it was, the ANC, those kinds of
8 statements are not statements that you can
9 cross him on at this proceeding.

10 It would just be relative to what
11 he shared at this proceeding under oath.

12 MR. LOWREY: Thank you, sir.
13 That's all I have.

14 CHAIRMAN LOUD: Okay. Thank you.
15 We are now at the part of the proceeding where
16 the party opponent gets to put on its case and
17 that would be the united parties, yourself,
18 Mr. Lowrey and Ms. Liendo. And you now have
19 the opportunity to present your case.

20 MR. LOWREY: Yes, sir. Do we --
21 how much time do we have?

22 CHAIRMAN LOUD: How much time do

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1 you need? What are you --

2 MR. LOWREY: Well --

3 CHAIRMAN LOUD: -- planning on
4 presenting for your case, witnesses?

5 MR. LOWREY: -- we --

6 CHAIRMAN LOUD: I'm sorry.

7 MR. LOWREY: -- don't have
8 witnesses, but can we both jointly speak?

9 CHAIRMAN LOUD: Sure.

10 MR. LOWREY: Okay. I see.

11 CHAIRMAN LOUD: You both can speak.

12 Just give me a sense of how long each of you
13 are going to take.

14 MR. LOWREY: I won't need very
15 much. I don't want to belabor what the
16 material I have already --

17 CHAIRMAN LOUD: Okay.

18 MR. LOWREY: -- sent you and
19 regurgitate that. You have it. Mr. McKinney
20 and his counsel have it. I don't believe that
21 Mr. Goldstein has it. I did file that. Do
22 you have it? Oh, thank you. Good. Okay.

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1 CHAIRMAN LOUD: So it would be
2 yourself and Ms. or Mrs. Liendo for
3 presentation of your case and then your case
4 would conclude?

5 MS. LIENDO: Yes, but --

6 CHAIRMAN LOUD: Okay.

7 MR. LOWREY: Yes, sir.

8 CHAIRMAN LOUD: Yes. Sure, we have
9 time for that.

10 MR. LOWREY: As stated in my
11 prehearing statement of opposition, I don't
12 believe that the application correctly states
13 the requested relief. I believe that it
14 should clearly be a use variance.

15 And I don't believe the applicant
16 has satisfied the burden of proof for variance
17 relief.

18 I would like to clarify one
19 statement that I did make in my prehearing
20 opposition statement that is on page 13 of
21 that statement and the conclusion. Mrs.
22 Liendo had intended to make or had told me she

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1 was going to make an offer for the property at
2 \$185,100 on the 25th of January.

3 And subsequent to our conversation,
4 it was -- she decided to go lower to \$160. So
5 -- but as I understand it now, Mrs. Liendo is
6 prepared to make an offer at \$185,100 for the
7 property. I just wanted to correct that,
8 because it appeared that I had misstated or
9 had incorrectly stated, which, in fact, was an
10 incorrect statement, but only because I
11 thought that what she was planning to offer
12 would be \$185,100 and not what she ended up
13 offering, which was \$160.

14 Okay. Mrs. Liendo and I both
15 bought our properties with the understanding
16 that the carriage house was to be used as an
17 artist studio. In fact, Dr. Amoroso, shortly
18 after I moved into the house, offered the
19 carriage house to me. He wanted to know if I
20 wished to buy it. I researched it and found
21 that the only use that it could be put to
22 would be as an artist studio or storage or

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1 parking.

2 And so I did not go through with
3 that. So it was my understanding and I
4 believe Mrs. Liendo's understanding at the
5 time of the purchase of our homes that this
6 property would be used as an artist studio.

7 I'm sorry, I'm a little bit
8 disorganized here.

9 As far as the statement that Mr.
10 McKinney made that there was a for rent sign
11 on the building, I do not recall there being a
12 for rent sign on the building. I do have a
13 parking space immediately next to the carriage
14 house and I believe I would have seen that,
15 especially over a two year period of time, but
16 I don't recall seeing that.

17 The carriage house had been used,
18 and I pointed this out in my statement, as an
19 artist studio in the past. The artist put on
20 a brand new roof. That was done in the
21 1993/94 time frame. And it was a new roof in
22 the sense that it was completely

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1 reconstructed. The roof was completely taken
2 off and a new roof was put on. I just wanted
3 to state that.

4 And at the same time frame or maybe
5 a little prior to that, Dr. Amoroso did
6 repoint the building, repointing the stone and
7 improved the stone exterior significantly.

