

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Office of Zoning  
Board of Zoning Adjustment

PUBLIC MEETING & PUBLIC HEARING  
OF THE BOARD OF ZONING ADJUSTMENT

Tuesday, November 8, 2011

441 4th Street, N.W.  
Jerrily R. Kress Memorial Room  
Second Floor Hearing Room, Suite 220-South  
Washington, D.C. 20001

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## Board Members:

MERIDITH MOLDENHAUER, Chairperson  
NICOLE SORG, Vice-Chairperson  
JEFFERY HINKLE, National Capital Planning  
Designee  
LLOYD JORDAN, Mayoral Appointee  
KONRAD SCHLATER, Zoning Commission

## Also Present:

CLIFFORD W. MOY, Secretary to the Board  
SHERRY GLAZER, ESQ.,  
Office of Attorney General  
MARY NAGLEHOUT, ESQ.  
Office of Attorney General

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

2 CHAIRPERSON MOLDENHAUER: This hearing  
3 will please come to order. Good morning, ladies  
4 and gentlemen. We are located in the Jerrily R.  
5 Kress Memorial Hearing Room at 441 4th Street,  
6 N.W. This is November 8, 2011, Public Meeting of  
7 the Board of Zoning Adjustment for the District  
8 of Columbia.

9 My name is Meridith Moldenhauer,  
10 Chairperson. Joining me today to my left today  
11 Vice-Chairperson Nicole Sorg, Mayoral Appointee.  
12 To my right is Lloyd Jordan, Mayoral Appointee.  
13 To my far right is Jeffery Hinkle,  
14 representative of the National Planning  
15 Commission.

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

19 We do not take any public testimony at  
20 our meetings unless the Board asks someone to  
21 come forward.

22 Please be advised this proceeding is

1 being recorded by a court reporter and is also  
2 being webcast live. Accordingly, I must ask you  
3 -- from any disturbing noise or actions in the  
4 hearing room. Please turn off all cell phones  
5 and beepers at this time.

6 Mr. Secretary, do we have any preliminary  
7 matters?

8 MR. MOY: Madam Chair, there are some  
9 preliminary matters, but Staff would suggest that  
10 the Board address those when I call each of the  
11 separate cases.

12 CHAIRPERSON MOLDENHAUER: Thank you.

13 I do believe that we've shifted the cases  
14 around this morning, just to make sure everybody  
15 knows that. We are going to be hearing -- let's  
16 see here. There's three appeal cases for a  
17 decision today, and we're pushing those three  
18 cases to the very end of the calendar. And so  
19 we'll be starting off with the David Maloney, and  
20 then we'll be going to the Capitol Hill Day  
21 School. Then we'll have Master, the Innovative  
22 Recycling [sic], Lester, Madrid. And then we'll

1 be doing Parrs, Lawrence [sic], and then Ward 5,  
2 in that order, just so everyone knows.

3 There may be a break for lunch in between  
4 that time frame, so I just want to make sure  
5 people are aware for efficiency's sake.

6 That being said, we will start off with  
7 our first case for the day.

8 Application No. 18301

9 MR. MOY: Good morning, Madam  
10 Chairperson, members of the Board.

11 The first case for action before the  
12 Board is the expedited review calendar, and there  
13 is one application on that calendar this morning.

14 And that is Application No. 18301 of David  
15 Maloney.

16 As advertised, it reads as the  
17 application is pursuant to 11 DCMR 3104.1 for a  
18 special exception to allow read and side  
19 additions to an existing one-family detached  
20 dwelling under Section 223, not meeting the rear  
21 yard (Section 404) requirements in the R-1-B  
22 District. This is at premises 4602 Fessenden

1 Street, N.W., property located in Square 1544,  
2 Lot 76.

3 As the Board is aware, the special  
4 exception Section 223 case is on Expedited  
5 Calendar. Application with the Applicant waives  
6 their right to a public hearing, and the  
7 applications are subject to either Board approval  
8 or removal from the Calendar pursuant to Section  
9 3118.3, .6, and .7 of the Zoning Regulations.

10 With that, the Board should act with the  
11 merits of the Expedited Review Calendar, pursuant  
12 to Section 3118 requirements, consisting of  
13 Application 18301 for special exception relief  
14 under Section 223.

15 CHAIRPERSON MOLDENHAUER: Thank you very  
16 much, Mr. Moy.

17 I think that this is a very  
18 straightforward case. This is an application for  
19 expedited review for a see under 223, where the  
20 Applicant has put everything together. We have a  
21 letter from the Office of Planning in support.  
22 We have the ANC exhibit, which also provides that

1 they are in support of this application, and a  
2 signed resolution that would receive great weight  
3 due to the fact that it has a regularly held  
4 meeting with proper notice, with a quorum  
5 present, and 5 to 0, the Commission voted to  
6 support the application. Our Exhibit 21, we have  
7 multiple letters in support as well from  
8 neighboring property owners and the adjacent  
9 property owners, Exhibit 19, 17 -- I believe we  
10 have another one, 20 as well. Thank you.

11 And so with that said, I think that I  
12 find no issue as to why we wouldn't approve this  
13 application. I don't believe that -- I believe  
14 that the Applicant has satisfied the standards  
15 under 223, and I would be in support of approving  
16 this application.

17 Is there any additional deliberation from  
18 Board members on this case?

19 MR. HINKLE: Madam Chair, just before we  
20 go a little bit further, I just wanted to note  
21 that I do do a lot of work with Mr. Maloney and  
22 his staff at the Office of Historic Preservation,

1 so I'm going to recuse myself from this case.

2 CHAIRPERSON MOLDENHAUER: Thank you. I  
3 appreciate that disclosure.

4 So I'll ask then the other two Board  
5 members that are participating in this case if  
6 there's any additional deliberation on this case.

7 MR. JORDAN: No.

8 CHAIRPERSON MOLDENHAUER: Seeing none,  
9 then I think we can -- I'll submit a motion, a  
10 motion to approve Application 18301 under 11 DCMR  
11 3104.1 for a special exception to allow rear/side  
12 addition to an existing one-family detached  
13 dwelling under Section 223, not meeting the rear  
14 yard under 404 requirements, in R-1-B District at  
15 premises 4602 Fessenden Street, N.W.

16 A motion has been made. Is there a  
17 second?

18 VICE-CHAIRPERSON SORG: Second.

19 CHAIRPERSON MOLDENHAUER: Motion has been  
20 made and seconded. All those in favor, say  
21 "aye."

22 [Chorus of ayes.]

1           MR. MOY: The Staff would record the vote  
2 as 3 to 0 to 2. This is on the motion of  
3 Chairperson Moldenhauer to approve the  
4 application and the Expedited Review Calendar  
5 containing the application. Second the motion,  
6 Ms. Sorg. Also in support of the motion, Mr.  
7 Jordan. We have a Board member who is recused,  
8 and no other Board members participating. So  
9 again, the final vote is 3 to 0 to 2. The motion  
10 carries.

11           CHAIRPERSON MOLDENHAUER: Seeing that  
12 there is no opposition on this case, we would  
13 like to waive our requirements and ask that a  
14 summary order be issued.

15           MR. MOY: Thank you, Madam Chair.

16           CHAIRPERSON MOLDENHAUER: Thank you.

17           [Pause.]

18           Application Nos. 17540 and 17541

19           MR. MOY: The next application before the  
20 Board for action is Application Nos. 17540 and  
21 17541 of the Capitol Hill Day School.

22           There are two motions here. One is for a

1 minor modification of approved plans, and the  
2 second is to extend the validity of the two  
3 orders. And these are pursuant to Sections 3129  
4 and 3130 of the Zoning Regulations.

5 As the Board will recall, at its Public  
6 Decision Meeting on October 4th, 2011, the Board  
7 conferred and requested that the Applicant submit  
8 further supporting documentation attendant to the  
9 standards under Subsection 3130.6(c), 1, 2, and  
10 3.

11 On Thursday, November 3rd, the Applicant  
12 made their filing, and that document is in your  
13 case folders identified as Exhibit 130.

14 There are no other filings in the record.  
15 Again, the Board is now to act on the merits of  
16 the two motions: one for minor modification and  
17 one for the extension of the 2-year time  
18 requirement of the order.

19 With that, that completes the Staff's  
20 briefing, Madam Chair.

21 CHAIRPERSON MOLDENHAUER: Okay. This  
22 case has been before us a couple times, trying to

1 finalize everything for the two different types  
2 of relief that we have. We have the submissions  
3 now, I think, that are finalized, satisfying the  
4 substantial evidence requirement under 3130(c)(1)  
5 to (c)(3).

6 We have the required -- not required, but  
7 from what we see fit as the necessary type of  
8 affidavit signed and attested to, statement  
9 identifying the financial and enrollment concerns  
10 of the Applicant signed by Walter Woolwine, and  
11 it indicates that -- I think, that they have  
12 substantially proven that they do have issues in  
13 which they are requesting an extension for,  
14 satisfying the requirements under 3130(c)(1),  
15 providing reasonable conditions.

16 That being said, I see no issue that we  
17 shall not support that application for an  
18 extension. In addition to that, they submitted  
19 proposals for minor modification. Those were  
20 modified, and we had a supplemental Office of  
21 Planning report for that back in July, on July  
22 5th, 2011, in our Exhibit 125. And that went

1 through the proposed minor modifications, and the  
2 Office of Planning recommended their approval,  
3 subject to the reinstatement of the previous  
4 conditions related to 214 Building as listed  
5 below and -- or the adequate demolition -- sorry  
6 -- demonstration by the Applicant that the  
7 conditions are no longer relevant.

8           And I think based on that, we do have a  
9 submission in our Exhibit 126, Subsection (e),  
10 from the Applicant which provides the revised  
11 conditions as are now relevant, and I would  
12 incorporate the Office of Planning's articulation  
13 of the standards under the minor modification and  
14 believe that the Applicant has satisfied those.

15           I would recommend approval for both the  
16 2-year extension and the minor modification.

17           Is there any additional deliberation from  
18 Board members?

19           MR. HINKLE: Madam Chair, I think I  
20 should note, just for the record, that I was not  
21 here for the October 4th discussion on this case,  
22 but I have looked at the record and will continue

1 to participate.

2 CHAIRPERSON MOLDENHAUER: Thank you very  
3 much, Mr. Hinkle, for identifying that on the  
4 record. I appreciate that.

5 And is there any additional comments from  
6 any Board members on this?

7 [No audible response.]

8 CHAIRPERSON MOLDENHAUER: Seeing none,  
9 then I will recommend to approve the request for  
10 an extension under 3130 and the request for a  
11 minor modification pursuant to Section 3129 of  
12 the Zoning Regulations and incorporate the  
13 conditions provided for in, as I said, Exhibit  
14 126, Exhibit E.

15 A motion has been made. Is there a  
16 second?

17 MR. JORDAN: Second.

18 CHAIRPERSON MOLDENHAUER: A motion has  
19 been made and seconded. All those in favor, say  
20 "aye."

21 [Chorus of ayes.]

22 MR. MOY: The Staff would record the vote

1 as 4 to 0 to 1. This is on the motion of  
2 Chairperson Moldenhauer to approve the request  
3 for minor modification of approved plans as well  
4 as to extend the validity of the order for both  
5 Order No. 17540 and 17541 of Capitol Hill Day  
6 School. Second the motion, Mr. Jordan. Also  
7 support of the motion, Ms. Sorg, Mr. Hinkle. No  
8 other Board members participating. So again, the  
9 final vote is 4 to 0 to 1. The motion carries.

10 CHAIRPERSON MOLDENHAUER: Thank you very  
11 much, Mr. Moy, and we would like to waive our  
12 requirements and ask that a summary order be  
13 issued for this case.

14 MR. MOY: Thank you, Madam Chair.

15 CHAIRPERSON MOLDENHAUER: Thank you.

16 Application No. 18245

17 MR. MOY: The next Board action is  
18 Application No. 18245. This is of Todd and  
19 Barbora Master, pursuant to 11 DCMR 3103.2, for a  
20 variance from the lot occupancy requirements  
21 under Section 403, a variance from the rear yard  
22 requirements under Section 404, and a variance

1 from the nonconforming structure requirements  
2 under Subsection 2001.3. This is to allow the  
3 expansion of a rear deck serving a one-family row  
4 dwelling in the R-4 District at premises 930  
5 Quincy Street, N.W., property located in Square  
6 2901, Lot 95.

7 At its decision meeting on October 4,  
8 2011, the Board rescheduled its decision to  
9 today, November the 8th. This would allow time  
10 to document the post-hearing filing.

11 That filing, Madam Chair, is identified  
12 as Exhibit 28 from the Applicant. I believe  
13 that's in your case folders.

14 CHAIRPERSON MOLDENHAUER: Thank you very  
15 much.

16 MR. MOY: The --

17 CHAIRPERSON MOLDENHAUER: Go ahead.

18 MR. MOY: I was just going to say the  
19 Board is to act on the merits of the variance,  
20 variance request.

21 CHAIRPERSON MOLDENHAUER: Thank you very  
22 much, Mr. Moy.

1           This case before us is a request to add a  
2 rear roof deck to a property that would not meet  
3 lot occupancy and that would not meet the rear  
4 yard requirement. This is a variance relief on  
5 both the lot occupancy and the rear yard  
6 requirement.

7           We have a letter from the Office of  
8 Planning, and we heard testimony from the Office  
9 of Planning in regards to their evaluation that  
10 they would not recommend approval of this  
11 application based on their statement that the  
12 property does not exhibit any observation of  
13 exceptional narrowness, shallowness, or  
14 topography, topographical conditions, thus not  
15 satisfying the first condition.

16           I think that we had a lot of discussion  
17 with the Applicant and a lot of additional  
18 submissions that went to this issue, and I think  
19 this is kind of the one area that we all were  
20 struggling with. We've all said in times past, a  
21 variance standard is the highest standard we have  
22 in regards to relief, and so the question here is

1 whether or not. I think even the Office of  
2 Planning does admit that if you get past the  
3 first prong, that they don't see any issue  
4 potentially with any substantial detriment to the  
5 public good or any substantial harm to the Zoning  
6 Regulations. I don't think that those are the  
7 issues. The question is whether the Applicant  
8 can get over that threshold of the first prong.

9 That being said, the Applicant has ANC  
10 support. It has letters, which is our Exhibit  
11 19, which would receive great weight, and it also  
12 has support from many of his neighbors, which we  
13 have in our record.

14 The Applicant has submitted some  
15 additional documentation trying to articulate how  
16 his property is exceptional in regards to the  
17 size based on other properties in his square and  
18 articulated the number of different lots,  
19 comparing that to each other. There's also  
20 evidence of some other properties on the block  
21 that may have done some other potentially  
22 nonconforming additions, without obtaining the



1 MR. HINKLE: Thank you, Madam Chair.

2 I think for the record, I need to state  
3 again that I was not here for the October 4th  
4 discussion, but I have looked at the record and  
5 will participate.

6 And on that note, you went right where I  
7 was going to go. It's certainly a difficult  
8 case, and reminds me of a case that we denied  
9 just about a year ago, but I think what's getting  
10 me over the fence in terms of the first prong is  
11 that there is this open space to the rear of the  
12 house. I think that does add to the uniqueness  
13 of the property. From that perspective, I could  
14 certainly see this making the -- or meeting the  
15 requirements of the first prong of the variance  
16 test.