8 Both Mrs. Liendo and I believe that
9 our privacy will be significantly affected by
10 the conversion of the carriage house to a
11 private residence. There is a deck and a
12 window overlooking my property. But the
13 windows and the deck overlooking Mrs. Liendo's
14 property are quite significantly more, the
15 amount of deck and the number of windows.

16 So her -- and the deck is an
17 elevated deck in that it would -- if anyone
18 standing or sitting on the deck would be able
19 to look over the deck, hence directly into
20 Mrs. Liendo's backyard and into her home.

21 So we believe that our properties
22 are affected, the privacy and the potential

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1 noise from this property being used as a full-
2 time residence.

3 Okay. Do you have anything that
4 you would like to say, Rosalinda?

5 MS. LIENDO: Yes. The only one
6 that I want to tell you, what I have tell
7 everybody before, when I bought the house in
8 '93 or '94, I was told that I was going to be
9 the first one being offerred if ever sell the
10 house, the carriage house.

11 And I never got the offer, even
12 though I was serving the United States in
13 Germany for two years. And I told my son if
14 anything happen, you need to let me know and I
15 never hear anything from anybody offering me
16 the property.

17 And the privacy of my house is very
18 important for me and my family, because when I
19 want to go home, I want to rest and I want to
20 be sure that nothing is bothering me in my
21 house.

22 It is very important to know that

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1 when Mr. McKinney bought the house, he knew in
2 '95, he said that he was offered the property,
3 which I didn't know about that. He knew that
4 it was only used as a storage room. Since I
5 bought the house, it has been storage room.
6 Even my son when he was going to school and my
7 kids go through that -- the back door, because
8 I don't have exit and I don't have a parking
9 place.

10 So I was really for many years
11 hoping to get that property, so it will be
12 really a good house for me, because I come
13 from work 2:00, 3:00 in the morning and I need
14 to park really far, because I don't have a
15 parking place.

16 Some people take three or four
17 parking places, even though they have in the
18 back garage. They don't use it. But I need.

19 And that is the only thing that I would like
20 for you to take into consideration that I am
21 willing to buy the property.

22 CHAIRMAN LOUD: Thank you both, Mr.

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1 Lowrey and Mrs. Liendo.

2 Why don't we see if the applicant
3 has any questions for you and then we will
4 turn to the Board to see if Board Members have
5 questions.

6 CROSS EXAMINATION

7 MR. SULLIVAN: I have a question
8 for Ms. Liendo. The applicant installed a
9 fence between his property and your property
10 or improved the fence. He raised the fence,
11 did he not to a height of 6 feet?

12 MS. LIENDO: Yes, he did.

13 MR. SULLIVAN: Also, you mentioned
14 you don't have a parking place.

15 MS. LIENDO: Yes, I don't. I was
16 rejected so many times when I apply for a
17 permit to have a driveway in front of my
18 house.

19 MR. SULLIVAN: So you don't have a
20 driveway in front of your house?

21 MS. LIENDO: No, I don't.

22 MR. SULLIVAN: Is this your house?

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1 Maybe I have the wrong house.

2 MS. LIENDO: No, it is.

3 MR. SULLIVAN: Okay. Is that a
4 driveway?

5 MS. LIENDO: It is a driveway, but
6 it's not being used because I don't have the
7 cut. So the Zoning is asking me to get it cut
8 in, so I have not done that yet, because, as I
9 said, I was serving outside the country and I
10 haven't followed that.

11 CHAIRMAN LOUD: I'm sorry, Mrs.
12 Liendo, I didn't --

13 MS. LIENDO: Curb.

14 MR. SULLIVAN: So it's not being
15 used?

16 MS. LIENDO: Curb cut.

17 MR. SULLIVAN: Right?

18 MS. LIENDO: Never.

19 MR. SULLIVAN: So why is there a
20 car on it, if it's not being used?

21 MS. BAILEY: Mr. Sullivan, whatever
22 document you are showing needs to be filed in

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1 the record.

2 MR. SULLIVAN: I only have one
3 copy.

4 MS. BAILEY: I'll make a copy.

5 MR. SULLIVAN: Okay. I don't even
6 need to submit it if she just admits that she
7 has a parking space.

8 CHAIRMAN LOUD: Why don't we do
9 this, if it's okay? Why don't we just -- you
10 go through your cross and then provide the
11 record later and we can make a copy and put it
12 in the record, so that we don't delay the
13 cross.

14 MS. LIENDO: Can I say something?

15 CHAIRMAN LOUD: Okay.

16 MS. LIENDO: I'm sorry. Maybe he
17 is referring when I was in Germany. I left my
18 car inside for two years with my orders in it,
19 that if something happens, they can contact me
20 and I have the phone number and everything
21 inside, but I was not driving in that time,
22 because I wasn't here. Maybe he is referring

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1 to that, so I cannot see it.

2 CHAIRMAN LOUD: Well, again, why
3 don't you show her the picture, just to make
4 sure we're all on the same page? And then
5 once you are through showing her the picture,
6 you can hand it to Ms. Bailey, so that we can
7 take a look at it.

8 COMMISSIONER SCHLATER: Mr.
9 Chairman?

10 CHAIRMAN LOUD: And can keep moving
11 forward. Yes, sir?

12 COMMISSIONER SCHLATER: I'm just
13 questioning the relevance of this line of
14 argument.

15 CHAIRMAN LOUD: Okay.

16 COMMISSIONER SCHLATER: On whether
17 or not there is a parking space or a curb cut.
18 I'm not sure it's relevant to the matter at
19 hand.

20 MR. SULLIVAN: I'll agree.

21 CHAIRMAN LOUD: Mr. Sullivan?

22 MR. SULLIVAN: I'll withdraw the

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1 question.

2 CHAIRMAN LOUD: Okay. All right.

3 MR. SULLIVAN: I have no further
4 questions. Thanks.

5 CHAIRMAN LOUD: All right. Why
6 don't we turn to Board Members then and see if
7 Board Members have any questions for the party
8 opponents?

9 COMMISSIONER SCHLATER: I have a
10 couple questions. To both, Mr. Lowrey and Ms.
11 Liendo, is that correct? It goes to this
12 privacy argument and it's certainly something
13 we have to take seriously in evaluating this
14 application.

15 I'm wondering how your privacy
16 would be more impacted by a single-family home
17 there than an artist studio? Because, to me,
18 either way you're going to have somebody in
19 that space. There is going to be windows.
20 There is still -- people are able to occupy
21 artist studio space 24 hours a day if they
22 would like to.

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1 So how is that creating more of a
2 privacy problem?

3 MR. LOWREY: Can I go first?

4 MS. LIENDO: Yes.

5 MR. LOWREY: Okay. I believe it
6 would create more of a privacy issue, because
7 the artist studio, yes, they could potentially
8 be there 24/7 and I requested the D.C.
9 Government to provide me with any rules and
10 regulations on the operation of an artist
11 studio. And I have not seen those yet.

12 So maybe they are not in existence,
13 but I believe it is reasonable for us to
14 believe that an artist will come to the studio
15 and work a fairly normal work day. The ones
16 that I know do. The ones that are -- that
17 have full-time jobs will come in and work part
18 of the night. But I don't believe that they
19 will be, in most cases, working 24 hours a
20 day, 7 days a week in that location.

21 With regard to the property
22 becoming a single-family residence and

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1 potentially being purchased by -- I will offer
2 this scenario, which is the same scenario I
3 offered in the Statement of Opposition, a
4 parent could come in or two parents could come
5 in and buy the carriage house for their
6 college age students to live in. And they
7 could claim that they are the owners and that
8 they are occupying the property.

9 But they would never be there. The
10 students would -- as college students do and I
11 used to be a college student and I know that
12 they tend to live in packs. It is sort of a
13 pack mentality. You party together and you
14 live together. And I believe that the amount
15 of traffic there late at night and the amount
16 of noise coming from parties outside, not only
17 on the deck, but the expansive backyard, there
18 is -- it has the potential to really be, I
19 believe, party central for any students that
20 might live there.

21 COMMISSIONER SCHLATER: Mr. Lowrey,
22 here would be my question. If you could be

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1 assured that this property were to be owner-
2 occupied, would that assuage some of your
3 concerns?

4 I understand the concern about
5 college students living there and there being
6 a party. And I hear you on that front. But
7 we have a situation where the owner is willing
8 to file a covenant on the property saying that
9 it will be owner-occupied. And we have to
10 take that at face value. We can't assume that
11 the owner is going to break the law.

12 MR. LOWREY: Yes, sir. I agree
13 with you that you have to take that on face
14 value. But who would be enforcing it if the
15 owner did not comply with the covenant? Who
16 would bear that responsibility and that burden
17 and that cost?

18 COMMISSIONER SCHLATER: Okay. Are
19 there any other concerns beyond the privacy
20 that you want to highlight?

21 MR. LOWREY: Privacy, I believe
22 that there would be quite significantly more

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1 traffic in the alley if there was a lot of
2 partying going on at the house. And all the
3 accompanying problems that you have with that.

4 COMMISSIONER SCHLATER: I'm
5 wondering if you recognize any potential
6 benefits of having a homeowner on that alley
7 in terms of safety, you know, eyes on the
8 street? Do you see any potential upside if
9 the property were well-maintained with an
10 owner occupant?