17 CHAIRPERSON MOLDENHAUER: Just for  
18 clarification, it does -- in the Office of  
19 Planning, it does about the play field of the  
20 Raymond Recreational Center in the rear, so  
21 that's just for clarification --

22 MR. HINKLE: Right, thank you.

1           CHAIRPERSON MOLDENHAUER:  -- that is what  
2 it does abut to.

3           MR. JORDAN:  I was going to say I agree  
4 with both of you, but additionally, I think that  
5 I even -- going back to the lot size, the lot is  
6 truly small, and it's 8 out of 52 lots are the  
7 same size.  So, I mean, there's 40, was that 44  
8 of the lots that are larger.  I think the 8 does  
9 make -- even though it's 8, it still makes it  
10 unique.  In conjunction with the space behind the  
11 lot and the other open field area, I think that  
12 it would meet this test.

13           VICE-CHAIRPERSON SORG:  Thank you, Madam  
14 Chair, and to the rest of the Board members, I  
15 respectfully disagree with all of your opinions.  
16 I think I'm the first person personally who  
17 wants to, you know, champion density in the city  
18 and champion, you know, property owners being  
19 able to improve their properties with something  
20 as simple as a deck, you know, and I think that,  
21 unfortunately, this case running up against our  
22 variance standards as they are, it's unfortunate,

1 but, you know, that this Applicant, in my  
2 opinion, doesn't get even close to getting over  
3 the first prong of the test.

4 I think he made a great -- the Applicant  
5 made a great testimony, and his submissions are  
6 great. And they're definitely something to look  
7 at, but to me, I mean, there's 52 lots in this --  
8 in this square. They, all 52, look out on the  
9 Recreation Center. They're all pretty square.  
10 They're all -- you know, there's several that are  
11 smaller. There's a few that are -- some are  
12 bigger. They're all rectangular. And it's  
13 unfortunate, but as the zoning -- to me, as the  
14 Zoning Regulations stands, there's some people  
15 who just cannot have a deck and park in the back  
16 yard.

17 And I don't think that's a good thing,  
18 for the record, and I think perhaps there may be  
19 some future change in the regulations that would  
20 allow for this type of project to come through  
21 under a different standard, other than a variance  
22 standard, that could allowing property owner, as,

1 you know, Mr. Master certainly is, to make those  
2 type of simple improvements, but to me, the  
3 variance test is a high standard. It's our  
4 higher standard, and he doesn't get over it. But  
5 I think if this is a 223, it would, you know,  
6 sail through.

7 That's my opinion, so I don't think I can  
8 support the variance.

9 CHAIRPERSON MOLDENHAUER: Thank you.

10 MR. HINKLE: I certainly appreciate that,  
11 those thoughts.

12 One of the issues that we're looking at  
13 here in terms of the variances, the lot  
14 occupancy, and I think it's important to keep in  
15 mind, in some ways, what that restriction is  
16 trying to do, and that's protect maybe the  
17 neighbors' access to light and air, their  
18 privacy. And I think with the open space that is  
19 behind this house, the lot occupancy becomes less  
20 important in terms of how the neighbors' light  
21 and air and privacy might be affected, and so  
22 that's where I'm coming from.

1           You know, I also respect the Applicant's  
2 attempt to reduce the lot occupancy from where  
3 they were before. I don't know exactly where it  
4 is, but they did redesign the deck as part of  
5 their latest submission and reduced what they're  
6 requesting. And I just wanted to note that.

7           VICE-CHAIRPERSON SORG: I agree,  
8 definitely, with you, Mr. Hinkle, on actually all  
9 of those points, but to me, the support and the  
10 lack of detriment to light and air to the  
11 neighboring property, then the support of the  
12 neighbors and so forth go not to the first prong  
13 but to the latter prongs of the test, which I  
14 certainly think, as you and Mr. Jordan and the  
15 Chair mentioned, are certainly no problem for you  
16 guys and were no problem for OP. To me, it's  
17 just a question of uniqueness of this, you know,  
18 regular, old, rectangular lot.

19           CHAIRPERSON MOLDENHAUER: I do think this  
20 is one of those challenging cases where it's  
21 relief that seems somewhat minor, but at the same  
22 time, it does have to meet this very high

1 standard.

2 I do see your perspective, Ms. Sorg;  
3 however, I do think that I'm just barely over the  
4 cusp in regards to the requirement to satisfy the  
5 first prong, especially seeing that the Applicant  
6 has -- initially, he did require relief of 82  
7 percent for the proposed. Now he's down to  
8 77-percent lot occupancy. That's less in regards  
9 to the relief that's needed.

10 And I do think that when you're looking  
11 at exceptional conditions of a property, while,  
12 yes, everybody in this square does look onto that  
13 recreational park, there are very few squares  
14 that will mirror that type of condition.

15 I disagree with my colleague, Mr. Jordan,  
16 and his analysis in regard to the fact that he  
17 finds the property to be unique in and of itself  
18 in regards to the size. I agree with you, Ms.  
19 Sorg, in that regard, but I do think that  
20 confluence of factors here satisfy the standards,  
21 in my view.

22 That being said, is there any additional

1 deliberation from any of the Board members that  
2 they'd like to add?

3 [No audible response.]

4 CHAIRPERSON MOLDENHAUER: Seeing none,  
5 I'll submit a motion, a motion to approve  
6 Application 18245, pursuant to 11 DCMR 3103.2,  
7 for a variance in the lot occupancy requirements  
8 under Subsection 403, a variance from the rear  
9 yard requirements under 404, and a variance from  
10 the nonconforming structural requirements under  
11 Section 2001.3 to allow the expansion of rear  
12 deck, serving a one-family dwelling in R-4, at  
13 premises 930 Quincy Street, N.W.

14 A motion has been made. Is there a  
15 second?

16 MR. HINKLE: Second.

17 CHAIRPERSON MOLDENHAUER: Motion has been  
18 made and seconded. All those in favor, say  
19 "aye."

20 [Chorus of ayes.]

21 CHAIRPERSON MOLDENHAUER: All those  
22 opposed?

1 VICE-CHAIRPERSON SORG: Oppose.

2 CHAIRPERSON MOLDENHAUER: Mr. Moy, if you  
3 can read back the record.

4 MR. MOY: Before reading the final vote,  
5 Madam Chair, we do have an absentee ballot vote  
6 from another participating member on this  
7 application who is Mr. Hood, Chairman Hood from  
8 the Zoning Commission. His, Mr. Hood's absentee  
9 vote, is to approve the application, so that  
10 would give a final vote of 4 to 1 to 0. The  
11 motion of Chairperson Moldenhauer to approve the  
12 application for the three variance relief.  
13 Second the motion, Mr. Hinkle. Also in support  
14 of the motion, Mr. Jordan and, of course, Mr.  
15 Hood, so that gives -- with Ms. Sorg opposed --  
16 final vote, 4 to 1 to 0. The motion carries.

17 CHAIRPERSON MOLDENHAUER: That being  
18 said, since there's no parties in opposition of  
19 this case, the Board would like to waive the  
20 requirements and have a summary order be issued.

21 MR. MOY: Yes. Thank you, Madam  
22 Chairperson.

1                   CHAIRPERSON MOLDENHAUER: Thank you.

2                                   Application No. 17676-A

3                   MR. MOY: The next application before the  
4 Board for action is Application No. 17676-A of  
5 Innovative Recyclers. This is a motion for a  
6 second 2-year extension of the validity of the  
7 order, pursuant to Section 3130 of the Zoning  
8 Regulations. The original application, which was  
9 approved on October 23rd, 2007, right -- the  
10 first extension request was approved on November  
11 10th, 2009, and this is pursuant to the relief as  
12 amended, pursuant to 11 DCMR 3103.2 for a  
13 variance from the building height requirements  
14 under Subsection 840.1 and pursuant to 11 DCMR  
15 3104.1 for a special exception to establish a  
16 solid waste handling facility under Subsection  
17 802.4 in the LO/C-1-M [sic] District a premises  
18 2225 Lawrence avenue, N.E., property located in  
19 Square 4106, Lot 820.

20                   The Applicant filed the request for the  
21 second 2-year extension, Madam Chair, on October  
22 7th, 2011. That filing is identified in your

1 case folders as Exhibit 42. There are two  
2 preliminary matters to this case, the first being  
3 the exploration date of the order, which expired  
4 on October 26th, 2011.

5 The second preliminary matter before the  
6 Board is the issue of Certificate of Service on  
7 parties. This is pursuant to Subsection  
8 3130.6(a).

9 With the Board addressing the preliminary  
10 matters, next then for the Board would be acting  
11 on the merits of the request to extend the  
12 validity of the order, pursuant to Section 3130  
13 and the specific requirements as described in  
14 Subsection 3130.6(a) through (c).

15 And that completes the Staff's briefing,  
16 Madam Chair.

17 CHAIRPERSON MOLDENHAUER: Thank you very  
18 much, Mr. Moy.

19 So before us is a request for a second  
20 extension under 3130, and this application has a  
21 number of problems, but instead of going into all  
22 the different issues -- well, I'll just address a



1           VICE-CHAIRPERSON SORG:  No.  I agree.  
2  Thank you, Madam Chair.

3           MR. JORDAN:  I agree.

4           CHAIRPERSON MOLDENHAUER:  I see other  
5  Board members off the record identifying that  
6  they agree, but if they'd like to go on the  
7  record, I'll allow that.  Otherwise, I'll submit  
8  a motion.

9           I'll submit a motion to deny a request  
10  for an extension on Application 17676-A, the  
11  Innovative Recycling [sic] Corporation.  A motion  
12  has been made.  Is there a second?

13          MR. HINKLE:  Second.

14          CHAIRPERSON MOLDENHAUER:  Motion has been  
15  made and seconded.  All those in favor, say  
16  "aye."

17          [Chorus of ayes.]

18          MR. MOY:  The Staff would record the vote  
19  as 4 to 0 to 1.  This is on the motion of  
20  Chairperson Moldenhauer to deny the Applicant's  
21  request for a second 2-year extension of the  
22  validity of the Order 17676-A of Innovative

1 Recyclers. Second the motion, Mr. Hinkle. Also  
2 in support of the motion, Ms. Sorg and Mr.  
3 Jordan. No other Board members participating.  
4 So again, the final vote is 4 to 0 to 1. The  
5 motion carries.

6 Application No. 18263

7 MR. MOY: The next application for Board  
8 action is Application No. 18263. This is of  
9 Stephanie and John Lester, pursuant to 11 DCMR.

10 I'm going to read the final caption of  
11 this application that has been amended, Madam  
12 Chair.

13 So this is pursuant to 11 DCMR 3104.1 for  
14 a special exception under Section 223 to allow a  
15 two-story addition to an existing one-family row  
16 dwelling and to construct a two-story accessory  
17 garage not meeting lot occupancy, Section 403  
18 requirements, as well as special exception relief  
19 from the rear yard, Section 404, and open court  
20 width requirements under Section 406.

21 On October 25th, 2011, the Board  
22 completed public testimony, closed the record,

1 and scheduled its decision on November 8th. The  
2 Board requested additional information to  
3 supplement the record by November 4th, 2011.

4 That filing from the Applicant, Madam  
5 Chair, is identified as Exhibit 38 -- rather  
6 Exhibits 39 and 40 in your case folders. The  
7 Applicant subsequently has also filed additional  
8 documents identified as Exhibit 41 and 42.

9 Moreover, as a possibly preliminary  
10 matter, there is also a filing from neighbors,  
11 Charles and Susan Parsons, who testified on  
12 October 25th, 2011. That filing, Madam Chair, is  
13 identified as Exhibit 38.

14 Other than the preliminary matters, Madam  
15 Chair, the Board is to act on the merits of the  
16 special exception relief under Section 223, not  
17 meeting the lot occupancy, rear yard, and open  
18 court width requirements.

19 That completes Staff's briefing, Madam  
20 Chair.

21 CHAIRPERSON MOLDENHAUER: Good morning.  
22 We are here to talk about this application which

1 is now for special exception relief under 223 to  
2 construct an addition to an existing attached  
3 dwelling at 117 C Street, S.E.

4           This is an application where there is a  
5 trellis connecting a single-family row dwelling  
6 to a rear structure where they are then going to  
7 provide not an accessory structure, but rather a  
8 second story to an existing premises and just ask  
9 for the ability to increase the lot occupancy  
10 from 60 percent allowance to 70 percent proposed.

11           Here, the Applicant has gone through, and  
12 I think they have Office of Planning support.  
13 They have support -- oh, sorry. Before I -- I'm  
14 jumping in here way before. I need to address a  
15 couple of issues.

16           First thing is that we are not -- we  
17 specifically left the record open only for one  
18 document, and that was something from Mr. Walls  
19 who there were different testimonies as to  
20 potentially what his perspective was on this  
21 request that was being submitted and this relief  
22 that was being submitted.

1           We received Exhibit 38, 39, 40, and 42,  
2 all addressing unrelated issues and just  
3 providing additional submissions. We  
4 specifically at the end of each hearing indicate  
5 to all parties that we are not accepting anything  
6 and the record will be closed except for material  
7 that is specifically requested by the Board. So  
8 this is just for the public as well.

9           When we indicate that, that means that  
10 the record is closed. If you want to submit  
11 something additionally, one, you have to ask for  
12 a request. You have to provide a reasonable  
13 explanation as to why you're submitting that.

14           The information that was submitted was  
15 not that which we -- for which we left the record  
16 open, so we are going to not review that  
17 information and not consider that as part of our  
18 deliberation for today.

19           That being said -- so that was a  
20 preliminary issue I want to make sure everyone is  
21 clear on. The next issue is actually going  
22 forward and addressing the merits of the case.

1 The merits of the case, as I indicated, are for  
2 223. The 223 standard has to do with evaluating  
3 the issue of light and air to neighboring  
4 properties, privacy use and enjoyment of  
5 neighboring properties, and whether or not there  
6 is going to be any potential substantial impact  
7 on the view from the streets and alleys or public  
8 ways in regards to the character, scale, or  
9 pattern of the homes along the street frontages  
10 of that property.

11 In this case, since we have letters of  
12 support from the neighbors and from the Capitol  
13 Hill Restoration Society in regards to their  
14 direct neighbors' light and air, we did hear, I  
15 think, extensive testimony. We permitted Mr.  
16 Parsons, who is present, to provide testimony  
17 about some negative impacts on the enjoyment of  
18 the street in regards to potentially increased  
19 transportation, increased access. There was  
20 also, I think, the argument of a slippery slope  
21 argument where if this is permitted, then there  
22 may be other individuals that are going to seek

1 additional relief to this degree.

2           And while I credit his testimony, I  
3 believe that he's lived there for a long period  
4 of time, he has a good handle on what's going on  
5 in that area, I do think that, that being said, I  
6 don't think that, one, his property location is  
7 not specifically adjacent to this application.  
8 So his concerns do not go specifically to any  
9 light and air of neighboring properties, as  
10 required under 223.2(a) or the -- also the factor  
11 of 223.2(b) also goes to neighboring properties.