11 MR. LOWREY: I believe that -- in
12 my experience, and I have lived there, you
13 know, for 18 years, and I believe that, from
14 my perspective, when the artist was there, and
15 this was some years ago, it was an ideal
16 situation. And he improved the property.

17 And I never had any problems. I
18 believe that it would function better as an
19 artist studio. And I would have fewer
20 problems. I mean, I honestly believe that.

21 I mean, the thing is in the
22 District, and I have had to live with this,

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1 and that is once a problem is created, you
2 don't get relief. It is hard to get relief.
3 The ANC is not going to stand behind you and
4 help you.

5 The District Government is loathe
6 to help you on those things. And so the
7 enforcement of it really is your problem, at
8 that point. It is your problem. I don't have
9 time to enforce these restrictive covenants.

10 COMMISSIONER SCHLATER: Understood.
11 Okay. Thank you, Mr. Lowrey.

12 Ms. Liendo, I don't know how to put
13 this exactly, but you are seeking to purchase
14 the property, correct?

15 MS. LIENDO: Yes, I do.

16 COMMISSIONER SCHLATER: You very
17 much want to?

18 MS. LIENDO: Yes, I would like.
19 Yes, because this case is cost me a lot of
20 lose my time and a lot of headache, because
21 people call me telling me that your property
22 is not paying this. Your property -- you are

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1 not paying that. Who -- when did you get the
2 license for that to fix it?

3 I said that's not my property.
4 That's not my house. Even the mail get every
5 day. I'm tiring of writing this is not the
6 correct address. Please, I'm really, really,
7 really, really tired of doing that every day.
8 And here is one of your's, Mr. McKinney.

9 COMMISSIONER SCHLATER: I guess, is
10 part of your opposition to this use variance
11 driven by the fact that you want to purchase
12 this property?

13 MS. LIENDO: Yes. Because I don't
14 want to have any problem. It will be nice for
15 me and for my peace of life also to have the
16 whole area and nobody bothering me. It really
17 will be if, you know, he can sell the house or
18 the area, I mean.

19 COMMISSIONER SCHLATER: Okay. I
20 have no further questions. Thank you.

21 CHAIRMAN LOUD: Are there any
22 additional questions from the Board? Okay.

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1 Why don't we then turn back to the party
2 status opponent. Did that conclude your case,
3 Mr. Lowrey?

4 MR. LOWREY: Yes, sir, it does
5 conclude my case. I would like to ask the
6 Board, respectfully, if you could leave the
7 case open. I believe that is your intent for
8 -- and I'm sorry, I'm not a lawyer and I have
9 got the words written down, but it is facts of
10 law and -- that we are able to submit 30 days
11 after the transcript comes out.

12 Is that possible?

13 CHAIRMAN LOUD: Well, we will, I
14 guess as Board Members, talk about leaving the
15 record open and what we would be looking for
16 in leaving the record open. I think as I
17 stated, you know, normally when we come out
18 here for the hearings, there is a recital that
19 I go through that says once we close the
20 record, then nothing else is allowed in and
21 that we will ask you to follow-up with the
22 things that we deem important for the record.

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1 Normally, when we leave the record
2 open, it is because there is some gap in the
3 record that whatever you would be submitting
4 would help to fill.

5 We don't typically ask for, if I
6 understand correctly, findings of fact and
7 conclusions of law as a matter of course in
8 most cases. I think it is just when it is a
9 very complicated case and it's helpful to have
10 somebody marshal all of that for you from a
11 transcript and from their notes or whatever.

12 So I wouldn't be in favor of
13 leaving it open for that, but I would also
14 invite the input of my fellow Board Members.
15 I think that we would be able, based on this
16 record, because it was well put together from
17 the applicant as well as yourself and OP, to
18 reach a decision without findings of fact.

19 MR. LOWREY: Thank you.

20 CHAIRMAN LOUD: Okay. So why don't
21 we then, if you have concluded your case, go
22 to the applicant for any closing remarks.

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1 MR. SULLIVAN: Thank you. I would
2 just like to start by briefly responding to
3 Mr. Lowrey's submittal that I got last night.

4 He says that we don't correctly state the
5 requested relief. There is no delineation in
6 the Zoning Regs between area and use variance.

7 And, in fact, the last couple rear
8 alley lot cases that came in, they came in
9 claiming to be area variances as well.

10 I would be happy to argue that it
11 is still an area variance, but I accept the
12 Board's opinion on that from the last two
13 cases, which happened after I filed this case,
14 you were very clear about that.

15 Used as an artist studio before, he
16 claims it was used as an artist studio. There
17 is no C of O existing to support that claim.
18 At any rate, Mr. McKinney didn't own it then
19 and so it really wouldn't have any bearing on
20 whether or not an artist studio use now would
21 provide a fair and reasonable return for Mr.
22 McKinney's investment in the property.

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1 I would like to address the art
2 studio advertisement that he included from
3 Craig's List, because I think it argues
4 perfectly for our case.

5 He submitted an advertisement for a
6 property that couldn't be more different than
7 the subject property. It is a bona fide art
8 studio where art is created and sold along
9 with tens of other artists. I think it is
10 called the Willow Street Gallery. They have
11 art shows, according to their website. They
12 have visiting shows. They have invitation
13 shows, group shows.

14 They have 64 artist spaces, which
15 creates the critical mass that an artist would
16 look for, if they actually wanted to sell
17 their work. They are small spaces, topping
18 out at a couple hundred square feet less than
19 the carriage house. They are not hidden in a
20 back alley with poor natural lighting.

21 They have a website. They have
22 advertising. So to compare these two, it's

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1 apples to oranges. Even then, even then, I
2 would submit that the rental rate that he
3 provides from that advertisement is lower than
4 the fair rental rate that you would get if you
5 rented this property, the applicant's
6 property.

7 The parking space rental issue, I
8 just don't think that's practical that you
9 could rent four parking spaces. There is only
10 -- there is a driveway. You would need to
11 have a full-time valet parking attendant if
12 you wanted to do that.

13 The issue on privacy, I think we
14 have kind of fleshed that out, but I would
15 just point out that my guess is that Mr.
16 McKinney values his privacy just as well as
17 his neighbors and that's why he installed and
18 raised the fence between him and Ms. Liendo's
19 property.

20 Regarding the covenant and the
21 assumption that it is going to be disregarded
22 after this hearing, there is no assurance that

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1 an artist studio would be used in accordance
2 with the law. So I just don't see how that is
3 relevant or knowable.

4 The final thing is that, regarding
5 his presentation, he submitted that Ms. Liendo
6 offered what is now corrected to \$160,000. I
7 think that also proves our case. The property
8 was appraised at \$525. I think she is
9 representing here what it is worth as a
10 private garage, which is half of what Mr.
11 McKinney has invested in it and a lot more
12 than that less than what it is appraised at.

13 So if I could just briefly go
14 through the three prongs?

15 The first prong I think it is a
16 very unique structure. Its history is unique.

17 Its configuration is unique. The fact that
18 it is three stories. It is also the fact that
19 it is on a separate lot and was on a separate
20 lot since before 1958 makes it very unique.

21 As brought out in testimony, it is
22 the only -- it would be the only single-family

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1 residential garage on the block or single-
2 family dwelling. And because of the age of
3 it, the upkeep of the building has called for
4 considerable effort and resources in
5 maintaining and improving the property.

6 The second prong, the undue
7 hardship. You have evidence in front of you
8 of what I would call a hidden location, a
9 solitary location, it's not near any other
10 arts uses, a lack of natural light. It's an
11 old building with very small windows, shaded
12 to the east by a four story office building
13 that actually starts at a higher elevation.

14 The very fact that it has sat
15 vacant off and on, I believe the Board has
16 spoken about that in the past about that being
17 an indication of whether or not a certain use
18 is viable. The fact that the use never --
19 actually didn't happen. And we have that in
20 this case.

21 There is no evidence of its use as
22 an artist studio, notwithstanding Mr. Lowrey's

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1 claim. I think it is too large compared to
2 the artist studio ad that Mr. Lowrey presented
3 for an art studio.

4 Mr. McKinney has made a significant
5 investment in the purchase of the property
6 which remember went under contract in 1995.
7 It was closed in 2001 at \$150,000. So we
8 haven't even talked about adjusting for time
9 value of money.

10 So again, the offer from Ms. Liendo
11 to purchase for use as a garage at less than
12 half of what Mr. McKinney has invested in it
13 and the comparison with the artist space in
14 Takoma Park, I think, is all very strong
15 evidence that we meet the undue hardship test.

16 And so I would like to speak about
17 the request for additional submission on that.

18 It's an expense. And we looked into it and
19 it was between \$500,000, depending on whether
20 we would have somebody come here and actually
21 defend that opinion.

22 We felt like there was plenty of

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1 information here for the Board to review it on
2 their own. And it's certainly not the case
3 that a use variance always requires economic
4 expert testimony.