12       And whereas he is further down the block and on  
13 the other side of the alley/street, then I don't  
14 also see -- and I give Office of Planning and  
15 their evaluation indicating in their report that  
16 the privacy would not be unduly compromised. And  
17 again, it has to be unduly potentially  
18 compromised, not just affected. I do think that  
19 this will affect potentially the use of the  
20 alley, but I don't think that it will unduly  
21 compromise that.

22           I think that there already is a high

1 level of traffic in that area, based on some of  
2 the other commercial uses at the end of that  
3 street, such as the Republican National Committee  
4 building, and I think that there are -- there's  
5 already a feeling of residences having -- there's  
6 dwellings on that street as well, and so I think  
7 that that being said, I think that this  
8 application satisfies the lower standard of the  
9 223 and will hopefully contribute to the area and  
10 will provide some relief to a local resident on  
11 that block. I think that was identified by both  
12 Mr. Parsons and by the Applicant that there were  
13 a fewer number of residents on that street, and  
14 that this obviously is a positive, and I think  
15 it's a positive for the city as well. I think  
16 that is something that may not actually have to  
17 be the standards but something that was just  
18 identifying.

19           That being said, we have ANC support of  
20 this application as well, and I would support the  
21 application.

22           I'll open it up for any additional

1 deliberation from Board members.

2           VICE-CHAIRPERSON SORG: Madam Chair,  
3 thank you very much.

4           I agree with your analysis, completely  
5 actually, and there's just a couple of things  
6 that I would both reiterate and add.

7           I would agree that, you know, this is a  
8 named alley and is an active area on Capitol  
9 Hill, an active alley, and that the flat or the  
10 addition that the Applicant is proposing here  
11 would, as you said, contribute to the sort of  
12 residential/commercial balance and putting it  
13 back to where, I think, the zoning wants it to  
14 be, a little bit more in this area.

15           I think also with regard to the question  
16 of the meaningful connection in the trellis, this  
17 is a certified -- self-certified application, and  
18 the Applicant certifies that the connection here  
19 is meaningful as per, you know, what our  
20 precedential standard has been, and it's up to  
21 the ZA and the, you know, correct agencies, DCRA,  
22 to judge whether or not that standard is being

1 met.

2           So I agree. I would be in support of the  
3 application.

4           CHAIRPERSON MOLDENHAUER: Any additional  
5 deliberation from Board members?

6           [No audible response.]

7           CHAIRPERSON MOLDENHAUER: Seeing none,  
8 then I will submit a motion, a motion to approve  
9 Application 18263 for relief under 223 to  
10 construct an addition to an existing attached  
11 dwelling at 117 C Street, S.E., under Section 403  
12 lot occupancy, 404 rear yard, and 406 court width  
13 requirements.

14           A motion has been made. Is there a  
15 second?

16           VICE-CHAIRPERSON SORG: Second.

17           CHAIRPERSON MOLDENHAUER: Motion has been  
18 made and seconded. All those in favor, say  
19 "aye."

20           [Chorus of ayes.]

21           CHAIRPERSON MOLDENHAUER: Mr. Moy, if you  
22 can read back the vote.

1 MR. MOY: Yes, Madam Chair.

2 Before I read the final vote, we do have  
3 another member on the Board who participated in  
4 this application, who is Mr. Anthony Hood, and  
5 his absentee vote is to approve the application.

6 So that would give a final vote of --

7 CHAIRPERSON MOLDENHAUER: Thank you very  
8 much, Mr. Moy. Seeing that --

9 MR. MOY: Well, I haven't read the -- I  
10 haven't read the vote yet.

11 CHAIRPERSON MOLDENHAUER: Oh, sorry. I  
12 was having a side conversation. Sorry. Go  
13 ahead.

14 MR. MOY: Yeah, I'm sorry. That would  
15 leave a final vote of 5 to 0 to 0. This is on  
16 the motion of Ms. Moldenhauer, Chairperson, the  
17 approve the application, special exception 223,  
18 not meeting relief under 403, 404, and 406.  
19 Second the motion, Ms. Sorg. Also in support of  
20 the motion, Mr. Jordan and Mr. Hinkle and Mr.  
21 Hood, who submitted an absentee vote to support  
22 the application. Again, the vote is 5 to 0 to 0.

1 The motion carries.

2 CHAIRPERSON MOLDENHAUER: Now I'm up.

3 Okay. Thank you very much, Mr. Moy, and we will  
4 ask that since there are no -- we had an  
5 individual in opposition to this case. We had no  
6 actual party status, parties in opposition to  
7 this case. So we'd like to ask that our  
8 conditions be waived and that a summary order be  
9 issued.

10 MR. MOY: Yes. Thank you, Madam Chair.

11 Also for the record, for the Staff  
12 anyways, Madam Chair, when you listed filings not  
13 to be accepted into the record, you said Exhibit  
14 No. 40, and that was actually the Applicant's  
15 submission, which was okay. No?

16 CHAIRPERSON MOLDENHAUER: I didn't -- I  
17 closed the record for everything.

18 MR. MOY: For everything.

19 CHAIRPERSON MOLDENHAUER: Yes.

20 MR. MOY: Okay, very good.

21 Application No. 18250

22 MR. MOY: The next application before the

1 Board for action is Application No. 18250. This  
2 is of Raymundo B. Madrid, pursuant to 11 DCMR  
3 3104.1, for a special exception to allow an  
4 addition to an existing one-family semi-detached  
5 dwelling under Section 223, not meeting the lot  
6 occupancy (Section 403) and side yard (Section  
7 405) requirements in the R-4 District at premises  
8 509 Q Street, N.W., property located in Square  
9 477, Lot 28.

10 At the public hearing on September 27th,  
11 2011, the Applicant amended the application to  
12 include special exception relief also from open  
13 court under Section 406.

14 On November 1st, 2011, the Board  
15 completed public testimony, closed the record,  
16 and scheduled its decision on November 8th. The  
17 Board allowed the record to remain open for a  
18 filing from ANC-2C by November 7, 2011.

19 Madam Chair, I was just in receipt this  
20 morning of a filing from ANC-2C, which I believe  
21 is now in your hands, identified as Exhibit 45.  
22 It's dated November 7, 2011, but the Office did

1 not receive the ANC letter until this morning,  
2 November 8, at 10:27.

3           So, with that, the Board is to act on the  
4 merits of the special exception relief, Section  
5 2203, not meeting lot occupancy, side yard, and  
6 open court width.

7           And that completes the Staff's briefing,  
8 Madam Chair.

9           CHAIRPERSON MOLDENHAUER: Thank you very  
10 much, Mr. Moy.

11           Seeing as I just made an earlier comment,  
12 I'll reiterate my comments. Here, we have a  
13 documentation from the ANC, which we received  
14 moments ago. I can't emphasize enough that while  
15 we did leave the record open for this letter, we  
16 are -- it creates a definite challenge for the  
17 Board. This is, obviously, only like a one --  
18 really one page. It's on two pages, but it's  
19 really a one-page letter, but we can't permit  
20 submissions that are so late in order to  
21 obviously allow us to adequately review them.

22           This, we will admit and permit into the

1 record. I think that all Board members were able  
2 to quickly peruse it, but I am just reiterating  
3 for the record that when we leave the record  
4 open, things need to be received timely, not just  
5 from Applicants but also from the ANC. And, you  
6 know, while the ANC, I know, has a lot of things  
7 on their calendar, they do need to try to -- if  
8 they want us to provide great weight or provide  
9 them the opportunity to review their information  
10 and have an adequate period of time to have a  
11 chance to read it, we need to make sure these  
12 submissions get into our office in time.

13           That being said, we will admit Exhibit  
14 485 in the record.

15           That being said, I am going to turn to  
16 Vice-Chairman Sorg to start us off in this  
17 deliberation on this application.

18           VICE-CHAIRPERSON SORG: Thank you, Madam  
19 Chair.

20           Well, for a 223 application, we sure had  
21 several hearings in this case. I think there was  
22 a lot of things about this project which were

1 somewhat different, perhaps unconventional to  
2 what we normally see in a request like this. So  
3 we had about three hearings and had a lot of  
4 documentation that we requested, including  
5 revised plans from the Applicant, and we had  
6 plans from the opposing party's architect. We  
7 had requested an additional supplemental  
8 memorandum from the Office of Planning to address  
9 issues of whether this project, which is a  
10 self-certified application as an addition to a  
11 single-family dwelling, whether the structure  
12 given the nature of the project was converted  
13 into a row dwelling from a semi-detached  
14 dwelling, you know, things about the carport as  
15 well as the trellis.

16           The relief that's being looked at here is  
17 223 relief, special exception, for lot occupancy  
18 where 40 percent is permitted and 60 percent is  
19 proposed; side yard, where 8 feet is required and  
20 zero feet are proposed. And the application also  
21 amended their application to request relief from  
22 406, open court for, oh, gosh, less than a foot

1 of relief.

2 I think we heard -- the Applicant is  
3 proposing to create an addition on the existing  
4 dwelling as well as to build a connection between  
5 the existing dwelling and other -- a connected  
6 structure in the rear yard for housing his  
7 parents, he says, and I think we've been shown --  
8 based on the requirements for 223, we've looked  
9 at lot at the design here of the connection.

10 And as I mentioned in the last case, this  
11 is a self-certified application, and, you know,  
12 it is up to the Applicant to meet the  
13 requirements and the precedent, you know, to get  
14 their building permit from the Zoning  
15 Administrator that they meet the requirements for  
16 a meaningful connection.

17 I think based on, you know, the Office of  
18 Planning in their report, in our Exhibit 24,  
19 recommends approval of this special exception  
20 relief. I think given that there is a neighbor  
21 in opposition, you know, the major things to  
22 think about here is the effect on light and air.

1           I think one of the things that was --  
2 that is compelling to me is that, you know, the  
3 Applicant here could actually build a significant  
4 -- given the dimension, though, could actually  
5 build a significant addition onto the rear of  
6 their home that majorly affected the light and  
7 air to the neighboring property. I think  
8 actually from my review and the testimony here,  
9 that the project as it is proposed decreases  
10 significantly the effect on the light and air of  
11 the neighboring property.

12           I think based on the configuration of  
13 these two properties, it would be difficult to  
14 find a way to design an addition that would not  
15 have any effect, but, of course, our standard is  
16 not that something should have no effect, but not  
17 should unduly effect.

18           And I think in this case, that the  
19 connection between these -- the principal area of  
20 the building and the addition, it does not reach  
21 a level of unduly affecting the light and air  
22 available to the neighboring property on her side

1 of her residence.

2           In addition, I think in this case, when  
3 we're talking about privacy and enjoyment, the  
4 discussion really centered mostly around  
5 security. Certainly, we're sensitive to --  
6 always, we try to be sensitive as a Board to, you  
7 know, the discomfort of property owners feeling  
8 insecure in their homes. It's not something, of  
9 course, that we would want anybody to feel, but I  
10 don't see that in this case, there is a decrease  
11 in the level of security that the -- that the  
12 adjacent neighbor, who is the opposing party,  
13 would experience as a result of this addition.

14           As you mentioned, Madam Chair, we have a  
15 reiterating letter from the ANC-2C in our Exhibit  
16 45 and as well as an original letter in our  
17 Exhibit 34 showing their support for the  
18 application and meeting our requirements for  
19 great weight.

20           And with that, I would be in support of  
21 the application.

22           Thank you.

1           CHAIRPERSON MOLDENHAUER: Thank you very  
2 much, Ms. Sorg.

3           Is there any additional deliberation from  
4 Board members?

5           MR. HINKLE: I think that it was pretty  
6 thorough. I certainly agree with everything that  
7 Ms. Sorg has stated.

8           CHAIRPERSON MOLDENHAUER: Thank you.

9           I agree with Ms. Sorg. I think that  
10 while it is unfortunate, potentially, that two  
11 neighbors, you know, are not -- obviously, we  
12 always try to encourage neighbors to try to find  
13 maybe a mutually beneficial resolution to things,  
14 but sometimes we have to be the decision-making  
15 body where we rule on a case where two members,  
16 two neighbors cannot come to some sort of  
17 compromise.

18           There was -- I just want to point out one  
19 issue that I wanted to put, make a comment on.  
20 There was some additional submissions in the  
21 record and some comments from Board members about  
22 the potential matter-of-right ability to build on

1 the property as opposed to the submissions that  
2 was being -- or the application that was being  
3 submitted.

4           While I think that sometimes a lot of  
5 Applicants in this situation, Applicants feel  
6 that that is persuasive, I just want to -- this  
7 is a smaller case, but it happens also on other  
8 larger cases. I just want to go on the record to  
9 say that I don't find that persuasive at all.

10           We are not here because they are doing a  
11 matter-of-right building. We are here because  
12 they are doing a type of structure or a type of  
13 application that needs relief. In that case,  
14 whether or not they -- what they could have or  
15 should have, could have done as a matter of  
16 right, I think, is totally irrelevant. I think  
17 the issue simply is do they satisfy the  
18 standards.

19           And here, I think Ms. Sorg adequately  
20 explain that they do satisfy the standards under  
21 a 223. That being said, I also just want to  
22 indicate that looking at the issue of light and

1 air, I think that we had sufficient information  
2 in the record in regards to shadow studies from  
3 both parties, and I don't think that -- while  
4 there will be an impact, I don't think it would  
5 rise to the level of being an -- substantial or  
6 unduly affecting the neighboring property in  
7 regards to the high standard that we have to  
8 evaluate for a 223 in this case.

9 That being said, I'll see if there's any  
10 final deliberation from any other Board members.

11 [No audible response.]

12 CHAIRPERSON MOLDENHAUER: Then I'll turn  
13 to Ms. Sorg, potentially, for a motion.

14 VICE-CHAIRPERSON SORG: Thank you, Madam  
15 Chair.

16 I'll submit a motion to approve  
17 Application No. 18250 for a special exception  
18 relief under 223 to construct an addition to an  
19 existing single-family dwelling, requiring relief  
20 from 403 lot occupancy, Section 405 side yard,  
21 and Section 406 open court relief at premises 509  
22 Q Street, N.W.

1           CHAIRPERSON MOLDENHAUER: A motion has  
2 been made. Is there a second?

3           MR. HINKLE: Second.

4           CHAIRPERSON MOLDENHAUER: Motion has been  
5 made and seconded. All those in favor, say  
6 "aye."

7           [Chorus of ayes.]

8           CHAIRPERSON MOLDENHAUER: Mr. Moy, if you  
9 could read back the vote.

10          MR. MOY: The Staff would record the vote  
11 as 4 to 0 to 1. This is on the motion of  
12 Chairperson Sorg to approve the application for a  
13 special exception relief on 223. Second the  
14 motion, Mr. Hinkle. Also in support of the  
15 motion, Ms. Moldenhauer and Mr. Jordan. No other  
16 Board members participating. Again, the final  
17 vote is 4 to 0 to 1. The motion carries.

18          CHAIRPERSON MOLDENHAUER: Thank you very  
19 much, Mr. Moy.

20                           Appeal No. 18257

21          MR. MOY: The next case before the Board  
22 for action, I believe, is Appeal No. 18257. This

1 is of Walter Parrs, pursuant to 11 DCMR 3100 and  
2 3101, from an April 8th, 2011, decision by the  
3 Zoning Administrator, Department of Consumer and  
4 Regulatory Affairs, to issue a building permit,  
5 allowing the construction of an elevator or a  
6 material lift in the C-2-A District in the rear  
7 of premises 3307 M Street, N.W., property located  
8 in Square 1205, Lot 79.