5 And in one of the cases last
6 summer, the Board made a decision without such
7 economic expert testimony and I believe it was
8 Commissioner Schlater that said that, you
9 know, we have the ability and we have the
10 knowledge of real estate to actually make a
11 decision on this, based on the information in
12 front of us.

13 I think this case is similar to
14 that. I'll be happy to submit more, if we
15 have to, but I think it is obvious that this
16 is just not a space where an artist would want
17 to rent space.

18 And to that end, I would like to
19 respond to Mr. Lowrey's claim that there was
20 no for rent sign up. I have a picture here
21 and I'll submit this to the record with a for
22 rent sign and this is before this hearing,

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1 because the garage doors are still on the
2 property. So what time period would this be?

3 MR. MCKINNEY: 2002.

4 MR. SULLIVAN: 2002.

5 CHAIRMAN LOUD: I'm sorry, let me
6 just ask again what this is for?

7 MR. SULLIVAN: Mr. Lowrey claimed
8 that he never saw a for rent sign on the
9 property.

10 CHAIRMAN LOUD: I see. Okay.

11 MR. SULLIVAN: Just submitting that
12 to rebut that statement.

13 CHAIRMAN LOUD: Well, it doesn't
14 mean he saw what is in the picture, but we
15 accept it for the proffer.

16 MR. SULLIVAN: No, I'm not saying
17 he is not telling the truth. I'm just saying
18 that --

19 CHAIRMAN LOUD: That there was one.

20 MR. SULLIVAN: -- I'm showing you
21 proof that there was a sign out there at one
22 point.

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1 Without getting too far into the
2 use variance versus area variance argument, as
3 you know from Palmer, the standard is whether
4 or not a use variance will alter the character
5 of the Zone District. And I don't think that
6 a use variance for a single-family dwelling
7 will alter the character of the Zone District.

8 Maybe it is a hybrid, in fact,
9 that's what -- in Palmer they said it was a
10 hybrid. So I think we comfortably meet the
11 hardship standard. So I don't want to push on
12 that point. But maybe that goes more to prong
13 three, that it is not detrimental to the
14 public good, because it is a residential use
15 surrounded by other residential uses.

16 So on the third prong, on that
17 point, I believe, again, I think it is fairly
18 obvious that there is no substantial detriment
19 to the public good. We think it is a great
20 benefit to the public good.

21 We have unanimous support of the
22 ANC-3E, support of Mr. LeMon and a couple

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1 other neighbors. And there is nothing about
2 use as a residence that suggests that there
3 would be an increase in density or intensity
4 of use or a decrease of privacy.

5 Regarding the integrity of the Zone
6 Plan, again, my argument is that we are asking
7 for a single-family residential use in an R-2
8 District. So notwithstanding Office of
9 Planning's argument, I don't agree that 2507.3
10 is any more strict than any other regulation.

11 There is a variance -- there is a
12 reason for the variance process. And it is
13 provided for any regulation and I don't think
14 there is anywhere -- well, the Board has
15 spoken on this and I would urge the Board to
16 go with what they decided for the two rear
17 alley lot cases last summer where they
18 disagreed with the Office of Planning on that
19 point.

20 I have nothing further. Thank you.

21 CHAIRMAN LOUD: Well, before we
22 formally close out the hearing on it and

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1 perhaps go into deliberation, let me just see
2 if Board Members have any final questions for
3 the applicant or for the party opponent?

4 Okay. Then I think what we will do
5 is we will reflect right now on whether we
6 think the record is full and we can deliberate
7 right now or whether individual Board Members
8 or Board Members as a whole see some gaps and
9 want to see those gaps filled.

10 We are not going to allow any
11 expert, you mentioned expert opinions and
12 testimony and that kind of thing, because the
13 case is over. We haven't qualified any
14 experts. There has been no cross. So we saw
15 that bus has left.

16 It would just be information that
17 fills the gaps relative to what was testified
18 to. And I think Mr. Schlater had mentioned
19 something about ongoing costs for taxes and
20 maintenance. I don't see why that would cost
21 the applicant \$500,000 to come up with that.
22 But I don't know if Mr. Schlater still wants

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1 that information or not.

2 But that's the kind of stuff we
3 will talk about.

4 So let me open it up to Board
5 Members to see how each of you feel about
6 whether we have got a sufficient record before
7 us to deliberate this afternoon, whether we
8 need additional time to reflect on it or
9 additional information. And it's a wide open
10 question for whoever wants to step into it.

11 Well, let me start. I'm not
12 comfortable moving forward today. I think for
13 a use variance the law -- and we have analyzed
14 this as a use variance, even in your initial
15 submission you hedged your bets and said let
16 me make sure I have touched the use variance
17 test, OP analyzed it like that, our previous
18 cases have analyzed these types of cases like
19 that.