9           On November 1st, 2011, the Board  
10 completed public testimony, closed the record,  
11 and scheduled its decision on November 8th. The  
12 Board is to act on the merits of this appeal of  
13 the decision by the Zoning Administrator to issue  
14 a building permit allowing the construction of an  
15 elevator or material lift.

16           And that completes the Staff's briefing,  
17 Madam Chair.

18           CHAIRPERSON MOLDENHAUER: Okay. I think  
19 now we are ready to start the deliberation on  
20 this case.

21           I was going to turn to Mr. Jordan, but I  
22 just threw -- let me -- I'll throw out an initial

1 point. That I think the question of is this a  
2 roof, what is it, potentially may be irrelevant.

3 The question may be more a matter of -- whatever  
4 it is, if there's a requirement under 774 for a  
5 C-2 -- in a C-2 zone, all structures, it says --  
6 all structures have to have a 15-foot setback.

7 So, when this building was built, whether  
8 there was relief or not -- maybe now it's a  
9 nonconforming structure. If it's a roof, then  
10 there's a nonconforming structure, because  
11 they're not providing that setback.

12 If they're putting an addition onto that,  
13 then it's an addition to a nonconforming  
14 structure, which would need relief for a  
15 nonconforming structure.

16 So, potentially, the ZA then would have  
17 erred in permitting this structure to be built,  
18 because it's an addition to a nonconformity,  
19 whether it's -- and that would be whether it's a  
20 roof or whether it's not a roof.

21 And as I -- I was going to turn to Mr.  
22 Jordan to start us off on deliberation, because I

1 think at our hearing the other day, he seemed to  
2 have things, you know -- have a very clear view  
3 of it, but I'll throw that out there. And then  
4 I'll ask all Board members to deliberate or to  
5 add their 2 cents.

6 VICE-CHAIRPERSON SORG: You want to go  
7 ahead, Mr. Jordan?

8 MR. JORDAN: If I would.

9 Yeah, I think that does change it a bit,  
10 because I think one of the first fundamental  
11 things is trying to decide whether or not this is  
12 a roof and a roof structure, and I think if we  
13 get to that point, which I believe it is, because  
14 it's a structure -- and I think our issue was  
15 turning on whether or not, because this structure  
16 was on grade, if that was an issue, but as we  
17 have the definition as to what, a structure can  
18 be on the ground -- and I believe this will fit  
19 that criteria and the attachments thereof, and  
20 that it is housing this elevator structure, that  
21 it is a building of a structure of a roof.

22 Now it gets to the question of what kind

1 of setback, and although we only have a 9-foot  
2 setback from the exterior walls, but if it's a  
3 structure, then it would fit within -- is it  
4 1776? No. 19 -- 1776, but that -- require  
5 setback of 15 feet. And so, therefore, it would  
6 not be applicable -- I mean would not be in --  
7 consort with the requirement.

8           So that, I mean, I think I'm clear in  
9 regards to the building, the roof, and the  
10 structure, but now it becomes a question of what  
11 the setback should be.

12           CHAIRPERSON MOLDENHAUER: Ms. Sorg?

13           VICE-CHAIRPERSON SORG: Madam Chair, as  
14 to your surprise comments in the beginning of our  
15 deliberations, I'm not really sure that 774 is  
16 applicable. That's a regulation that has to do  
17 with rear yards, and I don't -- we're not --  
18 there's a difference here, just kind of off the  
19 top of my head, between, you know, what do they  
20 treat things as when the building was built.

21           You know, I don't -- there's nothing to  
22 me that says this is a rear yard, that the area

1 underneath the elevator and elevator overrun that  
2 we're talking about is a rear yard.

3 So that's what I would say so far.

4 CHAIRPERSON MOLDENHAUER: I think Mr.  
5 Jordan is saying that he believes this to be a  
6 structure, a roof, and then it would be  
7 considered a roof structure in his analysis. I  
8 think you're indicating that this is --

9 VICE-CHAIRPERSON SORG: I'm saying I'm  
10 not sure that the regulation that you've just  
11 brought up is applicable here, because it's a  
12 regulation for a rear yard.

13 Additionally, I would wonder whether the  
14 regulations for a 15-foot setback of structure in  
15 a rear yard is applicable to this, which is a  
16 roof structure, which has its own category of,  
17 you know, regulations.

18 CHAIRPERSON MOLDENHAUER: Well, my point  
19 is that if you have a rear yard requirement,  
20 which there is one here, so -- no, no, no -- and  
21 doesn't -- it may not exist. So the property  
22 owner and the intervenor, who is CB2, who is a

1 lessee of the property, is claiming that this is  
2 a building. It is a building with a roof, that  
3 the building goes to the end of the property, the  
4 rear of the property line. So that means that  
5 it's a nonconforming building, because there's no  
6 rear yard.

7 Well, there was an argument that you  
8 could have a rear yard and a roof, but I don't  
9 believe that you can have both, a rear yard and a  
10 roof.

11 So, if the building structure goes all  
12 the way to the rear line, then it's a  
13 nonconforming building, and then this is an  
14 addition to a nonconformity.

15 VICE-CHAIRPERSON SORG: I hear what  
16 you're saying, and -- but the question, I think,  
17 is this is -- I don't believe that this is looked  
18 at as an addition to a nonconformity. I think  
19 this is, as I mentioned, a roof structure, a  
20 different category of things you could put on  
21 buildings. So I'm not sure that you treat it in  
22 the same way as you would a regular addition to a

1 building, you know, because there's a whole bunch  
2 of sections that say this is what you have to do  
3 for a roof structure, and that actually, I think,  
4 is part of what the Appellant was talking about  
5 in her original statement, saying this is an  
6 accessory building or this is an addition and so  
7 forth.

8           This is neither of those things. In my  
9 opinion, this is a roof structure, and it's --  
10 and I think part of, for example, what I would  
11 point to in my deliberations is if this is -- so,  
12 okay, A, I believe roof structures are a  
13 different category of items that can be part of  
14 buildings than a regular addition.

15           In addition, I think this elevator serves  
16 an integral, functional purpose to the building  
17 it's attached to. It's not the same thing to me  
18 as adding a sun room onto the back of your house.  
19 It's a functional element to the building.

20           So I believe that we can go ahead and in  
21 that case go through our deliberations with the  
22 same threshold question that we had, I think,

1 identified in the presentation of the case, you  
2 know, which would be is this -- is this thing on  
3 top of a roof and is this thing, you know -- and,  
4 therefore, does it meet -- and if it is, does it  
5 meet the requirements for a thing on top of a  
6 roof, i.e., a roof structure.

7           So I can talk to that more, but I feel  
8 like we're not --

9           [Laughter.]

10           VICE-CHAIRPERSON SORG: We're not there  
11 yet, so --

12           [Laughter.]

13           MR. HINKLE: All right, Madam Chair. I  
14 tend to agree with Ms. Sorg on this one. I think  
15 we've established that, you know, perhaps this a  
16 roof and not a back yard, not a rear yard, and  
17 the structure actually is a roof structure that  
18 has different setback requirements than a  
19 structure in a yard under 774.

20           CHAIRPERSON MOLDENHAUER: I agree with  
21 you. I agree with her. I think that it's a  
22 structure, and I think that, potentially, it's a

1 roof structure. But my question is even if it's  
2 a roof structure, is it then not -- if there is a  
3 rear yard requirement and the building then  
4 potentially does or does not comply with that  
5 rear yard requirement, is it not in addition to a  
6 nonconformity?

7 So I'm saying if I give you all of your  
8 argument that it is a building, that's my --

9 MR. JORDAN: Yeah. But I think going  
10 back, that's the specifics of 770.6 dealing with  
11 elevator structures would be more applicable in  
12 that required setback, because it's a  
13 continuation of the building as a roof. And I  
14 think that what we've been referring to as  
15 requiring a 15-foot setback for a rear yard  
16 wouldn't be applicable. We're talking -- this is  
17 more specific. 770 is dealing with the elevator  
18 structure.

19 VICE-CHAIRPERSON SORG: I agree with --  
20 oh, sorry, Madam Chair. Do you want to respond?

21 I agree with Mr. Jordan in this case. I  
22 think if you were to think of -- not that we want

1 to use hypotheticals very often, but if you think  
2 about a regular office building built in another  
3 C-2-type area and somebody comes in and wants to  
4 build a roof structure, you wouldn't call it in  
5 addition, and you would not subject it to the  
6 regulations for an addition. You would subject  
7 it to the regulations for a roof structure. It's  
8 a different type of modification.

9 CHAIRPERSON MOLDENHAUER: So you're  
10 telling me that if someone came in and -- you  
11 wouldn't consider it in addition to a  
12 nonconformity?

13 VICE-CHAIRPERSON SORG: An addition, I  
14 think, of a roof -- yes. I agree with --

15 CHAIRPERSON MOLDENHAUER: In addition to  
16 a nonconformity.

17 VICE-CHAIRPERSON SORG: Right, no. I'm  
18 agreeing -- no, I have not.

19 CHAIRPERSON MOLDENHAUER: You would not  
20 consider it an addition. All right.

21 VICE-CHAIRPERSON SORG: Because I --

22 CHAIRPERSON MOLDENHAUER: You consider it

1 an addition?

2 VICE-CHAIRPERSON SORG: I would not  
3 consider it an addition, because it is a special  
4 category of modifications to buildings that has  
5 its own area of the regulations that regulate it,  
6 you know, and it's things like elevators and  
7 elevator overruns and -- and rooftop HVAC units,  
8 and then that's why you call them roof  
9 structures. And the regs talk especially about  
10 them, I think.

11 MR. JORDAN: I agree with it. That's why  
12 I'm saying the specifics, that this is a roof --  
13 a roof structure. An elevator and roof structure  
14 would make it the nonconformity that you're  
15 talking about not applicable to this  
16 determination. So I don't think we get to that  
17 rear yard setback that you're talking about.

18 And it's very specific. 770 is specific  
19 in regards to elevators.

20 VICE-CHAIRPERSON SORG: Okay. I think  
21 that while the Chair is on an investigation of  
22 the regulations, what I think is useful to do is

1 to go ahead and, perhaps if other Board members  
2 agree, if they're listening, then to go ahead and  
3 -- and with our deliberations under what I  
4 believe, and I think that my other Board members  
5 would agree, is our threshold question.

6           And so I will kind of start off with some  
7 comments that I had about that, and we'll see  
8 what the Chair turns up. And maybe we have to  
9 rewind a little bit, but we can get through this  
10 piece as well.

11           So just a few kind of notes on the  
12 question, which I think we had established, as I  
13 mentioned before, is this thing a roof, is this  
14 thing on a roof, and if it is on the roof, is it  
15 a roof structure, and if it is a roof structure,  
16 then it is conforming with the regulations that  
17 deal with roof structures.

18           To me, the first thing that I think about  
19 is the portion of the building that's located  
20 under the loading where the elevator is, is a  
21 continuation of the main floor of the building.  
22 As such, the structural elements, the

1 waterproofing membranes and the top part of this  
2 area, which helps to hold the wall in, covering  
3 this portion of the building, constitutes a roof,  
4 whether or not there's asphalt on top or if  
5 there's dirt on top or if you can drive on it and  
6 there's loading can be conducted above, and  
7 whether or not it meets the grade at the loading  
8 entrance on Bank Street.

9           So I would say in that portion that this  
10 is a building, and it has a roof, based on --  
11 based on the definition in Merriam-Webster's, and  
12 so that starting as Point No. A.

13           I think the second point is, as I noted  
14 in comments to the previous discussion, that the  
15 elevator is an integral part of the main  
16 building, and that it provides a function for the  
17 main building and therefore can't be an accessory  
18 building. It has to be part of the main  
19 building, and therefore, you have to call it  
20 something that's part of the main building  
21 instead of an accessory or an addition in my  
22 opinion.

1           That brings me to a third point, which is  
2 that the portion of the elevator located on the  
3 roof, as I described, of the main building, of  
4 the back portion of the mai building, constitutes  
5 a roof structure, and therefore, it meets the  
6 setback requirements as per the regulations and  
7 the precedence set in the Kalorama case.

8           I would also note for the record that  
9 because I want to -- and I feel strongly about  
10 this -- that there was a lot of mention about the  
11 precedent that may or may not be set or relevant  
12 in this case in the ANC-3C and Woodley Park case,  
13 in which the Board decided that the garage was  
14 not a building.

15           I actually would disagree with that  
16 determination. I think that garages, whether  
17 they're underground or on top of the ground or  
18 building underground, you still have -- because  
19 it didn't -- because they decided it didn't have  
20 a roof.

21           I think in this case, outside of that, we  
22 can see it has a roof. It has all of the makeup

1 of a roof. So, based on that, you could see that  
2 I would be not in favor of the appeal. So that's  
3 all I have to say about that part. Maybe we've  
4 got some other points of discussion.

5 [Pause.]

6 CHAIRPERSON MOLDENHAUER: I agree, Ms.  
7 Sorg, with your analysis, and I do think that  
8 eventually -- that this is a roof, and that there  
9 was a lot of debate and discussion at our hearing  
10 about, you know, the grade and how that  
11 potentially affects every -- if that affects it  
12 at all, and I think that -- I think that at the  
13 end of the day, it doesn't.

14 I think that this is a roof, and I think  
15 that, as indicated by the intervenor, that there  
16 are multiple different levels of roofs that can  
17 exist, and I think that in this case, while, yes,  
18 the grading does make it a unique circumstance, I  
19 think that it is still a roof. And I don't think  
20 that this building in and of itself qualifies as  
21 an accessory building because of the fact that  
22 it's not an incidental use. It is actually

1 directly connected, and I think that that  
2 actually to me is the important part, that it's  
3 not an incidental use. It actually is physically  
4 connected, not just physically to the building,  
5 but also the use then is interconnected.

6 I then go -- but I still go back to this  
7 issue, because I don't -- I don't understand how  
8 if there is a requirement and if we're saying  
9 that there is a building with a roof on it,  
10 because that then is perceiving that there's a  
11 roof there, so there's a building that goes all  
12 the way to the rear yard. Does that not mean  
13 that this property is nonconforming as to the  
14 rear yard requirement overall, as it existed  
15 prior to this elevator shaft?

16 I'm not talking about the roof structure.

17 I'm just saying that as the building currently  
18 exists, it has a nonconforming aspect, because a  
19 building and a structure with a roof is built all  
20 the way to the rear property line.

21 So, if that is the fact, then how is this  
22 not whether it complies or not with the 770, an

1 addition to a nonconforming aspect?

2 [Pause.]

3 CHAIRPERSON MOLDENHAUER: To me, 2001.3  
4 applies to everything, not just structures, roof  
5 structures, and it says enlargements and  
6 additions may be to the structure provided. And  
7 this talks about if it's an existing, an  
8 increase, or an extension of an existing  
9 nonconforming aspect of a structure.

10 I mean, to me, this, you know, whether it  
11 is or -- I mean, if the intervenor is saying it's  
12 a roof, then the roof is on a structure, and to  
13 me, it's then definitely a nonconforming property  
14 and there is an addition to a nonconformity.