20 But one of the things you have to
21 show is that it is not possible to put the
22 property into use in conformance with the

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1 Zone, reasonably. I'm paraphrasing the
2 language, but generally, that's the idea.

3 MR. SULLIVAN: Right.

4 CHAIRMAN LOUD: And one of the
5 conforming uses would be an artist studio.
6 And I think the testimony today that leaves me
7 pause to say maybe I'm looking for a little
8 more information to leave the record open is
9 that the only efforts that I can see from the
10 record where attempts were made to put the
11 property to a conforming use as an artist
12 studio were the 2001, 2002, maybe 2000, 2001
13 for rent efforts by the applicant that
14 yielded, I think, four responses relative to
15 an artist studio. That was about maybe nine
16 years ago.

17 And the testimony from the
18 applicant that just based on his personal
19 knowledge, he doesn't think that potential
20 artists would be interested in an upper
21 Northwest location for a studio. More to the
22 point, able to afford an upper Northwest alley

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1 studio. They would be looking elsewhere like
2 Southeast or some other areas that he
3 mentioned.

4 And that he would be looking to get
5 roughly \$30 per square foot. And that that
6 would be the reasonable amount that he would
7 expect for an artist studio.

8 I would be looking for a little
9 more substantiation, something to back that up
10 a little bit more strongly and would be open
11 to the idea of leaving the record open to have
12 the applicant quantify that with an indication
13 of the fair market value rent for an artist
14 studio. And that shouldn't cost -- I don't
15 think it would cost money for the applicant to
16 pull that together.

17 I think many commercial real estate
18 brokerages will do that for free. But that's
19 my initial thought on it. And I'll again turn
20 back to colleagues for some of your
21 reflections.

22 COMMISSIONER SCHLATER: Mr. Chair,

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1 I think I'm in agreement with you that a
2 little bit more information for the record to
3 support the applicant's case would certainly
4 be helpful. I don't think I'm prepared to
5 vote today.

6 And information about the ongoing
7 costs, any information there is about how much
8 money has been expended on the property,
9 although we do have testimony on that already,
10 and information on comps for artist studio
11 space, although, I think we got some of that
12 into the record today, can only help the
13 applicant's case.

14 And I don't even think it would
15 take that long for the applicant to pull
16 together some of that information. And it is
17 a case that I would be prepared to vote on in
18 pretty short order after getting that
19 information.

20 CHAIRMAN LOUD: Thank you. Are
21 there others?

22 MEMBER SORG: I wanted to follow-up

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1 on a request that Mr. Schlater made earlier
2 that I thought would also help clarify, which
3 is to understand how the property is taxed.
4 We heard testimony today that it may be taxed
5 as vacant, which, of course, makes a big
6 difference. So clarification and confirmation
7 on that, I think, would be helpful.

8 CHAIRMAN LOUD: Thank you, Board
9 Member Sorg. Assuming that we are not going
10 to hear from Board Members Dettman and
11 Moldenhauer, then I think it is pretty clear
12 that we are not going to deliberate today.

13 What we will do is look for a date
14 that we can set this for decision. And then
15 working backwards from that date, indicate
16 some deadlines to submit some follow-up
17 information. And we will, you know, drill
18 down and be real clear about what the Board is
19 looking for.

20 In terms of a decision date, I
21 believe we can stick this in as a decision on
22 March 2nd, which would give us an abundance of

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1 time to get a clear transcript, which I think
2 might be helpful for the parties in this case,
3 and then work our way backwards from there in
4 terms of submitting.

5 The key information to submit would
6 be what Ms. Sorg indicated regarding the
7 designation of the property status for tax
8 purposes. And then what Mr. Schlater and I
9 have both tried to identify in terms of some
10 cost comparables for an artist studio.

11 And I think, Mr. Schlater, you had
12 mentioned some other things and I'm going to
13 ask you to make real clear to the applicant.

14 COMMISSIONER SCHLATER: Well, I
15 guess we have on the record how much the
16 applicant has put into the property as a sale
17 price and the improvements value, the value of
18 the improvements of the property.

19 So I'm comfortable with that. If
20 there are any other costs that can be
21 quantified regarding the ongoing maintenance
22 and any supporting evidence about how I think

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1 we got to a value of needing to get to \$2,500
2 a month to make it an economically viable
3 proposition for the applicant, any further
4 backup on that would be helpful.

5 CHAIRMAN LOUD: Thank you, Mr.
6 Schlater. And I think for me, some indication
7 of what you submit, Mr. Sullivan, that would
8 clarify what the market rental rate would be
9 for an artist studio.