15 And so in that specific aspect, the ZA  
16 then erred in permitting a permit which would  
17 have required relief.

18 VICE-CHAIRPERSON SORG: Madam Chair, I  
19 understand what you're getting at here, but I  
20 think that there are a couple of points regarding  
21 2001.3. And I think that your analysis is  
22 predicated on the assumption that a roof

1 structure is and counts as an enlargement or an  
2 addition.

3 But I think that, as I mentioned before,  
4 a roof, a roof structure and the building of a  
5 roof structure on a building is its own class of  
6 modifications.

7 CHAIRPERSON MOLDENHAUER: But 2001 covers  
8 any type of -- it covers all structures. So if  
9 you're talking about a roof structure being a  
10 subset, then it's definitely included.

11 I mean, Mr. Jordan, you were indicating  
12 maybe on the side that you may be interested in  
13 getting a legal brief, but I'll point it to you.

14 MR. JORDAN: No, and that's what I was  
15 about to say.

16 I really think that -- and I understand  
17 both arguments, and I'm leaning more toward where  
18 we were on the specific provisions of 770, but I  
19 think that we need to be properly educated on the  
20 points that we've raised here today. And I would  
21 like to see an opinion generated for the Board to  
22 review, because I think there's some particular

1 issues that have been raised by everyone on the  
2 dais today.

3 MS. GLAZER: Madam Chair, I just want to  
4 interject, since the issue has been raised about  
5 a legal opinion. As far as I know, this is the  
6 first time I've heard about this issue. I don't  
7 think the parties raised it during the hearing.  
8 I don't know that I can give you an opinion right  
9 now.

10 If you would like an opinion from the  
11 Office of the Attorney General, we can do that,  
12 though, but we would have to continue the matter.

13 VICE-CHAIRPERSON SORG: Madam Chair, can  
14 I make another comment, please?

15 I'm not opposed necessarily to getting a  
16 brief from OAG, but I just want to note, in  
17 reading 2001.3, if you go through it,  
18 enlargements or additions may be made to the  
19 structure provided. A, the structure shall  
20 conform to the percentage of lot occupancy  
21 requirements as provided in so on and so forth.  
22 A roof structure by its nature does not affect

1 lot occupancy.

2           And be it the addition or enlargement  
3 itself shall, A, conform to use and structural  
4 requirements, and as we've discussed, it's not an  
5 accessory. This is a functional, integral use  
6 that's part of the structure.

7           And then, too, neither increase nor  
8 extend any existing -- and I think this is the  
9 key -- nonconforming aspect of the structure.  
10 The placement, in my opinion, of a roof  
11 structure, an elevator, elevator overrun in this  
12 case, by nature of the classification of the type  
13 of modification that it is, doesn't increase or  
14 change any existing nonconformities or create any  
15 new nonconformity of the structure, whether --  
16 yeah.

17           That was all, even though that was the  
18 middle of a sentence.

19           CHAIRPERSON MOLDENHAUER: Mr. Jordan, you  
20 indicated maybe there were other issues. I think  
21 there is this one issue that I have. You said  
22 there's other issues that were raised this

1 morning or I guess we're on the -- some in the  
2 morning, that you would maybe want to be briefed  
3 on. Can you clarify?

4 MR. JORDAN: No. I was speaking --

5 CHAIRPERSON MOLDENHAUER: Can you go on  
6 the microphone, please, Mr. Jordan?

7 MR. JORDAN: No, I'm speaking about this  
8 issue that we've been discussing, whether or not  
9 it's a nonconforming structure and the conflict  
10 between -- or if there is a conflict between  
11 Section 770 and that one of 2001.3.

12 CHAIRPERSON MOLDENHAUER: I would be -- I  
13 would be fine in -- in asking for the parties to  
14 this appeal to -- and maybe even the District,  
15 obviously a party, to elaborate on this.

16 I mean, we didn't hear anything in the  
17 hearing that the ZA looked at this or that he  
18 said, well, you know, this was part of my  
19 decision and this was considered a minor -- a  
20 minor application, since there are modifications  
21 -- I mean to that effect. And that wasn't part  
22 of, I think, his deliberation process at the

1 time.

2           But I think if we want to open it up for  
3 additional briefings, the question is do we want  
4 to have another full hearing or a limited hearing  
5 on this issue saying that we've then made the  
6 preliminary decision that this is a structure,  
7 this is a roof structure, and at least cut out  
8 that issue from this point and say, you know,  
9 we've made the determination in that regard,  
10 let's move forward, and then determine whether  
11 this is potentially considered, one, whether the  
12 building is nonconforming as it exists now and  
13 then two -- because I think there were arguments  
14 made, while I don't think I agree with them, that  
15 you can have a rear yard and a roof, because I  
16 think that was asked. And I don't typically -- I  
17 don't agree with that, I don't think, but we can  
18 hear additional potential written submissions on  
19 that.

20           So the question is do we want to  
21 initially say we've made the determination, this  
22 is the determination, and based on these facts,

1 now lets move forward and either, one, have  
2 written briefs from the parties or, two, schedule  
3 an initial -- additional hearing where we get  
4 both briefed and then hear additional testimony  
5 or argument. Those are our potential courses of  
6 action at this point.

7           VICE-CHAIRPERSON SORG: Madam Chair, I  
8 think -- well, it sounds like at least a couple  
9 of -- you and at least one or two other Board  
10 members want to have some sort of brief or  
11 additional submissions about this.

12           You know, I really wish that we could  
13 deliberate and decide this today. I don't think  
14 that this issue is relevant to the case.

15           I think, you know, in 2001.2, it says  
16 that, you know, even in nonconforming structures,  
17 you can make modernizations, alterations, and  
18 repairs.

19           The elevator, you know, is not -- in my  
20 opinion, not an addition. It doesn't apply, and  
21 I think none of the parties brought this up, this  
22 issue up. It's not in any of their arguments,

1 and I also -- I'm not certain whether or not -- I  
2 don't really think that it's fair to ask why  
3 didn't the ZA consider this, when I also don't  
4 think that it's something that, at least given my  
5 reading of 2001.3, needs to be considered. But  
6 it doesn't look like we're going to be deciding  
7 right now.

8           But I would be in favor of going ahead  
9 with the application as it was submitted, the  
10 appeal as it was submitted, on the grounds that  
11 it was submitted and did the Appellant meet its  
12 burden of proof. They don't talk about this at  
13 all, and I don't -- I don't believe it's  
14 relevant, but that's my thought.

15           MR. JORDAN: And I hear what you're  
16 saying, but I don't know if we -- my issue is do  
17 we get to 2001 in any shape, form, or fashion, so  
18 that's why I wanted to be briefed on it, because  
19 if we take 2001.2, as you said, to say that there  
20 could have been some alterations or  
21 modernizations, then we would have said this was  
22 a nonconforming structure. And I'm just not

1 there, and I just don't know if that's the route  
2 to go.

3 MS. GLAZER: Madam Chair, if you would  
4 like, I will try to narrow what the issue is.

5 I have some reservations about giving --  
6 making this statement without doing some  
7 research, but my reading of 2001.3 is that it is  
8 not applicable, because it states -- 2001.1  
9 states that the sections underneath are only  
10 applicable to nonconforming structures that are  
11 devoted to a conforming use.

12 The roof structure here is an elevator.  
13 It has no independent use. It's part of a larger  
14 structure that has a particular use.

15 So that would be my starting point for  
16 analysis.

17 VICE-CHAIRPERSON SORG: I agree with OAG.  
18 I think it's not its own thing.

19 CHAIRPERSON MOLDENHAUER: Based on OAG's  
20 quick read, I think I'd still want to potentially  
21 be briefed, because I think that this could  
22 potentially have -- this analysis could have --

1 I'm not being clear at the moment. Sorry. I  
2 think it can't hurt to be briefed, is the  
3 opinion.

4 Do Board members feel that based on OAG's  
5 read that it does not apply and they feel fine  
6 going forward, or would they still -- I know Ms.  
7 Sorg is ready to make a decision right away.

8 Mr. Jordan, Mr. Hinkle, I'd like to hear  
9 from you both.

10 MR. JORDAN: I would like to be briefed  
11 on it, and I think one of the things that we've  
12 talked about since I have been on this Board is  
13 establishing some consistencies and some  
14 abilities for others in decisions and activities  
15 coming out -- from our decisions have something  
16 to base upon.

17 So I would be hesitant to go forward  
18 without that level of brief, so that when we do  
19 make the decision here, that it's something that  
20 has been well briefed, well reasoned, and we know  
21 where we're going with it.

22 MR. HINKLE: I think in other cases, we

1 have touched on this issue a lot, and I think  
2 perhaps a briefing would be helpful in terms of  
3 the nonconforming use and how this, what is a  
4 rooftop structure, affects that.

5           CHAIRPERSON MOLDENHAUER: Then I think  
6 what I would recommend is that we make a  
7 preliminary decision and a consensus of the Board  
8 members to evaluate where we are now and then  
9 potentially leave the record open for the final  
10 issue, this last issue that we have.

11           VICE-CHAIRPERSON SORG: Madam Chair, I  
12 don't understand how you would make a preliminary  
13 decision based on --

14           CHAIRPERSON MOLDENHAUER: I think I did  
15 indicate that we were going to rule or all vote  
16 whether or not we believe this to be a roof. So  
17 I would say I will submit a motion that this is  
18 considered a roof, and we'll all vote on that.  
19 Then we can go forward and consider that this was  
20 considered to be an exterior -- sorry -- that it  
21 was not considered to be an exterior wall under  
22 770 for roof structures. And then the only

1 person we have outstanding is whether or not this  
2 is considered a -- whether or not 2001 applies at  
3 all, and I think that's the general question  
4 outstanding right now, does it apply.

5 VICE-CHAIRPERSON SORG: I think -- I  
6 understand where you're going, but I'm not sure  
7 that I'm --

8 CHAIRPERSON MOLDENHAUER: You'd rather  
9 just leave the whole thing open and then just --

10 VICE-CHAIRPERSON SORG: Well, I think  
11 that, personally, it's fairly clear from all of  
12 our deliberations.

13 CHAIRPERSON MOLDENHAUER: You're going  
14 back to the original issue, but I think we --

15 VICE-CHAIRPERSON SORG: No, but I think  
16 that's what you're touching on. I think that  
17 you're saying, okay, we're deciding it's a roof  
18 because we all said so, and you're saying, okay,  
19 maybe we'll make a motion, you know, whatever,  
20 that it's a roof structure, but the regulation  
21 that you're pointing to touches all of those  
22 things, so --

1           CHAIRPERSON MOLDENHAUER: But you think  
2 that. But the rest of the Board wants to be  
3 briefed on it. So I'm just trying to -- I'm  
4 trying to narrow the issues for the parties, so  
5 that we don't have to -- if we open up the flood  
6 gates, we don't all of a sudden get people  
7 arguing that we were misinterpreting the issue of  
8 roof and -- that the Appellant doesn't try to  
9 take another bite at the apple and argue again.  
10 So we've already agreed at -- that's all I'm  
11 trying to do, is I'm trying to cut the door for  
12 the Appellant to say we've all made this  
13 decision, now let's just be briefed on this one  
14 point that we're still not sure on.

15           VICE-CHAIRPERSON SORG: Well, I mean,  
16 obviously, I had disagreed, you know, that I  
17 wanted to be -- that I thought that this issue  
18 was necessary to go into, but I think you can  
19 just as easily indicate to the parties what they  
20 -- if you want, if you're going to ask for  
21 things, then you may just indicate to the parties  
22 what you are willing to listen to. And if you --

1 I'm just not sure it requires a vote and so  
2 forth, but --

3 MR. JORDAN: I would agree that we go  
4 forward. We leave -- that we not make any  
5 decisions until we receive the brief on the point  
6 that we've discussed from the parties and/or OAG  
7 on this particular issue.

8 VICE-CHAIRPERSON SORG: I appreciate --  
9 I'm trying to not open the floodgates here, which  
10 is what, Mr. Jordan, you're suggesting it goes  
11 to, but I think if you're introducing a whole  
12 other pretty major question -- I mean, I don't  
13 think that we should be going to this in the  
14 first place, which is clear, but I think if  
15 you're going to introduce it and you're going to  
16 ask OAG to brief on it, I think you've got to let  
17 the parties also say something about it.

18 MR. JORDAN: Yeah. The parties can  
19 submit their brief, but we don't have to take  
20 testimony toward it. We're not asking for  
21 testimony.

22 VICE-CHAIRPERSON SORG: Oh, okay. Yeah.

1 No, I agree.

2 MR. JORDAN: I don't think there's  
3 testimony required. That's not it. We're down  
4 to the issue of what the regulation is and not in  
5 regards to a fact question about that. That's --

6 VICE-CHAIRPERSON SORG: I'm sorry. I  
7 thought you were trying -- wanting to limit them  
8 from not saying anything. My mistake.

9 CHAIRPERSON MOLDENHAUER: Mr. Hinkle?

10 MR. HINKLE: Well, I think we could limit  
11 what we request from the parties, if they want to  
12 submit additional materials. I think that would  
13 take care of some of these concerns about opening  
14 it up to multiple discussions.

15 CHAIRPERSON MOLDENHAUER: Okay. So what  
16 we'll do then is I think we will -- let's -- I'll  
17 submit a motion, a motion that the Board has done  
18 a preliminary decision that the -- that the issue  
19 in question or that the structure in question is  
20 a roof.

21 A motion has been made. Is there a  
22 second?

1 MR. JORDAN: Second.

2 CHAIRPERSON MOLDENHAUER: Motion has been  
3 made and seconded. All those in favor, say  
4 "aye."

5 [Chorus of ayes.]

6 CHAIRPERSON MOLDENHAUER: I'll submit a  
7 motion that the structure that is being  
8 challenged by the Appellant, which the building  
9 permit was issued for, has been determined to be  
10 a roof structure and not an accessory building.

11 A motion has been made. Is there a  
12 second?

13 MR. HINKLE: Second.

14 CHAIRPERSON MOLDENHAUER: All those in  
15 favor, say "aye."

16 [Chorus of ayes.]

17 CHAIRPERSON MOLDENHAUER: I will submit a  
18 motion that we still have preliminary issues  
19 outstanding as to whether or not 2001 even  
20 applies to a roof structure or whether there  
21 exists a nonconforming at this -- on this lot and  
22 ask that the parties and our OAG attorney brief

1 us in a written fashion. And since I know all  
2 lawyers cannot stand not being able to reply to  
3 each other, I'll permit time frames not just for  
4 initial briefs, but then also for reply briefs to  
5 reply to each other, if they so want. I know  
6 that people may not want to do that, but I will  
7 at least provide the time, so that they don't  
8 have to also argue for -- or submit a request or  
9 a motion for a waiver.

10 If they don't need to, they don't need  
11 to. If you guys don't need to submit a reply,  
12 that would be fine as well, but what I'll  
13 indicate is that all initial motions shall be  
14 filed by Friday the 25th. Any reply motions will  
15 be filed by -- I think we have -- when do we have  
16 our decision in December? It's the second week  
17 of December, right? The 13th? I think it's the  
18 second week, not the first week.