10 MR. SULLIVAN: Okay. Part of what
11 I'll submit is what Mr. Lowrey already
12 submitted, the top space was \$1,100 a month at
13 that Tony Studio complex in Takoma Park. And
14 then I would prepare a comparison, I guess, of
15 that property versus this property. And then
16 I'll look for other comps in that regard.

17 CHAIRMAN LOUD: That would be
18 helpful. And apples to apples, I mean, it
19 would be more helpful to me to have a square
20 footage breakdown of the cost as opposed to
21 just \$1,100 per month and not know how much
22 total square footage we are talking about.

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1 Okay. So how long do you think it
2 would take you, to Mr. Schlater's last point,
3 to pull that information together?

4 MR. SULLIVAN: Well, like you said,
5 working back from March 2nd, if I could have --
6 if we could have the deadline be two weeks
7 before that date? Is that enough time for Mr.
8 Lowrey to respond? What --

9 CHAIRMAN LOUD: Out of an abundance
10 of caution, could you do it just a week sooner
11 than that and then we will ask Mr. Lowrey if
12 he could respond to it within a week? And
13 then we will be well set for March 2nd.

14 MR. SULLIVAN: What would that date
15 --

16 CHAIRMAN LOUD: I mean, it
17 shouldn't take long.

18 MR. SULLIVAN: -- be?

19 MEMBER MOLDENHAUER: The 16th.

20 MR. SULLIVAN: The 16th would be
21 great. That's the two weeks before that. You
22 said you wanted it sooner.

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1 CHAIRMAN LOUD: That is the two
2 weeks, okay. Well, no. If we do it on the
3 16th, then give Mr. Lowrey about a week after
4 that to respond, seven days.

5 MR. LOWREY: Yes, sir, that's fine.

6 CHAIRMAN LOUD: That works for Mr.
7 Lowrey. And then I think we are well-
8 positioned to come back March 2nd and make a
9 decision then. Is there anything else?

10 MS. BAILEY: No, Mr. Chairman. If
11 I could just repeat the dates?

12 CHAIRMAN LOUD: Yes, ma'am.

13 MS. BAILEY: Decision is scheduled
14 for March 2nd. The applicant is to file the
15 submission that was asked for on March 16th and
16 the opposition party may file a response by
17 March 26th.

18 CHAIRMAN LOUD: Thank you, Ms.
19 Bailey. So then we look forward to getting
20 the supplemental responses. The record is
21 only left open for what we have asked for.
22 And we will decide the case on March 2nd.

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1 MS. BAILEY: I'm sorry, February
2 26th.

3 CHAIRMAN LOUD: I'm sorry. She has
4 corrected her dates.

5 MS. BAILEY: Sorry, Mr. Chairman.

6 CHAIRMAN LOUD: That's okay.

7 MS. BAILEY: I said March 26th, but
8 I meant to say February 26th.

9 MR. MOY: Mr. Chairman, do you want
10 --

11 MS. GLAZER: Mr. Chair, that's a
12 little more than a week.

13 MR. MOY: Yes.

14 MS. GLAZER: I thought you had said
15 a week from the time the applicant filed?

16 MR. MOY: That would be the 23rd
17 would be the Tuesday. 26th is the Friday.
18 Unless you want to give him that additional
19 time.

20 CHAIRMAN LOUD: Is there any
21 concern, Mr. Sullivan, about giving them until
22 the end of the week to respond to that?

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1 MR. SULLIVAN: Will I be able to
2 respond to it anyway?

3 CHAIRMAN LOUD: Will you be able to
4 respond to their response?

5 MR. SULLIVAN: Yes, response, yes.

6 CHAIRMAN LOUD: No.

7 MR. SULLIVAN: Yes, no? As long as
8 I get it by Friday, that would be good.

9 CHAIRMAN LOUD: Yes. Okay.

10 MR. SULLIVAN: Thanks.

11 CHAIRMAN LOUD: Very good. Okay.
12 It looks like we are set then for March 2nd.

13 Thank you to each of you for
14 participating and thanks to the witnesses as
15 well. We appreciate your patience and we look
16 forward to getting the follow-up materials.
17 Thank you.

18 Ms. Bailey, is there anything
19 further in this case or any other case for
20 today?

21 MS. BAILEY: I think that's it for
22 the day, Mr. Chairman.

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1 CHAIRMAN LOUD: All right. I want
2 to thank all of my colleagues and thank
3 everybody, OZ, for all the help you provide.
4 And I think this hearing is adjourned.

5 (Whereupon, the Public Hearing was
6 concluded at 4:01 p.m.)

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