19 MR. MOY: I believe it's December 6th,  
20 Madam Chair.

21 CHAIRPERSON MOLDENHAUER: Oh, it is the  
22 6th. Okay. Well, let's see if we can't -- okay.

1 So what did I say?

2 All initial motions by the 25th, any  
3 reply motions then by the 2nd since they would  
4 only specifically be replying to very minute  
5 potential issues, and then we'll put this on  
6 decision for the 6th. That way, we still are  
7 able to potentially provide the Applicant and the  
8 parties -- sorry -- the Appellant and the parties  
9 a timely resolution to this issue.

10 That being said, is there any questions  
11 about that?

12 MS. GLAZER: Madam Chair, do you mean a  
13 submission, not a motion?

14 CHAIRPERSON MOLDENHAUER: Yes. A written  
15 submission.

16 MS. GLAZER: Okay.

17 CHAIRPERSON MOLDENHAUER: Mr. Moy, do we  
18 have the time frame written down? I just want to  
19 make sure we're clear on it.

20 MR. MOY: Yes. According to my notes,  
21 the Board is going to reschedule its decision on  
22 December 6th. Parties to make their filings to

1 the issue, as discussed, by Friday, November the  
2 25th, and any responses to those filings from  
3 parties, any respondents by December the 2nd,  
4 which is --

5 CHAIRPERSON MOLDENHAUER: Friday.

6 MR. MOY: Which is a Friday.

7 CHAIRPERSON MOLDENHAUER: And then this  
8 will be put on the Decision Calendar for the 6th.

9 [Pause.]

10 MR. MOY: Is the Board ready for the next  
11 item for action, or do you want to recess a bit?

12 [Pause.]

13 CHAIRPERSON MOLDENHAUER: I know the  
14 individuals in the audience probably are hoping  
15 that we're going to get started on the next  
16 decision, but I think what we are going to do is  
17 we are going to take our lunch recess, which  
18 starts at noon, allow us also -- because there's  
19 a lot of submissions for this next case -- make  
20 sure that we all have had our individual  
21 opportunities to feel comfortable in entering  
22 into our decisions for these different motions

1 that are outstanding or that are going to be  
2 discussed in regards to the -- we keep on calling  
3 it the "Trees case," but I know that that's not  
4 obviously the proper case name.

5           And so what we'll do is we'll come back  
6 before 1:00. We'll restart this case at, let's  
7 just say, 12:40. That way, we'll at least be  
8 bale to try to provide some timely ability, but  
9 it will also give us a chance, because we have a  
10 pretty long afternoon, because we're going to  
11 have another decision case that will take us into  
12 the afternoon, and we don't want to starve.  
13 Exactly.

14           So that being said, we'll adjourn until  
15 12:40. If we can get out of here earlier, we  
16 will, but we'll be pushing for 12:40 to start.

17           Thank yo so much.

18           [Pause.]

19           CHAIRPERSON MOLDENHAUER: I actually have  
20 a quick roll call vote. I'm sorry. I apologize  
21 for that. Thank you. Just before you ran out of  
22 the door, I didn't want to have to then grab you.

1 I am Meridith Moldenhauer, the  
2 Chairperson of the Board of Zoning Adjustment for  
3 the District of Columbia for the District of  
4 Columbia. This is -- in accordance to Section  
5 405 of the Open Meeting Act, I move that the BZA  
6 hold a closed emergency meeting to be recorded in  
7 the Office of Zoning's conference room on  
8 November 8th, 2011, at 11:58 for purposes of  
9 seeking legal counsel and obtaining deliberation  
10 on the following case, Application 18300.

11 Is there a second?

12 VICE-CHAIRPERSON SORG: Second.

13 CHAIRPERSON MOLDENHAUER: The motion has  
14 been made and seconded. Will the Chair please  
15 take a roll call vote on the motion before us  
16 that has now been seconded?

17 MR. MOY: Yes. Board members, when I  
18 call your name, you can respond with you vote.

19 Ms. Sorg?

20 VICE-CHAIRPERSON SORG: Aye.

21 MR. MOY: Ms. Moldenhauer.

22 CHAIRPERSON MOLDENHAUER: Aye.

1 MR. MOY: Mr. Jordan?

2 MR. JORDAN: Aye.

3 MR. MOY: Mr. Hinkle?

4 MR. HINKLE: Yes.

5 MR. MOY: The vote is recorded as 4 to 0  
6 to 1, no other Board members participating. The  
7 motion carries for an emergency closed meeting.

8 CHAIRPERSON MOLDENHAUER: Thank you very  
9 much, Mr. Moy.

10 As it appears, the motion has been  
11 passed. I hereby give notice the BZA will hold  
12 this aforementioned emergency closed meeting in  
13 the conference room pursuant to the Open Meeting  
14 Act. Notice will also be posted at the Office of  
15 Zoning Electronic Reading Room and placed on the  
16 Office of Zoning's Electronic Calendar and its  
17 website and posted in the District of Columbia's  
18 Registry as time -- in a timely manner as  
19 practicable. So we'll also be posting in this  
20 location as well.

21 Thank you. Now we adjourn for -- until  
22 12:40.

1 [Luncheon recess.]

2 CHAIRPERSON MOLDENHAUER: We are  
3 reconvening for our morning session. I do  
4 apologize to the individuals in the audience for  
5 not getting out here exactly at the time we had  
6 identified.

7 Mr. Moy, if we can read the last case for  
8 what was on our morning calendar.

9 P.M. Session

10 Appeal No. 18300

11 MR. MOY: Good afternoon, Madam Chair,  
12 members of the Board. That would be Application  
13 No. 18300. This is the Appellant's motion for a  
14 stay to Appeal No. 18300 of Lawrence M. and  
15 Kathleen B. Ausubel, pursuant to Zoning  
16 Regulation Section 3100.4.

17 The appeal, as it is publicly announced,  
18 reads as pursuant to 11 DCMR 3100 and 3101, from  
19 a July 13th, 2011, decision by the Zoning  
20 Administrator, Department of Consumer and  
21 Regulatory Affairs, to issue a building permit,  
22 Permit No. B1103986, allowing an addition to a

1 one-family detached dwelling in the TSP/R-1-A  
2 District at premises 2750 32nd Street, N.W.,  
3 property located in Square 2199, Lot 25.

4 On September 9th, 2011, the Appellant,  
5 who is Arent Fox on behalf of the Applicant,  
6 filed their motion for a stay, and that document,  
7 I believe, is in your case folders identified as  
8 Exhibit 1.

9 The Applicant is also requesting the  
10 Board expedite the hearing, scheduling the appeal  
11 as early as possible.

12 The Appellant has filed some additional  
13 documents, which are in your case folders, Madam  
14 Chair, filings identified as Exhibits 29 and 32.

15 In response, the Intervenor, the property  
16 owner, has filed, principally the motion to  
17 dismiss on timeliness as well as opposition to  
18 the motion for the stay, and those are identified  
19 as Exhibits 27 and 28. And I believe the  
20 property owners have also replied to the  
21 Appellants' opposition to motion to dismiss under  
22 Exhibit No. 31.

1           And finally, the Appellee, DCRA, has made  
2 their filing in opposition to Appellants' motion  
3 for stay, identified as Exhibit No. 30.

4           With that, I think the Staff is going to  
5 conclude its briefing, Madam Chair.

6           CHAIRPERSON MOLDENHAUER: Thank you very  
7 much, Mr. Moy.

8           We are here today to address a -- this  
9 case is obviously not scheduled until January,  
10 but we're here to address a request for a stay  
11 prior to addressing a jurisdictional issue about  
12 whether or not we can address the issue of a  
13 stay. We first must address the issue raised by  
14 the property owner in the motion to dismiss for  
15 lack of timeliness; in fact, to determine whether  
16 or not we have jurisdiction in this case at all.

17           That being said, Board members have all  
18 reviewed the submissions from both parties and  
19 have reviewed Baskin and have reviewed Brannum,  
20 and I think that in light of the documentation, I  
21 think most of the Board is all on the same  
22 opinion that this case is untimely. That the

1 e-mail back and forth between the Appellants'  
2 counsel and Mr. Matt LeGrant, the Zoning  
3 Administrator, was not ambiguous and was clear  
4 that a decision had been made on the specific  
5 issue which is being appealed today, the issue of  
6 whether or not the TSP provisions in overlay were  
7 properly being interpreted by the ZA in the  
8 issuance of the permit.

9           The ZA in that letter -- in that e-mail  
10 -- I'm sorry -- says that, quote, "I find that  
11 the proposed addition is in compliance with the  
12 underlying R-1-A-based zone and applicable TSP  
13 provisions set forth in Section 1513 and 1514."  
14 He then says that, I will proceed to approve. So  
15 I don't really see that there's any ambiguity in  
16 that fact that he's actually saying I'm doing  
17 this, I'm making this decision.

18           I do think that Baskin is fairly clear in  
19 that regard. There is the three-prong test in  
20 regards to notice. Notice is obviously clear  
21 here that it was given to the Appellant. The ZA,  
22 I think, was adequately briefed on the issue, and

1 -- I'm sorry -- I think that whether or not that  
2 the writing must signify that the decision has  
3 been made to grant the permit, and I think that  
4 what I just read earlier -- and I know that the  
5 Appellant had argued that it was ambiguous, but I  
6 don't think that I personally am persuaded by  
7 that. And I'll let other Board members  
8 articulate their opinion on that as well.

9           So that being said, I'll open up the  
10 floor to any additional kind of discussion on  
11 that issue in regards to timeliness. Then I  
12 think the next question is, you know, is there a  
13 reasonable -- are there reasonable circumstances  
14 which would permit an extension or a late timely  
15 -- a late filing, and I think that while that was  
16 brief, I would potentially be open to having a,  
17 you know, 10-minute argument by each attorney,  
18 which I see in the audience, to verbally argue  
19 that issue, whether there was any reasonable  
20 facts for an extension or for the late filing of  
21 the motion or the appeal.

22           MR. JORDAN: Madam Chair, I just wanted

1 to agree with what you responsible saying,  
2 especially in regards to the timeliness of the  
3 notice. There was nothing that was ambiguous  
4 about the decision of the Zoning Administrator.  
5 He actually used the word "I find," and that he  
6 was going to approve.

7           And I think our case law is long in  
8 regards to when appeals are to be set forth and  
9 the route that people normally choose is a route  
10 that they choose, whether or not they care to  
11 meet those time frames and don't move forward  
12 with the proper way of staying activity and/or  
13 doing multiple aspects of appeals.

14           So I would agree with you, and I find  
15 nothing else to the contrary.

16           I also think we have been briefed in  
17 regards to whether or not their -- for the  
18 lateness of filing appeal is contained in one of  
19 the briefs, and that statement has already been  
20 provided to us. I don't necessarily believe that  
21 we would need to have any oral arguments  
22 regarding that, but if that's what the Board

1 would like to do, I certainly would go along with  
2 it. But I think we've been briefed on it.

3 CHAIRPERSON MOLDENHAUER: I believe that,  
4 you know, the case is untimely, but I personally  
5 would prefer to be briefed on that and to confirm  
6 that we have not -- that we've heard all of the  
7 issues in that and make sure that, you know,  
8 there may be any potential issue for extenuating  
9 circumstances, you know, in the absence -- you  
10 know, if there is actual -- a reasonable basis  
11 for the delay before dismissing a case for  
12 failure, especially considering, in my view, the  
13 small period of time between when the 60 days  
14 lapsed and then when the appeal -- we're not  
15 talking about, you know, a month or two, you  
16 know, 30 days or 40 days between the, you know,  
17 time frame when the appeal should have been filed  
18 in a timely manner and when it actually was  
19 filed.

20 So I think in that regard, I would like  
21 to hear an argument as to the reasonableness of  
22 the delay before ruling in that regard. Do Board

1 members have any agreement on that issue?

2 VICE-CHAIRPERSON SORG: Thank you, Madam  
3 Chair.

4 I agree with your comments regarding the  
5 timeliness of the application or the appeal  
6 itself, but I think given that this Board  
7 generally puts a certain amount of gravity on  
8 contemplating, you know, motions to dismiss, I  
9 would also be in favor of allowing the counsel  
10 which is here to make a limited oral argument, as  
11 you suggest.

12 CHAIRPERSON MOLDENHAUER: Okay. Then  
13 what I'm going to do is I'm going to first  
14 indicate that all Board members, I think, are in  
15 agreement that the case is untimely. Now the  
16 question is whether or not we would allow for the  
17 case to proceed based on the fact that there was  
18 a reasonable basis for delay, and I'll see if  
19 counsel are -- I'll ask counsel, since we  
20 typically do not hear from parties, to step  
21 forward and introduce themselves, and then see  
22 if, one, they are prepared or feel ready to

1 provide just a 10-minute argument each on the  
2 issue of whether or not there is a basis for  
3 reasonable delay here or not.

4 So, if parties can step forward and  
5 introduce themselves for the record? We'll start  
6 with the Appellant.

7 MS. BRAY: Good afternoon, Chairman  
8 Moldenhauer and members of the Board. I'm Kinley  
9 Bray with the law firm of Arent Fox on behalf of  
10 the Appellants Lawrence and Kathleen Ausubel.

11 MR. COLLINS: I'm Christopher Collins,  
12 counsel for the owners of the property.

13 MR. SURABIAN: Assistant Attorney General  
14 Jay Surabian on behalf of DCRA.

15 CHAIRPERSON MOLDENHAUER: And are all  
16 parties, are all attorneys present, ready, or  
17 prepared to provide at least just a 10-minute  
18 oral argument on this issue?

19 MS. BRAY: Yes.

20 MR. COLLINS: Yes.

21 MR. SURABIAN: Yes.

22 CHAIRPERSON MOLDENHAUER: Wonderful.

1 Then if we can -- we can get the clock and just  
2 make sure that we all have equal time, and I'll  
3 first turn to the Appellant to present their  
4 argument.

5 MS. BRAY: Thank you, Chairman  
6 Moldenhauer.

7 On June 21st when the Zoning  
8 Administrator e-mailed me and the Ausubels  
9 notifying of his intent to make a decision, the  
10 Ausubels had not seen the plans, did not know  
11 whether the plans had been revised since the  
12 April 5th, 2011, with the meeting with the Zoning  
13 Administrator. So it cannot be said, reasonably  
14 said, that we had adequate notice of a decision  
15 from which we are appealing.

16 The June 21st e-mail was an indication  
17 that some decision had been made. In fact, on  
18 April 21st, the Zoning Administrator indicated  
19 that he had received additional information from  
20 the owners as to revised tree protection plan and  
21 revised plans, but despite every reasonable  
22 effort to obtain a copy of those plans or to

1 review those plans in person at the District of  
2 Columbia Department of Consumer and Regulatory  
3 Affairs, we were -- we were absolutely denied  
4 that opportunity until the middle of August. And  
5 it really would have been premature to appeal  
6 until the permit itself authorizing the work  
7 itself was issued.

8           And obviously, the Board disagrees with  
9 that, but we feel very strongly that extenuating  
10 circumstances exist. Specifically, DCRA's Office  
11 of Records, which holds the plans, the documents  
12 that are submitted in support of an application,  
13 maintains that no permit may be released, no  
14 copies of permits may be released, no one other  
15 than the Applicant may obtain a copy or review  
16 plans that have not -- that are associated with a  
17 permit that has not yet been granted.

18           The Zoning Administrator's correspondence  
19 indicated otherwise, that the files were publicly  
20 available, and that they would be available in  
21 the records room. In fact, we included in our  
22 correspondence once we determined that it was

1 going to be absolutely necessary to file a FOIA  
2 request, a formal FOIA request to get these  
3 documents. The FOIA officer indicated that they  
4 were publicly available in the records room, and  
5 yet we were unable to get them in the records  
6 room, even after the permit had issued at that  
7 point.

8           We made absolutely every effort to obtain  
9 a copy of the plans and permits as the Zoning  
10 Administrator made his decision, so that we could  
11 determine whether there was still a basis for  
12 appeal, first of all; second of all, to be able  
13 to annunciate each and every allegation of error,  
14 which is required by the Board's Rules of  
15 Procedures and specifically enumerated on Form  
16 125 that an Appellant must avert each and every  
17 alleged error, and as you know, an amendment of  
18 an application or an appeal requires leave of  
19 this Board. Given that we weren't going to be  
20 before this Board for several months, it became  
21 extremely critical that we have a full appeal  
22 filed in the -- in the first instance.

1           Secondly, I feel like what is lost here  
2 is that the Zoning Administrator's determination  
3 was -- was, in fact, ambiguous and part of why it  
4 was so implementation to review the plans -- is  
5 the fact that the Zoning Administrator's  
6 correspondence on June 21st directly -- directly  
7 contradicted the attachment, which said from the  
8 Urban Forestry Administration, the authority on  
9 trees in the District of Columbia, that they felt  
10 strongly the work should not go forward.

11           All told, it became absolutely critical  
12 that we review a copy of the plans and that we do  
13 so in detail. All indications were that the date  
14 ran from the date on which the permit was issued,  
15 and so we took great care once we had those plans  
16 in our possession.

17           And I should note for the record, we  
18 still do not have a full response from the FOIA  
19 request. We requested all plans, documents, and  
20 correspondence that were associated with this  
21 permit. We have not received any correspondence  
22 from the Zoning -- between the Zoning

1 Administrator and the owners of the property  
2 relating to the permit. We have not received any  
3 correspondence at all, although that was part of  
4 our original FOIA request.

5           And without all of those documents, it  
6 really is impossible to formulate an appeal, and  
7 that's why we took great care, once we had what  
8 we had in hand, to make sure that we were  
9 providing as complete a picture to this Board of  
10 the allegations of error as we did. And we  
11 filed, you know, within the 60-day period, which  
12 we believe ran from July 13th.

13           CHAIRPERSON MOLDENHAUER: Do Board  
14 members have any questions, or would Board  
15 members like to hold off the question until the  
16 end?

17           [No audible response.]

18           CHAIRPERSON MOLDENHAUER: Okay. I think  
19 we'll hold them off, then.

20           Mr. Collins?

21           MR. COLLINS: Good afternoon.

22           CHAIRPERSON MOLDENHAUER: Good afternoon.

1           MR. COLLINS: The standard by which the  
2 Board is reviewing this particular issue is as  
3 follows: whether there are extenuating  
4 circumstances beyond the Appellants' control,  
5 which could not have been reasonably anticipated,  
6 that substantively impair the Appellants' ability  
7 to file a timely appeal with the Board.

8           The Appellants themselves indicated that  
9 they had available to them the permit the day  
10 before the appeal period expired. They said that  
11 the obstructionist DCRA withheld the plans until  
12 August 11th. The appeal period ended on August  
13 12th. So they had sufficient time had they gone  
14 down and gotten them that day or even the  
15 following morning to put together an appeal to  
16 file to the Board.

17           Secondly, the Board is well aware, as are  
18 Appellants' counsel, that an appeal may be  
19 supplemented with additional information,  
20 reports, expert testimony, outlined, anything  
21 else, up to 2 weeks prior to the hearing, and the  
22 hearing is scheduled for January of next year.

1 They had plenty of time to supplement their  
2 filing.

3 Third, they had plenty of time to, and  
4 they did, put together an appeal of --  
5 essentially an appeal of the Zoning  
6 Administrator's decision by filing a lawsuit in  
7 Superior Court, 3 weeks before the deadline for  
8 the appeal to this Board, and that lawsuit  
9 includes everything that they put in their appeal  
10 to this Board.

11 Fourth, what they raised in their appeal  
12 before the Board here is the same arguments that  
13 they raised to the Zoning Administrator in the  
14 spring, the same arguments that they raised to  
15 the court in their filing on July 22nd. They've  
16 stated no reason why they could not have filed an  
17 appeal to this Board either on July 22nd when  
18 they had filed their lawsuit in court or up to 3  
19 weeks after that point.

20 It's simply an untimely appeal, and there  
21 is no -- there are no extenuating circumstances  
22 beyond the Appellants' control which could not

1 have been reasonably anticipated, that  
2 substantively -- substantively impaired their  
3 ability to file a timely appeal with this Board.

4 Thank you.

5 MR. SURABIAN: Good afternoon.

6 Well, as my brief indicated, that as to  
7 the question of the sufficiency of the e-mail  
8 constituting the beginning of the deadline, I  
9 declined to take a position on that, but I think  
10 the Board has since ruled that it is sufficient,  
11 so I'll take that as law.

12 As for the issue of ambiguity, I don't  
13 believe that it was. I think the way the Zoning  
14 Administrator does business is he will send an  
15 e-mail like that indicating exactly what his  
16 decision was, and I think the filing with  
17 Superior Court is sufficient to show that any  
18 delay in obtaining the revised plans or whatever  
19 portion of those revised plans is sufficient to  
20 show that there wasn't a barrier to them filing  
21 with this Board.

22 Furthermore, on July 13th, the Appellants

1 had a lengthy meeting with the Zoning  
2 Administrator whereby they discussed at length  
3 all of the bases of his decision, and so if there  
4 was any information that they were lacking, it  
5 was discussed at length at that meeting.

6           And most importantly, the standard is --  
7 I don't believe in filling an appeal -- is not  
8 whether -- it's not the date upon which you had  
9 every piece of relevant information. It's the  
10 date you had knowledge of the decision, and --

11           And I guess just lastly, that all of the  
12 correspondence, the prior -- even prior to the  
13 issuance of the permit, identifies the same  
14 issues that constitute this appeal. It's the  
15 same provisions as to whether the construction  
16 will fatally damage the tree. That's the issue,  
17 and that issue was before the -- you know, the  
18 Appellants were aware of it as early as March  
19 when their arborist provided them a report. So I  
20 don't think there was any new issues, and there  
21 was certainly no barrier for them to file an  
22 appeal within 60 days.

1 Thank you.

2 CHAIRPERSON MOLDENHAUER: Thank you very  
3 much, everyone.

4 Do the Board members have any specific  
5 questions for any of the counsels who presented  
6 evidence to us? No?

7 [No audible response.]

8 CHAIRPERSON MOLDENHAUER: Then at this  
9 point in time, thank you all for stepping forward  
10 and presenting your additional argument. We will  
11 enter into deliberation.

12 I think the question now is whether or  
13 not there are extenuating circumstances that  
14 warrant an extension of time to appeal. We heard  
15 from Ms. Bray on behalf of the Appellant in  
16 regards to the -- her argument that there were  
17 issues beyond her control in regards to the FOIA  
18 request, having the revised plans, being able to  
19 obtain documentation from the Office of Records,  
20 and, you know, the question of ambiguity again.

21 We heard from Mr. Collins that, you know,  
22 none of that was really related to the ability,

1 her specific ability or the Appellants' specific  
2 ability to file an appeal. I think the question  
3 is, do we find those factors relevant or  
4 reasonable in regards to an Appellant seeking to  
5 file a timely appeal, or is that information  
6 that's necessary in order for an appeal to be  
7 presented.

8           In my view, I would rather err on the  
9 side of, you know, providing some additional  
10 flexibility to individuals to hear a case on the  
11 merits rather than err on the side of not  
12 providing that opportunity, in regards to erring  
13 on the side of the party seeking review.  
14 However, I do question whether or not that is  
15 then opening ourselves up. We don't have  
16 discovery requirements. We don't have issues in  
17 regards to whether someone absolutely has to have  
18 documents.

19           We had another case recently where  
20 someone was saying, "Oh. Well, I don't have  
21 these documentations. I had a FOIA request. I'm  
22 demanding this information," and, you know, we

1 indicated that that's not part of our process.  
2 And so that then gives me pause as to whether or  
3 not while -- are those arguments reasonable or  
4 relevant to satisfy extenuating circumstances.

5 I'm obviously kind of on the fence here,  
6 so I will -- those are kind of my thoughts. You  
7 see kind of where I may be leaning, but I want to  
8 hear from other Board members as to what they  
9 think.

10 MR. JORDAN: I don't think that the  
11 burden has been met to make that exception. I  
12 think the time frames are well set.

13 I think, as has been stated both in the  
14 brief and here again today, that the Appellants  
15 chose the route that they chose for whatever  
16 reason. They actually had enough to go to court  
17 and went to court, at the same time could have  
18 filed their appear here at the same time and  
19 could have -- as we said, could have supplemented  
20 the record.

21 We have, I guess we indicated, initially,  
22 when you -- Madam Chair, when you took the bench,

1 that we had found that we believe that the e-mail  
2 notice was definitive enough, that it wasn't  
3 ambiguous, but during the argument, it was  
4 continued that -- contrary to that discussion  
5 that you had coming out to the bench, and that's  
6 not where we were trying to get.

7 I don't think anything has been  
8 presented, anything different that would make me  
9 think there was a reasonable excuse for not  
10 filing this timely. You file in many different  
11 -- you file in many different avenues and then  
12 work your way back to supplement the record. So,  
13 getting records from DCRA, I don't find it to be  
14 substantial enough to want to warrant an  
15 exception in this case.

16 VICE-CHAIRPERSON SORG: Madam Chair, I  
17 don't have a great deal more to add, except I  
18 will indicate that I concur with Mr. Jordan's  
19 comments.

20 CHAIRPERSON MOLDENHAUER: Mr. Hinkle, any  
21 --

22 MR. HINKLE: Yeah, Madam Chair. I think

1 I'm in concurrence with Mr. Jordan here as well.

2 In particular, the filing to the court really  
3 persuades me that there was an opportunity to  
4 file this appeal.

5 CHAIRPERSON MOLDENHAUER: And I do agree  
6 with you all. I think that, typically, I would  
7 prefer to err on the side of hearing a case on  
8 the merits; however, I do think that in this  
9 case, there really have been no additional  
10 documentation or arguments as to anything that  
11 would be beyond the control or have exceptional  
12 circumstances, seeing that there is clear  
13 evidence that there was enough to file something  
14 in the D.C. Superior Court. That while an appeal  
15 could have been filed and then supplemented, I  
16 think that that is definitely an opportunity, and  
17 I didn't hear any new arguments presented by the  
18 Appellant in regards to potentially other factors  
19 that would have reasonably presented an  
20 opportunity or a need to have a small extension  
21 of time.

22 That being said, is there a motion?

1 MR. JORDAN: I would move that we discuss  
2 this appeal based upon it not being timely.

3 CHAIRPERSON MOLDENHAUER: A motion has  
4 been made. Is there a second?

5 MR. HINKLE: Second.

6 CHAIRPERSON MOLDENHAUER: Motion has been  
7 made and seconded. All those in favor, say  
8 "aye."

9 [Chorus of ayes.]

10 MR. MOY: The Staff would record the vote  
11 as 4 to 0 to 1. This is on the motion of Mr.  
12 Jordan to dismiss Appeal No. 18300 on lack of  
13 timeliness. Second the motion, Mr. Hinkle. Also  
14 in support of the motion, Ms. Sorg and Ms.  
15 Moldenhauer; no other Board members  
16 participating. Again, the vote is 4 to 0 to 1.  
17 The motion carries.

18 [Pause.]

19 Appeal No. 18114

20 MR. MOY: The next and last case before  
21 the BZA is Appeal No. 18114. This is Ward 5  
22 Improvement Association, pursuant to 11 DCMR 3100

1 and 3101, from an April 21st, 2010, decision by  
2 the Zoning Administrator to grant Certificates of  
3 Occupancy Nos. 1001838 and 1002471, for a  
4 restaurant with nightclub, not a sexually  
5 oriented business establishment, in the C-M-2  
6 District at premises 2127 Queens Chapel Road,  
7 N.E., property locate din Square 4258, Lot 34.

8           As the Board will recall, the Board  
9 scheduled a limited scope hearing on July 12th,  
10 2011, to hear the issue -- to hear and address  
11 the issuance of a new Certificate of Occupancy on  
12 September 20th, 2011, which was later rescheduled  
13 to September 27, 2011.

14           After the Public Hearing on September  
15 27th, the record was closed, and the Board  
16 scheduled its decision on November 8th, 2011.

17           The Board is to act on the merits of the  
18 appeal of the Zoning Administrator's decision to  
19 issue C of O No. 1101152 for a restaurant with  
20 nightclub, not a sexually oriented business  
21 establishment.

22           That complete's Staff's briefing, Madam

1 Chair.

2 CHAIRPERSON MOLDENHAUER: Thank you very  
3 much, Mr. Moy.

4 This has been a long, extended case, and  
5 we are here, I think, for hopefully our final  
6 deliberation on this matter, and what previously  
7 happened, just to kind of summarize everything  
8 for myself and hopefully for everybody else, we  
9 are here, we had a limited hearing simply on the  
10 factors that went into issuing a new revised  
11 building permit for the Stadium Club.

12 And the ZA presented -- sorry -- the  
13 District presented evidence from both the Zoning  
14 Administrator, Mr. Matt LeGrant, and also from a  
15 Justin Bellow, his inspector, who went out and  
16 took a look at the property.

17 We heard arguments from the property  
18 owner's counsel, and we also heard arguments from  
19 the Appellant in this matter regarding whether or  
20 not the additional information that was obtained  
21 provided any new information, which would have  
22 identified that there was an error from the ZA in

1 regards to whether the establishment is or is not  
2 a SOBE and whether the ZA's evaluation -- really  
3 matter whether the ZA's evaluation is in  
4 conformity with the Zoning Regulations.

5           That being said, I will provide my quick  
6 analysis on this, and I feel that based on Mr.  
7 Bellow's statement, the report and his testimony  
8 here, that in my view, his description of what  
9 occurred definitely is circumstances in which the  
10 positions assumed by the women and the manner in  
11 which the women displayed themselves demonstrated  
12 that that was for the purpose of stimulating an  
13 arousal of patrons.

14           I know that the ZA made a different  
15 determination, that Mr. Bellow indicated that he  
16 did not believe that this was arousing; however,  
17 I think that based on the description of what he  
18 provided, in my view, the decision by the ZA is  
19 not in conformity with the facts that he had.

20           I think that there were statements that  
21 they did touch -- you know, touch their breasts.  
22 Whether it was a brief, you know, exchange,

1 there were factors that go to the definition of  
2 whether or not a use is sexually oriented  
3 business and whether there are specific sexual  
4 activities, and I feel that here, there is  
5 evidence that the ZA erred in that decision.

6 I will open up the floor to additional  
7 deliberations, comments.

8 VICE-CHAIRPERSON SORG: I can start,  
9 Madam Chair.

10 I'll start backwards. With respect to  
11 the testimony of Mr. Bellow that you referenced  
12 in terms of the arousal and touching and so  
13 forth, I have a different view on that. I don't  
14 believe that the question is whether or not  
15 patrons were aroused in the absolute, but if  
16 specific actions were done in specific ways that  
17 intentionally were meant to arouse patients.

18 Here, I think that a distinction was  
19 made. Mr. Bellow testified that during the  
20 course of the performances, the ladies' hands  
21 brushed their bodies, and I think also in the  
22 testimony and I think also the filings, we saw --

1 and I found compelling -- that one can  
2 distinguish from "fondling" in Webster's from --  
3 as defined as to "touch lingeringly" -- was that  
4 definition there that we heard.

5           So here, I think it may be a close call,  
6 but I think the temporal aspect of the hands  
7 brushing as opposed to lingering is something to  
8 me that's distinguishing.

9           I think, though, more broadly than that,  
10 from the additional hearing as well as the sort  
11 of -- and the new facts that were supplemented  
12 there, I still see that, you know, the ZA had  
13 conducted an undercover investigation. He had  
14 conducted a coordinated agency review with ABRA  
15 and other folks. He conducted original plan  
16 review and discussion with the owners as well as  
17 additional plan review and discussion with the  
18 owners.

19           After the review of the C of O, he  
20 indicated -- and we saw on the record -- that no  
21 additional complaints had been made, and I think  
22 it's pretty clear from the record here and the

1 actions of the ZA that his statement and  
2 testimony in the last hearing, that he has done  
3 more in reviewing the C of O than any he had ever  
4 encountered in his career, I think he said.

5 And I think that his efforts went above  
6 and beyond, and I believe that he acted correctly  
7 in this matter.

8 Thank you.

9 CHAIRPERSON MOLDENHAUER: Any additional  
10 Board members?

11 MR. HINKLE: Thank you, Madam Chair.

12 I don't have too much more to say  
13 following Ms. Sorg, but I do believe that the  
14 Zoning Administrator did conduct the correct  
15 investigation, I'll say, in terms of the June  
16 24th, 2011, C of O. I'm certainly satisfied with  
17 the conclusions they came up with prior to  
18 issuing that C of O that this is not a SOBE, and  
19 I'll leave it at that.

20 MR. JORDAN: Well, how interesting. I  
21 would agree with -- that this is not a SOBE.  
22 It's my belief that the Zoning Administrator was

1 correct at the time he made the decision, and  
2 this decision should be sustained.

3 I think that, one, one of the  
4 difficulties that we have here is the fact that  
5 our regulation is so overly broad and vague. In  
6 fact, if you go through the cases -- and I did  
7 take a look at the cases across this country  
8 about -- that uses the exact same wordings that  
9 we use, a lot of those have been overturned and  
10 reversed for being unconstitutional, and some  
11 jurisdictions have made changes to that, because  
12 it's just so hard to put, you know, something  
13 rational to something you can measure, something  
14 you can identify with, especially on the issues  
15 of what's sexually stimulating.

16 And contrary to my colleague saying that  
17 -- Mr. Bellow said clearly and distinctly that he  
18 did not find it stimulating. He said he didn't  
19 find it stimulating, and for us to say, well, I  
20 think it's stimulating, but you didn't find it  
21 stimulating, that's part of the problem.

22 And the witness that Mr. -- I think it's

1 that Mr. Padou had, he said he didn't find it  
2 stimulating, although he had one point when he  
3 went to the private dance room -- and let me say  
4 I believe his testimony is biased.

5 I sat and listened to 6 hours worth of  
6 testimony and then read the transcripts to follow  
7 back up, so I'm well abreast of what people were  
8 saying. And this guy, who was Mr. Padou's  
9 witness, had a good time for 5 hours. I mean, he  
10 wasn't so shocked, his conscious wasn't shocked  
11 about what was going on. He stayed there for 5  
12 hours and I think spent over 300-and-something  
13 dollars on there.

14 And I don't think that we had any  
15 evidence that goes to the level of the standard  
16 that the -- that if we assumed that there was  
17 some type of sexual activity there, that it was  
18 substantial or a significant portion of the  
19 business that was being done. In fact, we have  
20 the testimony and the rules from that  
21 establishment that says certain things are  
22 against their policy to do, and that they also

1 discipline people who violate those rules.

2 I mean, we had earlier discussion the  
3 last time about pole dancing and pole dancing of  
4 itself being sexually oriented, and I just really  
5 have to take aback by that because, you know,  
6 pole dancing is a new fad for physical  
7 exercising, and in most of these fitness clubs  
8 across America, pole dancing is the new things  
9 for physical --

10 CHAIRPERSON MOLDENHAUER: They are not  
11 naked when they are doing that.

12 MR. JORDAN: Well, let's --

13 CHAIRPERSON MOLDENHAUER: I mean, let's  
14 be honest.

15 [Laughter.]

16 MR. JORDAN: Meridith -- protocol, Madam  
17 Chair.

18 CHAIRPERSON MOLDENHAUER: They aren't  
19 naked.

20 MR. JORDAN: Protocol, Madam Chair, Madam  
21 Chair.

22 CHAIRPERSON MOLDENHAUER: They're not

1 naked when they're doing it for physical  
2 activity.

3 MR. JORDAN: Well, let's talk --

4 CHAIRPERSON MOLDENHAUER: That is a  
5 completely different situation.

6 MR. JORDAN: Well, let's say you haven't  
7 seen what people dress up in, in some of these  
8 fitness classes.

9 But neither here nor there, being naked  
10 of itself doesn't mean that someone's -- come on  
11 -- sexually oriented. I mean, people have --  
12 doing pole dancing, it's a new fitness. Most of  
13 our fitness clubs are now giving some type of  
14 pole dancing, and under our present regs -- and  
15 some people coming in, in skimpy shorts in the  
16 fitness clubs and whatever it is, still within  
17 our definition would make it sexually oriented.  
18 So, arguably, then we should shut them down.

19 But pole dancing is even now being  
20 petitioned to be part of the Olympics, because of  
21 the great coordination, physical abilities, whole  
22 9 yards, and as you can't go there.

1           And I read about Helen -- is it Helen  
2 Mirren who is 67 years old. She's won several  
3 Academy Awards. She was the woman in "Queen."  
4 She won the Academy Award as Best Actress in the  
5 movie "Queen," "The Last Station." She got Best  
6 Supporting Actress in 1994, "Madness of King  
7 George" -- said, "To be honest, I rather like  
8 watching pole dancing, not that I'm gay or  
9 anything. I just like the ballet of it."

10           So whatever reason people go to these  
11 places cannot be summed up by the fact that  
12 they're on poles or doing whatever they're doing  
13 is sexually oriented is what I'm saying, but the  
14 basis is that this Zoning Administrator did a  
15 real investigation. He sent somebody out.

16           He looked at the ABRA records, and ABRA  
17 did an intensive background investigation to what  
18 the Stadium Club was doing. And the Zoning  
19 Administrator, although it was alluded to by, I  
20 think, the Appellants that the Zoning  
21 Administrator should not have even relied on ABRA  
22 -- and I think that that doesn't make a lot of

1 sense, because we should encourage more of that  
2 coordination among agencies and saving taxpayers  
3 money, et cetera.

4 Also, Madam Chair, I know you said  
5 something about the women touching their bodies  
6 and that makes it sexually oriented and what have  
7 you. Well, our Redskin cheerleaders touch their  
8 bodies, and they do it in a sexual way.

9 CHAIRPERSON MOLDENHAUER: They're not  
10 naked.

11 MR. JORDAN: Well, you watch -- some  
12 people would consider them naked. See, there we  
13 go again with the standard of what naked is and  
14 what's a peg and what's partially covered.

15 CHAIRPERSON MOLDENHAUER: These women are  
16 100-percent naked, and the --

17 MR. JORDAN: So now, I don't remember  
18 that there was a percentage in our regulations  
19 that talked about how much covering  
20 percentagewise.

21 CHAIRPERSON MOLDENHAUER: They're talking  
22 about coverage of the breast and of the buttocks

1 and of the genitals.

2 MR. JORDAN: And you see some of the  
3 Redskins' buttocks, too, cheerleaders' buttocks,  
4 too.

5 All I'm saying, Madam Chair, is that I  
6 think that it goes back to what I said initially  
7 like a lot of these cases across the country are  
8 founded, the standard is so -- it's so vague and  
9 overly broad, and we really need to encourage a  
10 change in that.

11 But even if you take in everything that  
12 you heard here and even if I concede what you're  
13 saying, there has not been one iota of evidence  
14 in this hearing room that show that there's  
15 substantial or significant portion of the  
16 business, that they're in this business, and that  
17 those things that you find repulsive or sexual --  
18 let me say sexual -- not repulsive -- means that  
19 they're in a business that requires that makes it  
20 a SOBE. And we have not had that type of  
21 evidence in here.

22 We've had one guy came in here, said,

1 well, somebody brushed against him, and you had  
2 -- someone said that the -- the business owner  
3 said yes, they dance nude, and they're on poles.

4           So I believe that we should sustain the  
5 decision of the Zoning Administrator, because the  
6 standard -- to the contrary, there's nothing been  
7 shown that the Stadium Club's business is  
8 significantly or substantially sexually oriented.

9           CHAIRPERSON MOLDENHAUER: I know that I'm  
10 at least standing alone here, but let me just  
11 clarify my perspective for the record, because I  
12 don't find it -- what was the term that you used,  
13 Mr. Lloyd?

14           MR. JORDAN: "Repulsive."

15           CHAIRPERSON MOLDENHAUER: "Repulsive."

16           I think that there are certain  
17 regulations out there, and that there are certain  
18 processes that are supposed to be maintained.  
19 And I feel like in this situation, SOBEs are  
20 permitted use within -- I think even the zone of  
21 this property is located in, so long as they get  
22 a special exception.

1           And I think that it would be totally fine  
2 for this establishment to conduct their business,  
3 to have pole dancing, to have someone be naked,  
4 to have somebody be touching or brushing their  
5 breast, and if people want to go to that type of  
6 establishment, good for them. Go and do that.  
7 That is a business. It is -- you know, there's a  
8 lot of businesses out there that focuses on that.

9           My problem here is that, yes, the  
10 regulations are not written well, but we have to  
11 work within the regulations. I think here, the  
12 ZA, I think, has erred, because he's trying to  
13 find that it's not a SOBE. I don't understand  
14 why, because I think that it is, and that there's  
15 no reason why if he finds it -- all they have to  
16 do is go and get a special exception, and then  
17 they can continue to have their business.  
18 There's nothing in my view that -- there's no  
19 reason why they shouldn't just simply say this  
20 conduct they're having -- you know, the women are  
21 naked. That's one of the standards which  
22 differentiates it from athletic facilities, which

1 differentiates it from performance, you know,  
2 where they're -- you know, such as the Redskins  
3 are from, you know -- I don't know -- any other  
4 type of, you know, cheering individuals. It  
5 differentiate it from other aspects.

6           And here, they're 100-percent naked.  
7 They are, you know, at an establishment, in my  
8 evaluation, based on the record, which is for  
9 patrons to go and to have entertainment where  
10 women are dancing to music in a form which is  
11 provocative and in a form that the dancing, you  
12 know, is to potentially show off their different  
13 -- their breasts, show off their butt, to touch  
14 themselves, whether it's for a fleeting moment or  
15 not. That is -- pole dancing is, in my view,  
16 whether I was there or not -- when you do it for  
17 athletics or not, it's -- in the purpose of  
18 trying to accentuate a woman, usually --  
19 typically a woman's body in ways which are  
20 attractive to the opposite sex.

21           And what does that mean in my view? That  
22 means that it is for the purpose of, you know,

1 stimulating and arousing the patrons. And I  
2 think that based on information that the ZA had  
3 from Mr. Bellow, it was clear that it falls  
4 within the terminology of women dancing in the  
5 manner under the California Steakhouse.

6 And obviously, I may be on my own on  
7 this, but, you know, that is my view, and the  
8 fact that the ZA had that information, and that  
9 it then should have been determined to be a SOBE,  
10 and then the Applicant should just come forward  
11 for a special exception.

12 MR. JORDAN: Madam Chair, is a motion in  
13 order?

14 CHAIRPERSON MOLDENHAUER: I want to see  
15 if there's any -- I think that Mr. Schlater had  
16 been active member from the Zoning Commission on  
17 this case, and he may be in agreement with  
18 everybody, everything that everybody else said  
19 and may not need to add anything, but let me  
20 first make sure that he had an opportunity to  
21 speak, if he so wants to, before a motion is  
22 potentially presented.

1           MR. SCHLATER: Madam Chair, thank you for  
2 the opportunity to speak.

3           I don't need to say much. I have plenty  
4 on the record saying how I feel about this case.  
5 Since the first time we vote don it, I thought  
6 this was not a sexually oriented business  
7 establishment, and nothing in the record in the  
8 subsequent votes has changed my mind about it.

9           My read on this case comes from looking  
10 at California Steakhouse, which I think is our  
11 most direct precedent, and in that decision, I  
12 think it was fairly clear that, you know, nude  
13 dancing is not a sexually oriented business. And  
14 I think, you know, pole dancing and all that, it  
15 falls within the nude dancing category.

16           There had been a lot of talk about  
17 process throughout this case, but I think with  
18 the evidence on the new Certificate of Occupancy,  
19 that's even -- that case, while I already agreed  
20 with the process that the ZA went through, I  
21 think he went above and beyond on the issuance of  
22 the new Certificate of Occupancy. And I feel

1 comfortable that the proper process has been  
2 followed.

3           So I don't need to belabor the point. I  
4 do not believe that this is a sexually oriented  
5 business establishment, and I'm willing to make a  
6 motion.

7           CHAIRPERSON MOLDENHAUER: If there's a  
8 motion?

9           MR. SCHLATER: I move that we deny Appeal  
10 No. 18114 of Ward 5 Improvement Association.

11           CHAIRPERSON MOLDENHAUER: The motion has  
12 been made. Is there a second?

13           MR. JORDAN: Second.

14           CHAIRPERSON MOLDENHAUER: Motion has been  
15 made and seconded. All those in favor, please  
16 say "aye."

17           [Chorus of ayes.]

18           CHAIRPERSON MOLDENHAUER: All those  
19 oppose?

20           Nay.

21           CHAIRPERSON MOLDENHAUER: The Staff would  
22 record the vote as 4 to 1 to 0. This is on the

1 motion of Mr. Schlater to deny Appeal No. 18114  
2 of Ward 5 Improvement Association. Second the  
3 motion of Mr. Jordan. Also in support of the  
4 motion, Ms. Sorg and Mr. Hinkle. Opposed to the  
5 motion is Ms. Moldenhauer. Again, the final vote  
6 to deny appeal is 4 to 1 to 0. The motion  
7 carries.

8 CHAIRPERSON MOLDENHAUER: Thank you very  
9 much, Mr. Moy, and I believe the full order is  
10 going to be necessary for this case.

11 And so that then concludes our day of  
12 decision-making, and we will reconvene next week.  
13 Thank you.

14 [Whereupon, at 2:09 p.m., the Public  
15 Meeting was adjourned.]

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